FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 44
CA46/19

Lord President
Lord Menzies
Lord Doherty

OPINION OF LORD CARLOWAY,
the LORD PRESIDENT

in the Reclaiming Motion by

BAM TCP ATLANTIC SQUARE LIMITED

Pursuers and Reclaimers

against

(FIRST) BRITISH TELECOMMUNICATIONS PLC; AND (SECOND) FIRLEIGH LIMITED

Defenders and Respondents

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Pursuers and Reclaimers: Dean of Faculty (Dunlop QC), Garrity; Morton Fraser LLP
First Defenders: Massaro; Shepherd & Wedderburn LLP
Second Defenders: Moynihan QC; Russel Aitken LLP (on behalf of Miller Samuel Hill Brown LLP, Solicitors, Glasgow)

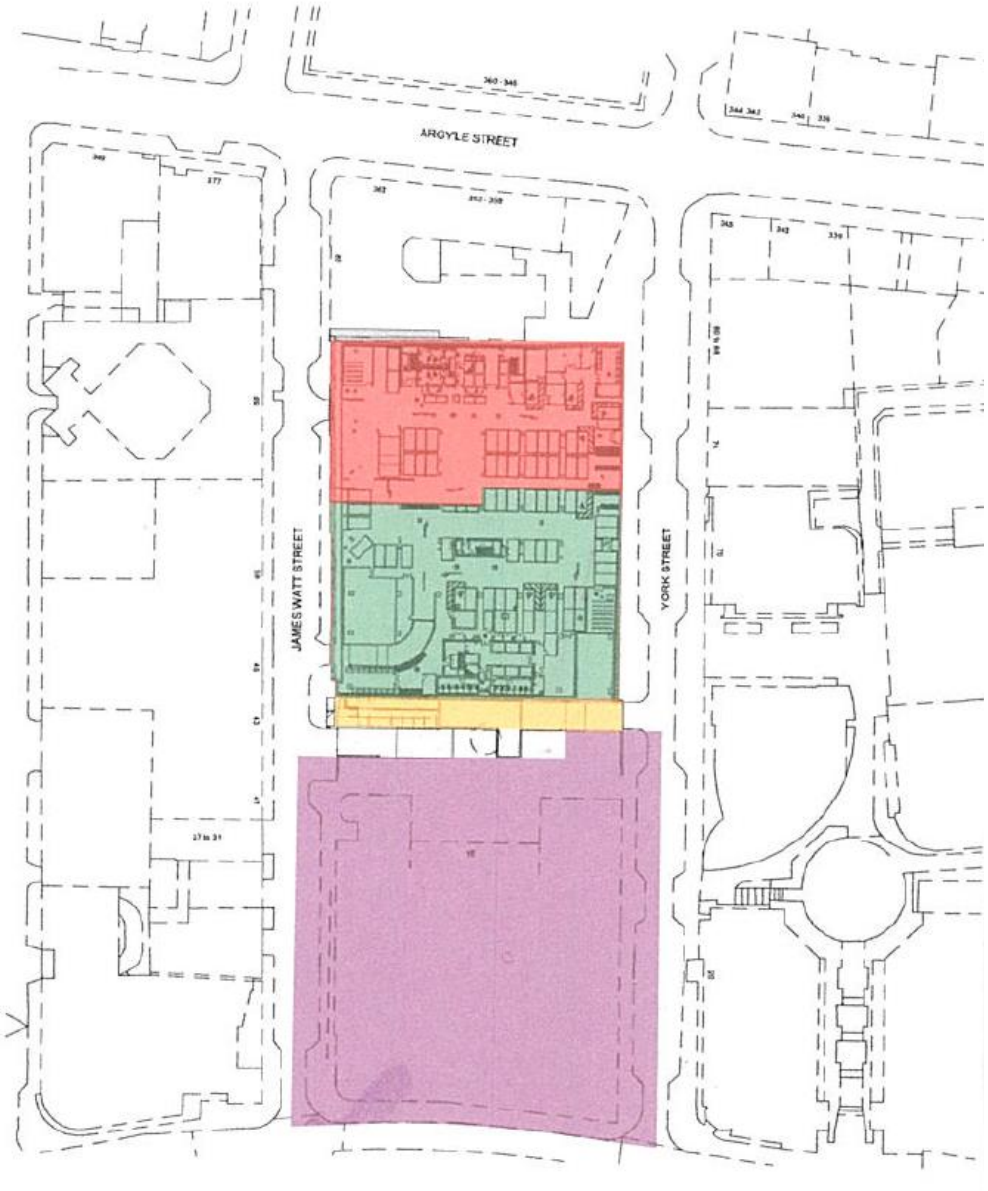
20 August 2021

Introduction

[1] The pursuers seek a declarator that: (1) they are the sole and exclusive heritable proprietors of a vehicular access ramp leading from York Street, Glasgow to the underground car park at Atlantic Quay, Broomielaw, Glasgow and the associated turning circle all as shown tinted ochre on a plan annexed to the summons; and (2) the York Street

Ramp and the turning circle at the foot of the York Street Ramp are not, and never have been, the common property of the pursuers and the first defenders.

[2] The plan shows the following:



[3] For introductory purposes, the pursuers own the red (northern) portion of what are now office blocks which lie between the Broomielaw and Argyle Street to the south and north and between York and James Watt Streets on the east and west. They are also still the owners of the green (central) section, but have disponed this to Legal and General Pensions Ltd. The first defenders own the purple (southern) section. Both red and green areas are

shown together "edged red" on a cadastral plan attached to the pursuers' title sheet. This red etched area includes the yellow (ochre) section between the purple and green areas. This area contains a ramp which leads from York Street down towards a basement car park. The pursuers maintain that they are the exclusive owners of this area; standing the terms of their title sheet.

