OUTER HOUSE, COURT OF SESSION

[2019] CSOH 51

CA1/19

OPINION OF LORD DOHERTY

In the cause

LOTHIAN AMUSEMENTS LIMITED

Pursuer

against

THE KILN'S DEVELOPMENT LIMITED

First defender

and

DANIEL MARTIN TEAGUE

Second defender

Pursuer: Thomson QC; DLA Piper Scotland LLP
Defenders: Lindsay QC; Ennova Law LLP

2 July 2019

Introduction

[1] In this commercial action the pursuer claims that the first defender is in material breach of missives dated 9 August 2013 for the sale of 18 car park spaces. The pursuer resiled from the missives on the grounds of those breaches and it seeks damages from the first defender. The pursuer also avers that the second defender guaranteed the performance by the first defender of its obligations under the missives and that the the second defender is jointly and severally liable with the first defender for the pursuer's loss, injury and damage.

The defenders do not accept that the first defender is in breach, and they maintain that the first defender was, and is, willing and able to fulfil its obligations. They maintain that the reason the sale did not proceed was because the pursuer was not able to pay the purchase price. The case came before me for a debate on the relevancy of two aspects of the pleadings.

Background

[2] The 18 spaces were to be in a basement car park which was to be part of a development ("the Development") to be constructed at Harbour Road/Bridge Street/Pipe Lane, Portobello. The Development comprised 55 residential apartments ("the Apartments") within seven apartment blocks. When the Development was originally conceived it was planned that a further development of 18 additional apartments (the Arcade development) would be built by the pursuer immediately adjacent to, and to the east of, Block 7 on the LAL Property; and that residents in the Arcade development would use the 18 spaces.

[3] At the same time as the missives were concluded the second defender became the sole shareholder of the first defender. After the missives were concluded the Development was built, but, to date, the Arcade development has not proceeded (and, indeed, the pursuer sold the LAL Property in November 2016). The first defender began erecting the Development in about 2013. In the course of those works it conveyed its interest in the Development to PHG Developments (Scotland) Limited ("PHG"), a company in the beneficial ownership of the second defender. The work constructed included a doorway in the eastern wall of the car park ("the KDL Doorway"). When it was constructed the KDL Doorway was filled with temporary blockwork (as clause 1 of the missives had contemplated would happen pending the erection of the Arcade development). On

3 December 2014 PHG executed a Deed of Conditions relating to the Development, and it was registered in the Land Register on 12 May 2015. The Development was completed in or around July 2015. PHG entered into members' voluntary liquidation at about the same time. During 2015 and 2016 the Apartments and the commercial unit were sold and disponed to purchasers, and the purchasers' titles were registered in the Land Register. The first Apartment was registered on 18 May 2015 and the final Apartment was registered on 2 June 2016. In December 2015 PHG disponed to the first defender the property to which it had title, and the first defender became the registered proprietor of that property on 1 July 2016. The first defender's title is to residual property which has not been removed from title MID5181821.

[4] The parties are agreed that in terms of the missives the price is £400,000. They are also agreed that the contractual date of entry has now passed.

The missives

[5] In terms of the missives the first defender offered to sell and the pursuer agreed to purchase 18 of the parking spaces in the car park to be constructed by the first defender, which spaces were delineated red on Plan 1 of the missives ("the Subjects"). A plan with the area delineated in red was not produced, but I understood the parties to be agreed that the Subjects were the 18 spaces situated on the north side of the part of the car park which is beneath Blocks 6 and 7. From Plans 1 and 2 annexed to the missives and Plans 1 and 2 appended to the Deed of Conditions it appears that the car park is located beneath the Apartments in Blocks 2, 3, 4, 5, 6, 7 and below the lane between Blocks 5 and 6. The missives referred to the pursuer as "LAL" and to the first defender as "KDL". Condition 1 of the first defender's offer provided:

" ...
'Deed of Conditions' means the deed of conditions for each of (i) the LAL Property and the Subjects; and (ii) the larger subjects to be agreed between the parties as soon as practicable following the date hereof and initialled by the parties respective solicitors as so agreed;
...
'Disposition' ... shall include (1) the grant of.... the LAL Car Park Access (2) the imposition of real burdens on the Subjects and LAL's Property such that the proprietor of those areas is (a) responsible for an 18/70th share of the maintenance, repair and renewal of the LAL Car Park Access and (b) obliged to keep the Subjects maintained, repaired and (when necessary) renewed in all time coming and (3) the imposition of real burdens on the Larger Subjects such that the proprietor of those subjects is (a) responsible for an 52/70th share of the cost of maintenance repair and renewal of the LAL Car Park Access and (b) obliged to keep the underground car park at the Larger Subjects maintained, repaired and (when necessary) renewed in all time coming.