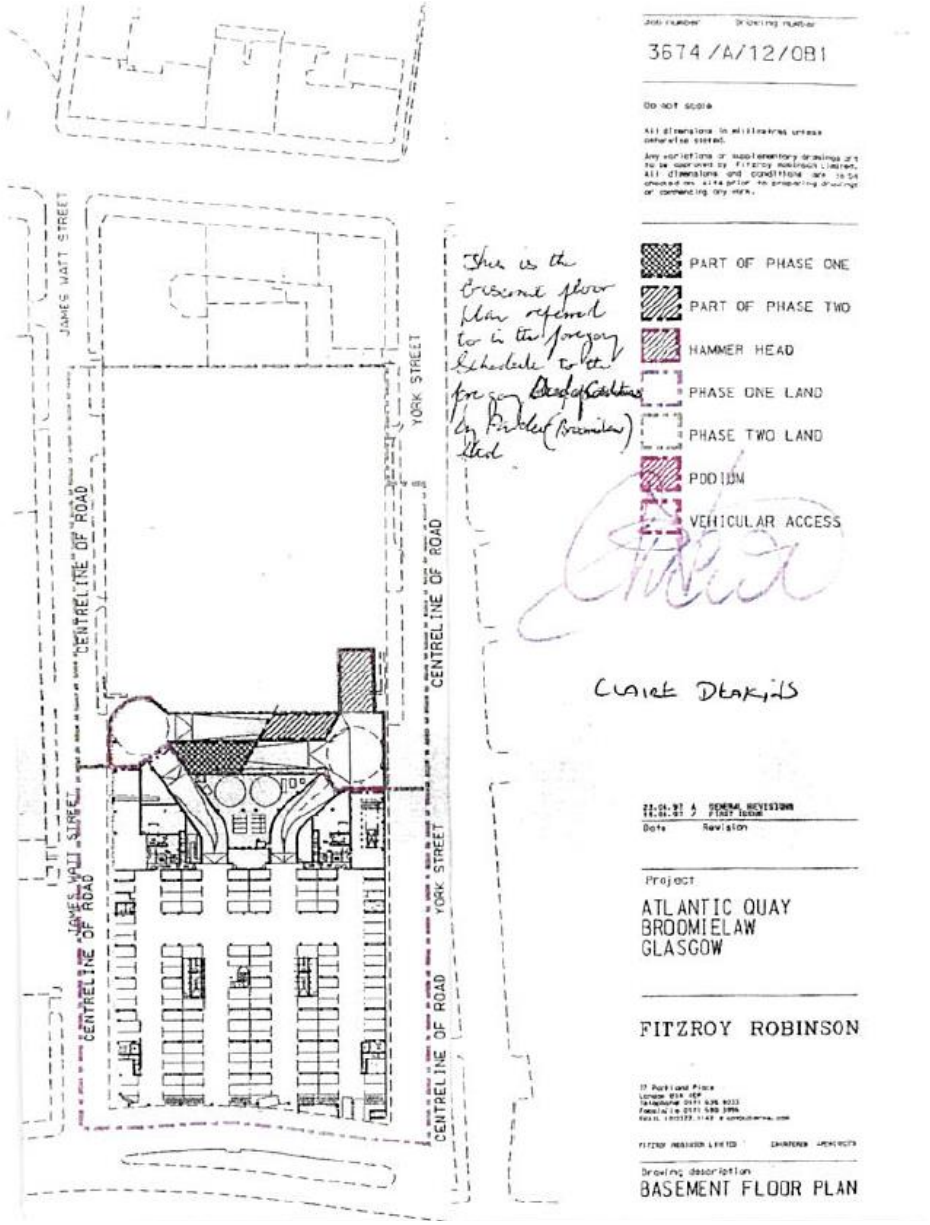
[4] The first defenders maintain that the ramp is common property in which they have a one-half *pro-indiviso* share. This is what the disposition of the land to them states. In so far as the pursuers' title sheet differs from this, they say that it is manifestly inaccurate. The issue is whether the pursuers' title sheet ultimately prevails over the first defenders' earlier title sheet and the terms of their disposition; all of which refer to a Deed of Conditions. The Deed predates the building of the office blocks, but it describes what were to be the ramps as they were to be built upon the common parts.

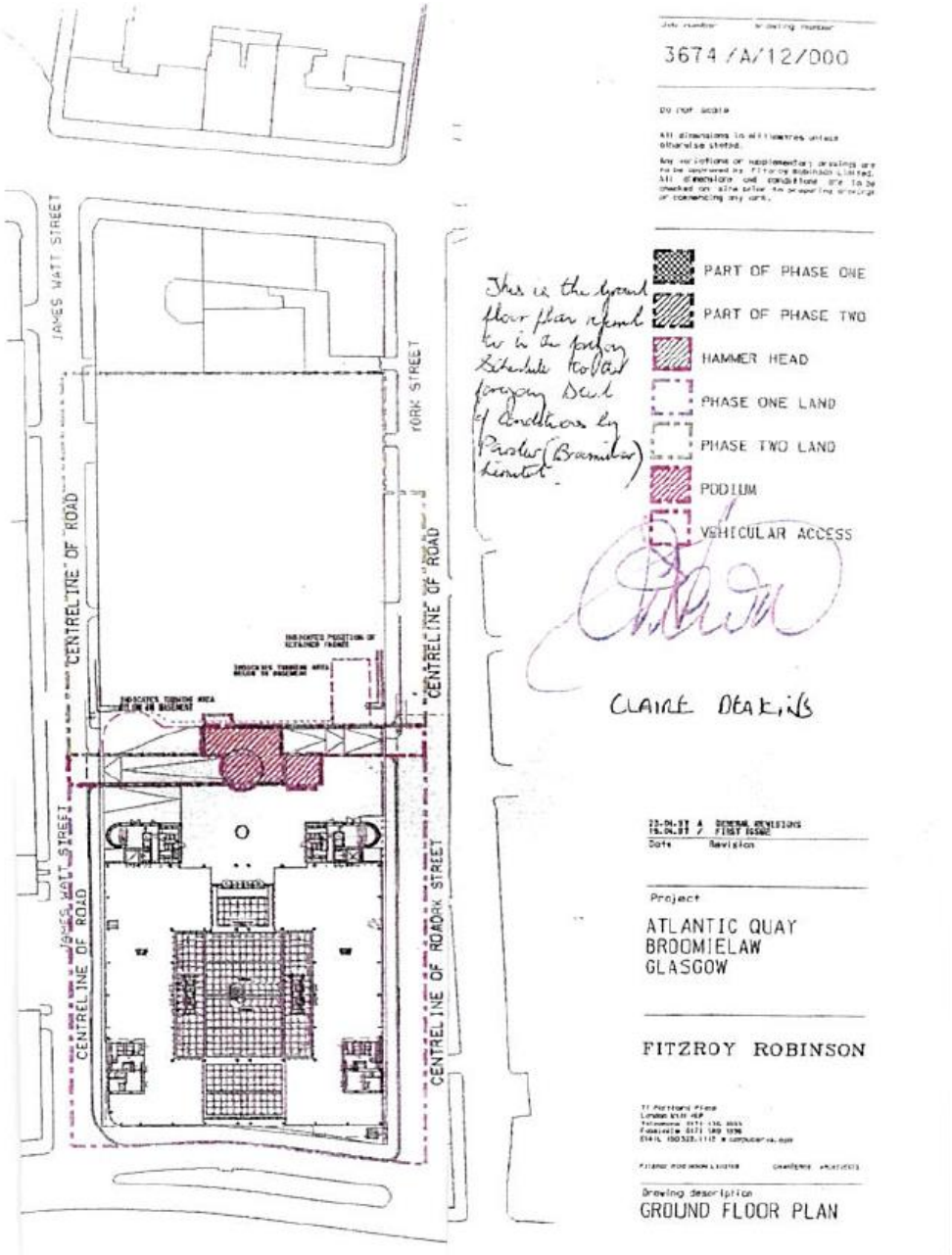
The Titles

The Deed of Conditions

[5] Pardev (Broomielaw) Ltd owned a substantial parcel of land to the north of the Broomielaw in Glasgow. The land was bounded by Argyle Street on the north, and York and James Watt Streets respectively to the east and west. In June 1997, Pardev registered a Deed of Declaration of Conditions, dated 29 April 1997. This stated their intention to develop the land in two phases. The Deed's stated purpose was to set out various burdens and conditions to which the subsequent owners, of what is described as the Phase I and Phase II land, would be subject. These would be incorporated into the subsequent dispositions by reference to the Deed rather than repeated *ad longum*.

[6] The Deed is bedevilled with defined terms. The Phase I land is the southern part of the site. It is shown outlined in blue on two plans (basement and ground) attached to the Deed as follows:





[7] Although relatively indistinct as reproduced, the blue line encloses at ground floor level the purple area shown on the plan lodged by the pursuers (see para [2]). The line on the basement plan is slightly different, but the important feature is that the delineated area does not encroach on the common parts. The common parts are expressly excluded from the Phase I land. The Phase II land is the rest of the site (ie excepting the Phase I land and the common parts). It is outlined in green on the plans. The green outline encompasses the red and green areas on the pursuers' plan. It too does not envelop any of the common parts.

[8] The common parts are defined as including a podium and vehicular access. They were to "be owned in common" by the Phase I and II proprietors. The podium was to be a raised platform above the access at ground floor level. It is shown hatched red on the ground floor plan. Vehicular access "means those structures to be constructed pursuant to the Works" and to be comprised, *inter alia*, of two ramps, including their turning circles, from ground level at York Street and James Watt Street down to the basement areas. The access is shown "indicatively outlined in red but unhatched" on the Deed's plans. The red line on the basement plan encompasses both turning circles. The areas underneath the York Street and James Watt Street ramps were not to form part of the common parts, but they would respectively be part of the Phase II and Phase I land. These areas are shown hatched and cross hatched on the basement plan. The James Watt Street ramp included a "Hammerhead", which was an area hatched in green on the basement plan and was to be used for Heavy Goods Vehicle access. The ground floor plan delineates the turning circle and hammerhead underneath. The red delineated common parts appear at all times to be outside the green (Phase II) and blue (Phase I) land. The "Works" were to be carried out to form the common parts in accordance with "approved drawings" and the Deed.

The Disposition to, and title sheet of, the first defenders

[9] In April 1997 Pardev disponed the Phase I land to the first defenders. The land was the subject of a general bounding description under reference to a red delineation on two plans of the ground and basement floors. The two plans are the same as those annexed to the Deed of Conditions, but they do not have the same annotations. Also conveyed were the "whole rights, common, mutual and exclusive pertaining thereto as specified in the Deed

…". The conveyance was conversely subject to the "whole burdens, conditions, reservations and others specified as referred to in" the Deed.

[10] The first defenders' title sheet (as updated) is dated 2005. It obviously pre-dates the Land Registration etc. (Scotland) Act 2012. The sheet describes the subjects as being within land edged in red on the title plan. This is a description of the whole of the Phase I and II lands. The sheet states that the subjects are shown edged in red at ground and basement levels as shown in Supplementary Plans 4 and 5. These plans show identical building configurations for the ground and basement floors. In each plan the York Street ramp and turning circle are shown. The red edged area includes the Phase I land but not the common parts. However, the description states that the subjects include "the rights specified in the Deed", which is repeated in the burdens section *ad longum*. The title includes Supplementary Plan 1, which is an enlarged section of the basement plan in the Deed, and with the same annotations (but moved to a different part). Supplementary Plan 3 is an enlarged version of the ground floor plan in the Deed with the same annotations (but on a different part). Both plans thus delineate the podium and the vehicular access as being common parts.

The pursuers' title sheet

[11] In October 1999 Pardev conveyed the Phase II land to the pursuers' predecessors in title. The pursuers acquired their title in April 2002. Their title sheet (as updated) is dated 2017, which post-dates the 2012 Act. The disposition to the pursuers is, curiously, not produced. At that time the first defenders' office block and the York Street ramp had been built. According to the title sheet, the subjects are "edged red" on a cadastral title plan. The area enclosed by the red edge includes the common parts and an area under the James Watt

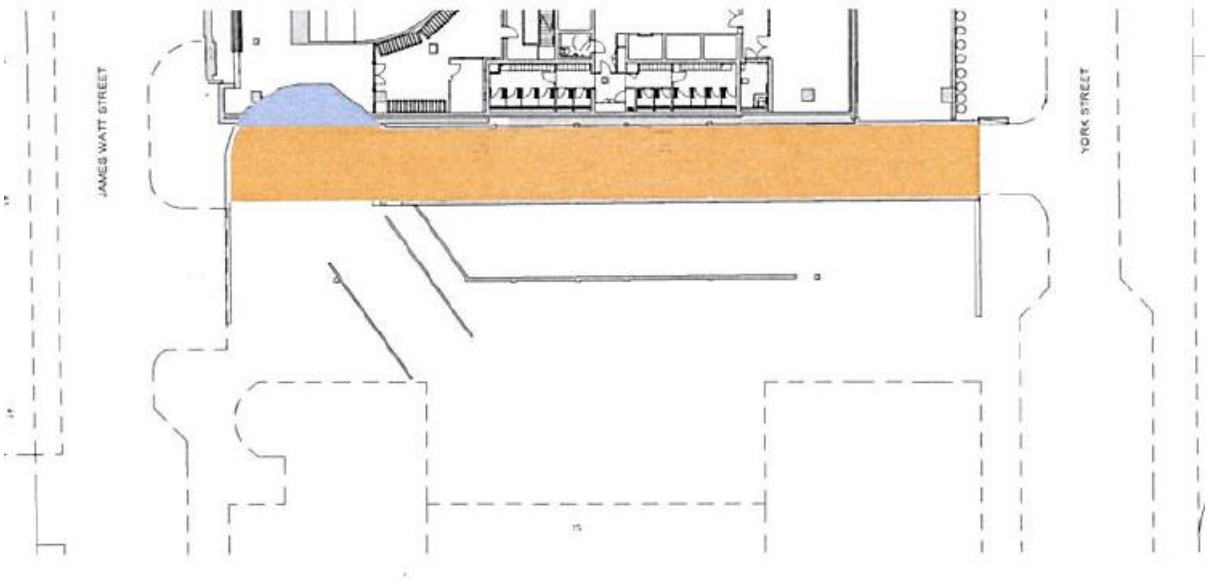
ramp which was part of the Phase I land, but this mauve hatched area is "not included in this Title". Part of the James Watt Street ramp, including most of its turning circle, and a section of podium, are not included. The title plan states "see supplementary plan(s)". These include the Supplementary Plans 1 (basement) and 3 (ground) which are attached to the first defenders' title sheet. As already noted, these supplementary plans delineate the podium and the vehicular access, including the turning circles, all of which the Deed describes as the common parts. The burdens section incorporates *ad longum* the terms of the Deed of Conditions.

[12] By disposition dated 26 January 2018, the pursuers purported to convey ownership of the green area in the pursuers' plan (para [2] above) to Legal and General Pensions Ltd. The disposition, which is also not produced, is said to include a section of the turning circle at the bottom of the York Street ramp together with a *pro indiviso* share in the remainder of the ramp in common with the pursuers, but not the first defenders. L&G have applied to the Lands Tribunal for a variation of what they describe as the first defenders' servitude right over the ramp.

[13] The pursuers maintain that they are the sole and exclusive heritable proprietors of the York Street ramp and that the ramp is not common property. Notwithstanding the terms of, and plans in, the Deed of Conditions, they argue that the first break-off disposition of the Phase I land in the first defenders' favour, which was registered on 2 July 1997, did not convey to the first defenders a one-half *pro indiviso* share of the common parts.

[14] The practical implications of the dispute arise out of the pursuers' development of the Phase II land. This is to include a car park underneath the building on that land. The pursuers have divided that land by selling part of it to L&G but retaining a *pro indiviso* share with them in most of the York Street ramp (in yellow), which is now discontiguous with the

land which the pursuers continue to own. On the pursuers' plan (para [2] above), there is now no discernible turning circle at the bottom of the York Street ramp. The reason for that is that the pursuers have built a wall across the northern part of the circle. They have purported to dispone the area, which is now cut off by the wall, along with the green area, to L&G. The Keeper has not yet registered that disposition. Although the pursuers, pending registration, assert their sole and exclusive ownership of what is shown as the yellow and grey areas on the following plan, they acknowledge that, on their interpretation of the 1997 disposition, a servitude right of access over the York Street ramp (inclusive of the walled off section) has been granted to the first defenders.



Legislation

[15] Section 3(1) of the Land Registration (Scotland) Act 1979 introduced the so-called Midas Touch[1], whereby registration of an interest in land in the Land Register would create a real right which might, unknown to another person with a registered interest, extinguish existing rights. The section has been described as "mystifying in its opaqueness (*sic*)" (Reid

[1] Scottish Law Commission Discussion Paper No. 125 on *Land Registration: Void and Voidable Titles* para 5.34.

and Gretton: *Land Registration* para 2.7). Registration vested the interest as a real right, "subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far as adverse to the interest or that person's entitlement to it …".