'Development' means the development of 73 residential flats, amusement arcade, kiosk and café at Pipe Lane/Bridge Street, Portobello, Edinburgh in accordance with the Planning Permission;
...
'LAL Car Park Access' means the heritable and irredeemable servitude right to be granted by KDL to LAL of pedestrian access to and egress from the Subjects and the car park which forms part of the Larger Subjects through, over and across the KDL Doorway, the lift, the stairwell and stairs which form part of the Larger Subjects ..."
...
'Larger Subjects' means ALL and WHOLE those subjects lying on the south east side of Harbour Road, Edinburgh being the subjects registered in the Land Register of Scotland under Title Number MID51821 under exception of the Subjects".
...
'KDL Doorway' means the doorway to be formed and/or constructed by KDL on the Larger Subjects as coloured red on Plan 1. The said doorway will be temporarily blocked up by KDL once formed or constructed until such time as LAL completes their development when LAL shall be wholly responsible for opening up the said doorway and carrying out and completing the installation of an appropriate door and ancillary apparatus at their sole expense all to KDL's reasonable satisfaction...
..."

Clauses 2, 7, 9, 10 and 13 provide:

"2. **Entry/Construction of the Subjects**
Entry to and vacant possession of the Subjects shall be given by KDL to LAL on the Date of Entry in exchange for the Price plus vat thereon...

...

9. Completion
KDL shall:-

...

9.2 deliver a validly executed Disposition in favour of LAL or its nominees;

...

10. Execution and Registration of Deed of Conditions

KDL and LAL shall:

10.1 Validly execute and deliver their respective Deed of Conditions to their solicitors for registration as soon as reasonably practicable after conclusion of the Missives but no later than the date occurring 21 days following the date of conclusion of the Missives.

10.2 Instruct their respective solicitors, upon delivery of the validly executed Deed of Conditions and payment of registration dues to register their respective Deed of Conditions against the title for the Larger Subjects and LAL's Property and the Subjects as applicable prior to the date of settlement...

..."

Deed of Conditions

[6] Mr Thomson indicated that the pursuer was not involved in the preparation of the Deed of Conditions and had not agreed its terms. Mr Lindsay did not contradict that.

[7] Clause 1.1 of the Deed of Conditions contained the following definitions:

"...

'**Apartment Owners**' means the respective heritable proprietors from time to time of the Apartments or any of them...

'**Arcade**' means the area of ground immediately adjacent to the Development being the area of ground outlined in blue on Plan 1.

...

'**the Apartment Buildings Common Parts**' shall mean...the solum on which the Relevant Apartment Building is erected and the following parts of and items pertaining to the Relevant Apartment Building, videlicit:-

(a) The foundations;

...

(c) The outside walls of the Relevant Apartment Building;

(d) All load bearing walls...whether situated within an Apartment or not...;

...

(n) The lifts...

(o) All other parts of the Relevant Apartment Building common to the proprietors thereof and all others including those items providing shelter or support for the Apartment Buildings, and generally the whole structural frame of the Apartment Buildings and all other parts of or fittings in the Apartment Buildings which are part of the main structure thereof and any other thing which serves all of the Apartments within the Apartment Buildings...

...

'**Car Park**' means the surface of the car park which car park is located at basement level within the Development and spaces therein and the surface of any access ramp, roads and others serving the same...

'**Car Park Space**' means a car parking space within the Car Park;

'**Development**' means ALL AND WHOLE those subjects lying to the south east side of Harbour Road, Edinburgh being the subjects registered in the Land Register of Scotland under Title Number MID51821;

'**Development Common Parts**' means those parts of the Development....which are intended to serve all Apartments within the Development not comprising the Apartment Buildings but excluding therefrom...the Car Park, ... and any other parts of the Development for which alternative provisions are stipulated within this deed...
...
'**Owners**' means the Apartment Owners collectively except in relation to matters solely affecting the Apartments when it shall mean the Apartment Owners or, as the case may be, in relation to matters solely affecting the Car Park;
..."

[8] Clause 2 of the Deed of Conditions provides that certain parts of the Development are common property. In particular it states:

"2.1 The Apartment Buildings Common Parts of the Relevant Apartment Building shall be owned in common by the Owners of all Apartments in the Relevant Apartment Building who shall have an equal *pro indiviso* interest therein.
...
2.9 The Development Common Parts shall be owned in common by each of the Owners of all Apartments who shall have a 1/55 interest therein..."

[9] Clause 5.2 provides:

"Car Park: Each of the Car Park Spaces shall be held subject to the following burdens and the Owners shall be bound and obliged to implement and observe jointly with the others the following burdens and all costs properly and reasonably incurred in so implementing such obligations shall be paid, in terms of the other provisions of this deed or otherwise on demand, by each of the Owners to the extent aftermentioned:-
...
5.2.3 The Owners shall have the right to use one Car Park Space per Apartment on the following basis:-
5.2.3.1 no more than one vehicle per Apartment shall be permitted at any time;
5.2.3.2 each Owner shall ensure that their vehicle is parked considerately without blocking access to any other car parking spaces.
5.2.4 Each of the Owners shall have a right of vehicular and pedestrian access to the Car Park Spaces across the Car Park..."