[16] In terms of section 9(3) of the 1979 Act, the Keeper was empowered, or could be ordered by the court or the Lands Tribunal, to rectify an inaccuracy in the Land Register. If rectification "would prejudice a proprietor in possession" she could only do so if:

> "(iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; …".

[17] The 2012 Act created (ss 80-85) a new, and easier, system of rectification. If an inaccuracy in a title sheet or in the cadastral map is manifest, the Keeper must rectify it.

[18] There was no definition of "inaccuracy" in the 1979 Act. One is provided in the 2012 Act (s 65), but it does effect the position under the earlier legislation. A title sheet or cadastral map is inaccurate if, *inter alia*, it "wrongly depicts or shows what the position is in law or in fact".

[19] The 2012 Act (sch 5, para 19(2)) repealed the Midas Touch, subject to transitional provisions. Inaccuracies, which existed before the designated day of 8 December 2014 (s 122 of the 2012 Act and the Land Registration etc. (Scotland) Act 2012 (Designated Day) Order 2014, art 2) and which the Keeper had the power to rectify (1979 Act, s 9), are to be treated as having been so rectified (2012 Act, sch 4, para 17). If there was no rectifiable inaccuracy, then the Land Register stands (*ibid*, para 22). In applying section 9(3) of the 1979 Act when operating these provisions, there is a rebuttable presumption that a registered proprietor was in possession of the land (*ibid*, para 18).

[20] Section 1 of the Prescription and Limitation (Scotland) Act 1973 provides that, if land has been possessed by any person for a continuous period of ten years openly, peaceably

and without judicial interruption, and the possession was founded on the recording or registration of a deed which is habile to constitute a real right in the land then, as from the expiry of that period, the real right is exempt from challenge.

The commercial judge's reasoning

[21] Before the commercial judge, the pursuers moved for decree of declarator in terms of their first conclusion. The defenders moved for absolvitor, which failing a proof before answer. The pursuers advanced two propositions. First, whatever the terms of the Deed of Conditions, the disposition by Pardev to the first defenders did not convey a real right of ownership in the York Street ramp. The first defenders relied on their disposition as disponing that right of ownership. If their title sheet did not now reflect this, then the 2012 Act granted them that right because this was a rectifiable inaccuracy. Even if the 1997 disposition did not convey ownership, or that real right had been extinguished in 2002, its terms constituted a title habile to permit the application of prescription. The pursuers' second proposition was based on the Midas Touch principle in the 1979 Act. They had acquired sole and exclusive ownership upon registration of their title in 2002. This extinguished the first defenders' *pro indiviso* ownership.

[22] The commercial judge made *avizandum* on 29 October 2019. In her opinion of 29 May 2020 she refused to grant the declarator sought. The reasons for her decision were framed as an analyses of, and answers to, eight self-posed questions. First, the Deed of Conditions set out an intention that the York Street ramp would be the common property of the Phase I and II proprietors. Secondly, although the ramp was outside the area delineated in red on the two plans annexed to the first defenders' disposition, the parts and pertinents clause was sufficient to convey the real right of common ownership which was referred to in the Deed.

Thirdly, the first defenders' title sheet included that right, having regard to the contents of the property section, the title plan and the supplementary plans. The answer to the fourth question, on the effect of the registration of the pursuers' land in 2002, depended on whether the rights in the pursuers' and first defenders' title sheets were inconsistent. They were inconsistent. There was no reference to the Deed in the pursuers' title sheet that was relevant to trigger the qualification of a matter adverse to their interest in the land. That meant that the pursuers acquired a real right of sole and exclusive ownership of the common parts, by operation of the Midas Touch. Whether this remained the case depended, fifthly, on whether there was a bijural inaccuracy as at the designated day that, sixth, was rectifiable. There was a bijural inaccuracy; the pursuers' title was *a non domino* in relation to the first defenders' share of ownership in the common parts. The inaccuracy was in principle rectifiable as knowledge of the terms of the Deed put the pursuers and their predecessors in bad faith. Whether it could be rectified was, seventhly, a matter for proof on the defenders' averments which sought to rebut the presumption that the pursuers were a proprietor in possession. Eighthly, even if the first defenders' real right had been extinguished, their title, which derived from the 1997 disposition, was habile to found possession for the purposes of prescription. Proof was required on the averment that the first defenders had been in possession for the required length of time.

Submissions

Pursuers

[23] The first defenders' averments about possession were irrelevant. They had not acquired any ownership rights in the common parts in 1997. This resulted either from the wording of the disposition and/or the *de praesenti* principle. The latter had not been relied

upon before the commercial judge. That was the end of the matter. If it were otherwise, the defenders still had to rely on the bad faith of the pursuers to counter the Midas Touch. There were no relevant defences to that effect. If that simple answer was not accepted, the court would have to decide (cf Reid and Gretton, *Conveyancing: what happened in 2020?* at 126-127) whether the inaccuracy had passed through every successor in title up to the pursuers, or whether it had been "washed out" when the Phase II land was sold by the person who had purchased it from Pardev in 1999.

[24] The 1997 disposition did not, and was not habile to, dispone a *pro indiviso* ownership in the York Street ramp. The subjects were described by a dispositive clause which referred to two plans. The ramp lay outwith the boundary description. A proprietor could hold only incorporeal rights outwith the boundary (Gordon & Wortley: *Scottish Land Law* (3rd ed) I, para 3.03-07). Possession could not confer title outwith the boundary (Johnston, *Prescription and Limitation* (2nd ed), para 17.45).

[25] The commercial judge erred on the dispositive effect of the parts and pertinents clause in the 1997 disposition. The phrase "pertaining thereto" referred back to the bounding description, which did not encompass the common parts. The first section of the clause could not be read as disponing something outwith the boundary. Even if that had been the intention, the "Works", ie the relevant structures, did not exist at the time of the registration of either the Deed or the disposition. They were described in the Deed in aspirational, flexible and malleable terms, such as by reference to "Approved Drawings" that had to be agreed. The plans were indicative only. As such, no valid conveyance could have taken place. Real rights could only operate *de praesenti*. This rendered invalid any conveyance of land ascertainable only by reference to an uncertain future event (*PMP Plus* v *Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2, paras 30-32; *Miller Homes* v *Keeper of*

the Registers of Scotland 2014 SLT (Lands Tr) 79, paras 55-61 and 64). The drawings were not only referable to the podium works. The final layout of the vehicular access was subject to change.

[26] Even if the first defenders' title was habile to be acquired through positive prescription, the defenders' case, that there was a rectifiable inaccuracy, rested wholly on bad faith. That the dispositions in favour of the pursuers or their predecessors may have been *a non domino* was irrelevant without bad faith (Reid & Gretton (*supra*); *Stair Memorial Encyclopaedia*, Vol 18, para 692). Amenability to rectification had to be assessed as at 7 December 2014 (2012 Act, sch 4, para 17). The transitional provisions in the 2012 Act were irrelevant to the operation of the Midas Touch. An inaccuracy had to be rectifiable in terms of section 9. *Trade Development Bank* v *Warriner and Mason (Scotland)* 1980 SC 74 had been concerned with the Sasines Register. The whole purpose of the Land Register was to avoid searching antecedent conveyances for problems. If bad faith was not pled, the defenders could not succeed.

Defenders

[27] The essence of the dispute had been about the nature of the right disponed to the first defenders in 1997, not the area of land affected by that right. It was not possible to interpret the disposition as referring to the Deed of Conditions as conveying a servitude right, but not a *pro indiviso* share in the ownership of the common parts.

[28] A corporeal right could be conveyed in a parts and pertinents clause under reference to a Deed of Conditions (*Auld* v *Hay* (1880) 7 R 663, at 668-9 and 673). That was unremarkable (Reid & Gretton, *Conveyancing: what happened in 2020?*). Unlike *PMP Plus* v *Keeper of the Registers of Scotland* (paras [52], [54] and [63]) and *Miller Homes* v *Keeper of the*

Registers of Scotland, all versions of the relevant plans clearly delineated the York Street ramp and its associated turning circle. *PMP Plus* was compatible with this, in so far as it required a purposive construction of the disposition (paras [70]-[72], citing *Candleberry* v *West End Homeowners Association* 2006 SC 638, para [19]). The drawings to be agreed related only to the podium. Even then, the parties recognised a possible need for a deed of variation. There was no difficulty in construing the Deed in a manner consistent with an intention to make a specific common conveyance. There had been no issue in terms of voidability on grounds of uncertainty before the commercial judge.

[29] The Midas Touch ended on 8 December 2014. The transitional provisions asked simply whether the circumstances were appropriate for rectification. Good or bad faith was not relevant. The only question was whether the pursuers were prejudiced as a proprietor in possession. The defenders averred in clear terms that they were not. This gave rise to inaccuracy. It was accepted that the defenders required to go to proof to rebut the presumption of the pursuers' possession. The first defenders had, in any event, reacquired *pro indiviso* ownership rights through their own prescriptive possession.

[30] If bad faith were required, the commercial judge was correct to hold that it existed. When the pursuers took title, the ramp and turning circle had been built. At that date, looking at their own title, the pursuers would have recognised that the intention was for the Phase II proprietors to acquire only common property. They could as a matter of general property law only have done so as a result of Pardev's *a non domino* disposition. The terms of the Deed would have directed a party in good faith to make inquiries of the first defenders' title.

Decision

General

[31] This is a dispute between commercial enterprises raised in the commercial court. It is very important that the outcome of such a dispute is explained in terms which are kept within reasonable bounds in terms of both length and comprehension. This is particularly so where the judge's decision follows a hearing which has not involved any consideration of testimony but was a legal debate on the import of conveyancing documents.

De praesenti

[32] The starting point chronologically is the Deed of Conditions. This sets out, in clear terms, the boundaries of the Phase I and II lands and defines with equal clarity what were to be, and would become, the areas of ground on which two ramps, turning circles and related structures serving the basement car park were to be constructed. These are defined as common parts. In the event of the Deed of Conditions being incorporated into a disposition to a purchaser, including the pursuers, the disposition would carry with it (upon registration of title) a *pro-indiviso* right in common to the ramps or any other structure as subsequently (or previously) constructed on the ground conveyed.

[33] The pursuers belatedly raised the impact of the *de praesenti* principle. It was not foreshadowed in the pleadings, the commercial judge's opinion, or even in the original written note of argument before this court. The principle is that it is not competent to convey an area of land which is ascertainable only by reference to an uncertain future event. A conveyance operates *de praesenti* and the real right is acquired on registration (*PMP Plus* v *Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2 at para [56]). This principle, according to the Tribunal in *PMP Plus*, followed from the terms of section 3(1) of the Land

Registration (Scotland) Act 1979, which vested a real right upon registration. There could be no postponed vesting. A second principle, deriving from section 4(2)(a) was the requirement for a sufficient description by reference to the Ordnance map.

[34] There is no difficulty with the ascertainment of the boundaries of the land which was to form the common parts, even although, at the time of both the Deed of Conditions and the disposition to the first defenders, the ramps had not been constructed. The land is clearly delineated in both the basement and ground floor plans attached to the Deed. Even in the unlikely event of the ramps never being built, the area delineated in red on the ground would have vested in the first defenders as common property with Pardev, as the then owners of the Phase II land, once the first defenders' interest in the land, as contained in the disposition to them, came to be registered. There is, in short, no uncertainty. The potential for the precise nature of the structures to be changed is of no practical significance in this case, given that there is no suggestion that they were varied in the manner provided for by the Deed.

[35] Had there been any difficulty in defining the extent of the interest in land to be conveyed and registered, this ought to have been noticed by the Keeper. No problem was perceived by her; and rightly so. It may nevertheless not be entirely without significance that, by the time of the disposition to the pursuers, the York Street ramp was in existence and the nature of its ownership was set out in the Deed to which the pursuers' title sheet, and presumably the disposition of the Phase II land to them, referred.

[36] If the *de praesenti* principle were to be applied in the manner sought by the pursuers, it would operate as a substantial obstacle to developers of multi-occupation phased development sites for which they wish to set out *ab ante* the rights and obligations of potential purchasers in connection with what is intended to be used as common property (cf

Gretton & Reid: *Conveyancing* (5th ed) para 12.29 on inconvenience and excessive legality). The use of the Deed of Conditions by Pardev was a common, sensible and appropriate use of a single document setting out the conditions to be incorporated by reference in subsequent split off dispositions. In practical terms, no doubt the nature of the structures to be built would already have been the subject of extensive planning and building warrant procedures. The nature and location of the structures was described in a manner which met the *de praesenti* principle.

A conflict of title sheets?

[37] The 1979 Act was not without its problems in terms of practical application. The creation of a register of interests in land (1979 Act, s 1(1)), rather than a record of deeds of conveyance, and the plotting of these interests on an Ordnance map (1979 Act, s 6(1)(a)), so that a purchaser need look no further than the relative title sheet, was (and is) an ambitious project. The registration of the interest creates the real right in a new owner, subject only to those real burdens and other encumbrances which are listed on the title sheet (1979 Act, s 3(1)). If one of the burdens or encumbrances, which existed in favour of another owner, did not appear on the sheet, it would thereby be extinguished by the Keeper's Midas touch. Therein lay a difficulty, if the interest as registered was "inaccurate"; hence the remedy of rectification in that event (1979 Act, s 9(1)). Rectification was not to be permitted when it "would prejudice a proprietor in possession" (1979 Act, s 9(3)).

[38] The 1979 Act did not contain specific provisions for the registration of common property. This could, in practical terms, be achieved in at least three different ways. First, the whole of the proprietor's interests, exclusive and in common, could have been plotted on the Ordnance map. This would mean that there could be several title sheets with ostensibly

conflicting maps (see Reid and Gretton: *Land Registration* at para 4.20); the resolution of which would have to be by reference to words elsewhere in the title sheet. Alternatively, only the exclusive area could be delineated on the map, with the common area being referred to as a pertinent in the title sheet for the main area. This was a preferred method at least prior to the 2012 Act (see eg *Registration of Title Practice Book* (2000) para 5.52). The system under the 2012 Act is not supposed to permit either method. Rather, and this is the third method, a shared area should form its own cadastral unit and have its own title sheet (2012 Act, s 12(1) and (2)), although there is scope for the earlier method to continue in operation (2012 Act, s 12(3)).

[39] Against that background, one question which arose before the commercial judge was whether there is a conflict between the two title sheets. The sheets certainly approach the effect of the Deed of Conditions differently and, to that extent, they are inconsistently drafted. The first defenders' title sheet contains Ordnance maps which have delineations only of the ground exclusively owned. The description in the property section contains the words "together with the rights specified in the Deed of… Conditions in… the Burdens Section". The terms of that Deed are repeated, whereby the podium and the vehicular access are to be "owned in common" by the Phase I and II proprietors. The podium and vehicular access are delineated on Supplementary Plans 1 and 3, which are part of the title sheet. On its face, the first defenders' title sheet creates a real right not only in the exclusively owned area delineated in red on the Ordnance map but also in common in respect of the common parts. The right conveyed was not one of servitude but one of ownership. *Quantum valeat*, that conforms to the disposition to the first defenders which, for the avoidance of doubt, conveyed those areas.

[40] The pursuers' title sheet is in a different style or form. The description of the subjects in the property section is remarkably short. It states simply that the subjects are edged in red. It does not make any distinction between land held exclusively and that which is in common. As has already been seen, the area edged in red includes not only the area to which Pardev retained exclusive ownership, following the disposition to the first defenders, but also to what were, in terms of the Deed, the common parts. Following the disposition, Pardev had no title to convey exclusive ownership of the common parts to anyone since they had ceased to have exclusive title to them (*nemo dat quod non habet*). The dispositions to the pursuers and their successors in title have not been produced. It is not possible to probe how matters might have developed. The pursuers simply found upon their title sheet as establishing their exclusive ownership of the common parts. The question then is whether that is its effect.

[41] As described above, one way of plotting subjects, at least prior to the 2012 Act, was to include not only an exclusively owned area but also any common parts within the Ordnance (but not the cadastral) map. This would not be inaccurate, even although other common owners would have title sheets delineating the same common area within the totality. This ought not to pose a significant problem, as long as the matter is made clear within the title sheet. In this case, the terms of the Deed of Conditions are included *ad longum* in the Burdens Section. It may have been prudent to have included a reference to it in the Subjects Section, but the import of the Deed is clear. In respect of the common parts, it is not just a burden but *pro indiviso* ownership that is provided. A person who looked at the title sheet would see that this was what is intended, since otherwise there would be little point in including Supplementary Plans 1 and 3 which delineate the common parts.

[42] Construed in this way, and differing from the commercial judge on this point, there is no obvious conflict between the two title sheets. The pursuers' title sheet does not provide for their exclusive ownership of the common parts. The first defenders' title sheet does include the common parts. On this basis the commercial judge ought to have dismissed the action against the first defenders as irrelevant. However, the first defenders did not cross-appeal with a view to securing that remedy in advance of a proof before answer.

***A non domino* and bad faith**

[43] There is no question of there being an "*a non domino*" conveyance to the pursuers. If there was a conveyance of exclusive ownership of the common parts, that is to say including those which had already been conveyed by Pardev to the first defenders, it was in direct conflict with the disposition to the first defenders. A *domino* already existed.

[44] In the absence of averments, no issue of bad faith can arise. That is not to say that the pursuers can be taken to have been unaware of the terms of the Deed of Conditions. Given the terms of their title sheet, they clearly were aware of what the Deed said about the common parts.

Inaccuracy and Proprietor in Possession

[45] If there were a conflict between the title sheets, it is caused by an inaccuracy in one or other of them which, leaving aside the question of a proprietor in possession for the moment, could have been rectified under sub-section 9(1) of the 1979 Act. At the risk of unnecessary repetition, once Pardev had conveyed a *pro indiviso* right in the common parts to the first defenders, they ceased to have title to convey these parts exclusively to anyone else, including the pursuers' predecessors in title. Exactly where the error (assuming there to be one) in the pursuers' title sheet arose is unclear, but the existence of such an error is

manifest. The inaccuracy existed before the designated day. The first defenders are therefore deemed to have the rights which they would have had in the event of rectification (2012 Act, sch 4 para 17).

[46] However, rectification would not have been possible under the 1979 Act if the pursuers were proprietors in possession immediately before the designated day (8 December 2014). Depending on which title is deemed to be inaccurate, the person registered as the proprietor is presumed to be in possession unless the contrary is shown (2012 Act Sch 4 para 18). The first defenders aver that they were in possession up until 2018, when the pursuers began construction work on the Phase II land. Prior to that, the ramp(s) had been used only for the carpark under their building. Since there is, at least on record, a dispute on that factual matter, the case requires to proceed to a proof before answer.

Prescription

[47] Linked to the issue of possession is prescription. The 2012 Act amended section 1(1) of the Prescription and Limitation (Scotland) Act 1973 in a manner which allows prescription to operate on land referred to in a title sheet. For reasons already explored, the first defenders' title sheet and their disposition, in so far as relating to the common parts, are at least habile to permit prescription to run in a manner which would create a real *pro indiviso* right of ownership. If the first defenders possessed the ramp(s) for a period in excess of ten years in terms of the 1973 Act, their title will be purified. Since this too remains in dispute, the proof would also require to cover this area.

Outcome

[48] The commercial judge's interlocutor of 29 May 2020 repelled the pursuers' second and third pleas in law which sought respectively to exclude certain unspecified averments

from probation and *decree de plano.* The appropriate course of action, given that the defenders do not seek dismissal of the action, is to leave all pleas standing and to allow a proof before answer. The proof should be restricted to the two matters of fact which are in dispute; the issues of proprietor in possession in terms of section 9(3) of the 1979 Act and the operation of prescription under sub-section 1(1) of the 1973 Act. That is not to say that these will be the only matters which may be the subject of submissions thereafter. At present, all pleas, none of which refer to either possession or prescription, should remain standing. If there is to be a determination based on either of these two points, it will be important that appropriate pleas are inserted into the record.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 44
CA46/19

Lord President
Lord Menzies
Lord Doherty

OPINION OF LORD MENZIES

in the Reclaiming Motion by

BAM TCP ATLANTIC SQUARE LIMITED

Pursuers and Reclaimers

against

(FIRST) BRITISH TELECOMMUNICATIONS PLC; AND (SECOND) FIRLEIGH LIMITED

Defenders and Respondents

_____

Pursuers and Reclaimers: Dean of Faculty (Dunlop QC), Garrity; Morton Fraser LLP
First Defenders: Massaro; Shepherd & Wedderburn LLP
Second Defenders: Moynihan QC; Russel Aitken LLP (on behalf of Miller Samuel Hill Brown LLP, Solicitors, Glasgow)

20 August 2021

[49] I am grateful to your Lordship in the chair for setting out the background and submissions in this reclaiming motion. I have not found it easy to reach a concluded view on it. In particular, I was initially attracted by the submission for the pursuers and reclaimers on the *de praesenti* principle, despite the fact that this was not raised in the pleadings, nor was it argued before the commercial judge, nor did it feature in the Notes of

Argument. However, on reflection I have reached the view that this submission is not well founded, and I agree with the reasoning of your Lordship in the chair at paragraphs [32]-[36] above.

[50] "[T]he principle of property law, not just "registration law", that real rights to land can only operate *de praesenti*, renders *ex facie* invalid any conveyance of land ascertainable only under reference to an uncertain future event, so that such a title cannot found prescriptive possession" – *Miller Homes Ltd* v *Keeper of the Registers of Scotland,* 2014 SLT (Lands Tr) 79, at paragraph [30]. "…it is not possible to convey an area of land ascertainable only under reference to an uncertain future event. A conveyance operates *de praesenti* and the real right is acquired on registration" – *PMP Plus Ltd* v *Keeper of the Registers of Scotland,* 2009 SLT (Lands Tr) 2, at para [56].

[51] I accept both these statements of the law, but the circumstances of each of these cases appear to me to be different from those in the present case. In *PMP Plus* the issue related to a non-residential purchaser of an undeveloped area of ground within a residential development site. The Keeper of the Registers of Scotland decided to register the title, but only with exclusion of indemnity, because (1) the title sheets of the individual proprietors of dwelling houses in the development appeared to grant a *pro indiviso* right to the common parts, and the subjects could be said to fall within the description of such common parts, and (2) in any event there was a significant risk that the title was voidable under reference to the principle in *Rodger (Builders) Ltd* v *Fawdry* 1950 SC 483 where, properly understood, the deed of conditions reflected a commitment to use the whole development subjects for dwelling houses and common parts, and that the parts of the site left at the end unbuilt on by dwellings would be owned in common by the house and flat owners by which the developers were bound. The passage from paragraph [56] of the Tribunal's decision which

is quoted above must be read in the context of those circumstances, and bearing in mind that the matter was the subject of agreement between the parties, so no contradictory submissions were advanced.

[52] The Tribunal accepted (para [70]) that they should seek to construe the deed of conditions and the plan appended to it in such a way as to reflect a practical approach to the registration of title and avoid holding that a title was ineffective from uncertainty. It considered (particularly at paragraphs [61]-[65]) the desire for flexibility by the developer, which will be a common feature, particularly on a big site. At paragraph [70] the Tribunal accepted the appellant's contention that the intention was clearly that the common parts were only to be defined at some future point after the start of the development. So, at the time that the appellant's title was presented for registration, it was not possible to determine from the deed of conditions and the plan appended to it whether the subjects to which the appellant sought to register title was or was not in the common parts.

[53] The circumstances in *Miller Homes* were strikingly similar to those in *PMP Plus* – it was impossible to ascertain the extent of the common parts of a residential development as at the date of presentation of a title for registration, so it was argued that it was impossible to ascertain if the appellant in that case had a good title, or whether it might found title on prescriptive possession.

[54] The circumstances of the present case appear to me to be different. In those cases the boundaries and extent of the common parts could not be ascertained as at the date of presentation of the title for registration. In the present case, as your Lordship in the chair observes, there is no difficulty with the ascertainment of the boundaries of the land which was to form the common parts. The desire for flexibility (common in cases such as this) to which the Lands Tribunal referred in *PMP Plus* is apparent from the terminology of the deed

of conditions; it is clear that the works had not been carried out to form the common parts at the time of the deed of conditions, and in looking to the future the deed of conditions envisaged that there might be amendments or variations to the Approved Drawings, and to the way in which the Podium and the Vehicular Access might be constructed – but not without the approval of each of the Phase I & Phase II Proprietors, each of which will act reasonably (clause 2.3). The area occupied as, or allocated to, common parts is not affected by this element of flexibility. I consider that this is sufficiently clearly identified, and is not properly categorised as "an area of land ascertainable only under reference to an uncertain future event". There were clearly uncertain future events anticipated, but unlike in the cases of *PMP Plus* & *Miller Homes,* the extent of the land was not ascertainable only by these.

[55] I agree with the observations of the Lands Tribunal in *PMP Plus* (at paragraph [70]) that it is appropriate to seek to construe the deed of conditions (and plans) in such a way as to reflect a practical approach to the registration of title, and (where possible) to avoid holding that a title is ineffective from uncertainty. The construction urged on this court (for the first time) by the pursuers and reclaimers is not in accordance with these observations, and in my view does not reflect a practical approach to the registration of title. I agree with your Lordship in the chair on the *de praesenti* issue.

[56] The point about whether or not there is a conflict between the title sheets of the pursuers and the first defenders is an interesting one, and I find your Lordship in the chair's reasoning on the point persuasive. However, the commercial judge held that there was a conflict, and there is no appeal against her decision on this point, nor have we had the benefit of argument on the point. I would prefer not to base my decision on this point.

[57] I am in complete agreement with your Lordship in the chair's reasoning and conclusions on bad faith, inaccuracy/proprietor in possession, and prescription, and need add nothing further. I agree with your Lordship's proposed disposal.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 44
C46/19

Lord President
Lord Menzies
Lord Doherty

OPINION OF LORD DOHERTY

in the Reclaiming Motion

by

BAM TCP ATLANTIC SQUARE LIMITED

Pursuers and Reclaimers

against

(FIRST) BRITISH TELECOMMUNICATIONS PLC; AND (SECOND) FIRLEIGH LIMITED

Defenders and Respondents

Pursuers and Reclaimers: Dean of Faculty (Dunlop QC), Garrity; Morton Fraser LLP
First Defenders: Massaro; Shepherd & Wedderburn LLP
Second Defenders: Moynihan QC; Russel Aitken LLP (on behalf of Miller Samuel Hill Brown LLP, Solicitors, Glasgow)

20 August 2021

Introduction

[58] I have reached a different conclusion from your Lordships, for the following reasons.

[59] The defenders have two defences to the action. The primary defence is that on registration of their disposition on 2 July 1997 the first defenders obtained a real right to a one-half *pro indiviso* share in the Common Parts; that when the pursuers registered their

disposition in 2002 they obtained title as exclusive owners to the whole of the Common Parts; that as a result immediately before the designated day (8 December 2014) there was an inaccuracy in the register in respect of which the first defenders could have obtained rectification in terms of s 9 of the Land Registration (Scotland) Act 1979; and that by virtue of the operation of Sched 4, para 17 of the Land Registration etc. (Scotland) Act 2012 the first defenders are now to be treated as if they had obtained that rectification. The secondary defence is that if the first defenders did not obtain a real right to a one-half *pro indiviso* share in the Common Parts on registration of their disposition, they nevertheless subsequently acquired that right by reason of the operation of prescription.

[60] In my opinion the primary defence falls at the first hurdle because on registration of their disposition on 2 July 1997 the first defenders did not obtain a real right to a one-half *pro indiviso* share in the Common Parts. However, in my view the secondary defence is suitable for inquiry.

The first defenders' Title Sheet

[61] The Property Section of the first defenders' Title Sheet contains the following description:

> "Description:
>
> Subjects ALEXANDER BAIN HOUSE, 15 YORK STREET, GLASGOW G2 8LA within the land edged red on the Title Plan, which subjects are shown edged red at ground level on Supplementary Plan 4 to the Title Plan and edged red at basement level on Supplementary Plan 5 to the Title Plan, together with the rights specified in the Deed of Declaration of Conditions in Entry 3 of the Burdens Section."

The Title Plan contains the note "See Supplementary Plans". Supplementary Plans 4 and 5 are mentioned in the Property Section but Supplementary Plans 1, 2 and 3 are not.

Supplementary Plans 1, 2 and 3 are derived from the basement plan, the site plan and the ground floor plan contained in the Schedule to the Deed of Conditions, and for all material purposes they are identical to those plans.

The Deed of Conditions

[62] The Deed of Conditions provides:

> "**1 Definitions**
>
> In this Deed (including the Recitals) the following words and expressions shall have the meanings respectively given to them as follows:
>
> 'Approved Drawings' means such drawings as have been approved from time to time by both the Phase I Proprietors and the Phase II Proprietors relative to the Podium Works as the same may be amended or varied with the approval of both the Phase I Proprietors and the Phase II Proprietors in accordance with this Deed;
>
> …
>
> 'Common Parts' means the Podium and the Vehicular Access and will include all common service media constructed or to be constructed thereon all as may be altered or varied in accordance with this Deed from time to time and which will be owned in common by the Phase I Proprietors and Phase II Proprietors subject to the terms of this Deed;
>
> …
>
> 'the Podium' means the raised platform to be constructed at ground floor level only above the Vehicular Access as part of the Works and will include the pedestrian accesses, (if these are to be constructed in accordance with this Deed), landscaping, lighting, signage and any features (as part of the works or otherwise all to the extent mutually agreed by the Proprietors) thereon and as indicatively shown hatched red on the Ground Floor Plan and the final layout for which will be determined by the Works carried out in accordance with this Deed and which will include where appropriate any walls or structure exclusively serving the Podium and to a mutual extent any walls or structure which are mutual between the Podium, the Phase I Land on the one hand or the Phase II Land on the other.
>
> …
>
> 'Vehicular Access' means those structures to be constructed pursuant to the Works comprising (a) the vehicular ramps leading from York Street to basement level ('the

York Street Ramp') and the turning circle leading therefrom to serve the Phase I Building and (by means of an access to be created as envisaged by Clause 3.2) to the Phase II Buildings but excluding the area beneath the York Street Ramp which will form part of the Phase II Land (as indicatively hatched black on the Basement Plan) (b) the vehicular ramp leading from James Watt Street to basement level ('the James Watt Street Ramp') but excluding the area beneath the same as indicatively cross hatched black on the Basement Plan which will remain part of the Phase I Land) and the turning circle leading therefore (*sic*) to serve the Phase I Building and (by the accesses to be created leading from the turning circle and from the Hammerhead as envisaged by Clauses 3.2 and 11.2) to the Phase II Buildings and (c) the structure, sub-structure and means of support of and all load bearing walls and all surfaces of and in relation to the York Street Ramp, the James Watt Street Ramp and the said turning circles and the supporting structure of the Podium together with, to a mutual extent, any walls which are mutual as between the Vehicular Access and Phase I Land on the one hand or the Phase II Land on the other but excluding in each case any area or property right at any level other than (1) at basement level (as aforesaid) and (2) the ramps themselves and declaring that the final layout of the foregoing will be determined by the Works carried out in accordance with this Deed, which Vehicular Access is shown indicatively outlined in red but unhatched on the Ground Floor Plan and the Basement Plan;

'Works' means the works to be carried out to form the Common Parts in accordance with the Approved Drawings and this Deed.

2 The Works

2.1 Subject the Clause 2.2, as part of the works to construct the Phase I Building (if the Phase I proprietor elects to construct the same) the Phase I Proprietor will carry out or procure the carrying out of the Works in a good and workmanlike manner in accordance with the Approved Drawings, all relevant statutory … consents and permissions and requirements … which the Phase I Proprietor will obtain and exhibit to the Phase II Proprietor and will complete the works within 12 months or such other period as the parties may agree after commencement and for the foregoing purpose will be entitled to take access to the site of the Common Parts.

2.2 If the Phase I Proprietor has not commenced the Works by 1 September 1997 then the Phase II Proprietor will be entitled to give notice to the Phase I Proprietor at any time thereafter unless the Phase I Proprietor has then commenced the Works that it intends to carry out the Works and the provisions of Clause 2.1 will apply *mutatis mutandis* to the Phase II Proprietor …; declaring the Proprietors will consult with each other as regards the timing and party who is to carry out the Works.

2.3 The Approved Drawings shall not be amended or varied without the approval of each of the Phase I Proprietor and the Phase II Proprietor each of whom will act reasonably; Provided that on completion of the Works the Proprietors will enter into a Minute of Variation of this Deed (and ensure that the same is registered

in the Land Register of Scotland) to record the final Approved Drawings and to make any consequential amendments which may be required to this Deed to record the physical position to that extent.

2.4 The Proprietor who carried out the Works will be entitled to reimbursement of 50% of the cost reasonably and properly incurred and as approved by the other Proprietor … by it in designing and constructing the Works.

…

13 Common Property

13.1 The Common Parts will be owned in common by the Phase I Proprietor and the Phase II Proprietor.

13.2 For the avoidance of doubt, subject to the terms of the Deed (a) the Phase I Proprietor will be able to utilise, enjoy and deal with the Phase I Land (including any part thereof falling beneath or above the Common Parts) at its discretion and (b) the Phase II Proprietor will be able to utilise, enjoy and deal with the Phase II Land (including any parts thereof falling beneath or above the Common Parts) at its discretion.

..."

Discussion

[63] In terms of the Deed of Conditions the Common Parts were to be the Podium and the Vehicular Access. The Deed envisaged that they would be constructed at some time in the future as part of the Phase I Building works (Clause 2.1, 2.2), in accordance with Approved Drawings and all relevant statutory consents, permissions and requirements. It contemplated a process after the disposal to the Phase I Proprietor in which the Phase I and Phase II Proprietors would reach agreement as to the precise location and content of the Works. On completion of the Works the proprietors were to enter into a Minute of Variation of the Deed of Conditions to record any alterations to the Approved Drawings and to make any consequential amendments required to record the physical position. The Minute was to be recorded in the Land Register.

[64] The disposition to the first defenders was granted on 30 April 1997 and they registered their title on 2 July 1997. The construction of the Phase I Building, and of the Common Parts, did not begin until later. It is not suggested that as at 2 July 1997 there were any Approved Plans relating to the Works to the Common Parts, let alone that by that date the final layout of the Works had been agreed.

[65] In my opinion on a proper construction of the Deed of Conditions it does not provide that the land on which the Common Parts would be constructed is to be common property. Rather, it provides that the structures making up the Common Parts will be common property.

[66] In any case, in my view the Deed of Conditions did not definitively describe or delineate the land on which the Common Parts were to be constructed. The descriptions of the Vehicular Access and the Podium in Clause 1, and the indications in the basement and ground floor plans of their proposed locations, did not provide definitive descriptions or delineations of the land upon which each was to be erected. The Vehicular Access was merely shown "indicatively outlined in red". The Podium was "indicatively shown hatched red on the Ground Floor Plan". In each case it was provided that "the final layout will be determined by the Works carried out in accordance with this Deed". In my opinion the land was not sufficiently identified for there to have been an effective conveyance of a real right to a one-half *pro indiviso* share of it to the first defenders when they registered their disposition on 2 July 1997 (*PMP Plus* v *Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2, paras [57] - [58]).

[67] So far as the structures are concerned, they did not exist on 2 July 1997. That would not have precluded an effective conveyance of them on that date if they had been clearly and definitively described in the Deed of Conditions. However, they were not. All that was

done was to indicatively delineate their proposed locations on the basement and ground floor plans. They were not sufficiently identified for there to have been an effective conveyance of them to the first defenders on 2 July 1997 (*PMP Plus Ltd* v *Keeper of the Registers of Scotland*, paras [56] - [58]).

[68] Since registration of the first defenders' disposition on 2 July 1997 did not effect a conveyance to the first defenders of a real right to a one-half *pro indiviso* share of the Common Parts, or of a real right to a one-half *pro indiviso* share of the land upon which it was proposed that the Common parts be located, the defenders' primary defence cannot succeed. The averments relating to it are irrelevant.

[69] The secondary defence is that the first defenders acquired a real right to a one-half *pro indiviso* share of the Common Parts by the operation of positive prescription. In my opinion the first defenders' disposition was a habile foundation writ for positive prescription. I do not consider that it can be said from the terms of the disposition itself that it is a self-destructive deed in so far as it purports to convey the right of common property. At least in theory, the final layout of the Common Parts could have been agreed, or indeed the Common Parts could have been built, by the date of registration of the disposition. Reference would have to be made to extrinsic material to establish that that had not occurred. See eg *Cooper Scott* v *Gill Scott* 1924 SC 309, Lord Justice-Clerk Alness at p 323; *Johnston, Prescription and Limitation* (2nd ed) para 17.31; Reid and Gretton, *Conveyancing 2014,* pp 137-139**;** cf. *Miller Homes Ltd* v *Keeper of the Registers of Scotland* 2014 SLT (Lands Tr) 79, paras [35] - [41]. Since the pursuers deny that the first defenders have possessed the Common Parts for the prescriptive period, the secondary defence will require to go to inquiry.

[70] I would have allowed the reclaiming motion by recalling the commercial judge's interlocutor of 29 May 2020; by sustaining the pursuers' second plea-in-law to the relevancy of the defenders' averments *quoad* the primary defence, and otherwise leaving all pleas standing; and by allowing a proof before answer on prescription.