[10] Clause 16.2 provides:

> "16.2 RESERVED RIGHTS
> 16.2.1...
> 16.2.1(sic) The Developer reserves the right to grant to the proprietor(s) of the Arcade or any part thereof or anyone authorised by such proprietor(s) without the requirement to obtain the consent of any of the Owners or the Commercial Owner (or their tenants or any other occupier of the Development) servitude rights over any part of the Development in relation to...(f) a right to knock through any part of the eastern boundary wall of the Car Park and form and/or construct a doorway, entrance for pedestrians and vehicles or other means of communication ("doorway") from the Car Park to the Arcade and grant heritable and irredeemable servitude rights of pedestrian access through the doorway, subject to, in each case, the party exercising such rights making good all damage caused in exercise of the same."

[11] Clause 17 provides:

> "17. REAL BURDENS
>
> 17.1 This deed is a constitutive deed creating real burdens within the meaning of Sections 4 and 122(1) of the [Titles Conditions (Scotland) Act 2003]. All of the provisions herein are declared to be real burdens and conditions and where appropriate positive servitudes or ancillary burdens affecting the Development and each of the Apartments and the Commercial Unit in so far as applicable thereto.
>
> 17.2 Where servitudes are created or reserved they shall have effect so far as individual Apartments and/or the Commercial Unit are concerned on the registration of a separate title for such Apartment or Apartments or Commercial Unit in terms of Section 75(2) of the 2003 Act insofar as regards such Apartment or Apartment or the Commercial Unit as both a dominant and servient tenement in relation to such servitude.
>
> 17.3 The real burdens contained in this Deed of Conditions are declared to be community burdens (in which the community is the Development) and enforceable by the Owners of the Apartments or Commercial Unit in the Development, in terms of Section 27 of the 2003 Act.
>
> 17.4 A proprietor wishing to enforce a real burden herein shall require an interest to enforce within the meaning of Section 8(3) of the 2003 Act..."

The pleadings

[12] The pursuer avers that the first defender is in material breach of the missives. It maintains that at the date of entry the first defender was unable to comply with its obligations (i) to grant the pursuer entry to and vacant possession of the Subjects; and (ii) to

grant a "Disposition" which includes "the grant of....the LAL Car Park Access". It avers that the basement walls which enclose the Car Park are Common Parts, either because they are Development Common Parts or, failing which, because they are Apartment Building Common Parts. Since the eastern basement wall is the wall through which the first defender has undertaken to grant the LAL Car Park Access and at the date of entry the wall was owned in common by the Apartment Owners, the first defenders were not able to fulfil the obligation. Moreover, the first defender could not give vacant possession of the Subjects because all of the Apartment Owners have rights to park there as well as rights of access and egress across them.

[13] The defenders aver that the first defender was, and is, able (i) to grant the pursuer entry to and vacant possession of the Subjects, and (ii) to grant the Disposition in terms which provide for the LAL Car Park Access. They aver that the Temporary Blockwork in the KDL Doorway is not part of the Common Parts because it is neither part of the Development Common Parts nor of the Apartment Building Common Parts. If, contrary to their primary position, it is part of the Common Parts, PHG were entitled in terms of clause 16.2.1(f) of the Deed of Conditions to grant to the proprietor of the Arcade a servitude right of pedestrian access through the KDL Doorway, and the liquidator of PHG is willing to grant such a servitude in favour of the pursuer if asked by the first defender to do so.

[14] The pursuer has a preliminary plea that the defenders' averments are irrelevant, and the defenders have a preliminary plea that the pursuer's averments are irrelevant.

Counsel for the defenders' submissions

[15] Mr Lindsay submitted that pursuer's averments are irrelevant and that the action should be dismissed. He understood that for the purposes of the debate the pursuer was

content to proceed on the basis that the KDL Doorway had been constructed, and had been filled with temporary blockwork which is not load bearing.

[16] Neither the KDL Doorway nor the temporary blockwork in the KDL Doorway are the common property of the Apartment Owners. They are not part of the Development Common Parts. Nor are they part of the Apartment Building Common Parts.

[17] The KDL Doorway and the temporary blockwork are not Development Common Parts because they were not intended to serve all (or indeed any) Apartments within the Development. On the contrary, they were intended to serve the Car Park and/or the Arcade development. In any case, they are excluded from the ambit of the definition of Development Common Parts because the Deed of Conditions makes express alternative provision in clause 16.2.1(f) for the KDL Doorway.

[18] The KDL Doorway and the temporary blockwork are not Apartment Building Common Parts. They do not fall within part (o) of the definition. In particular, they are not part of the "structural frame" of Block 7 or of the Apartment Buildings. The structural frame is a steel structure.

[19] The KDL Doorway and the temporary blockwork are not common property. They belong to the first defender. The first defender is entitled to remove the temporary blockwork to open up the KDL Doorway, and it is entitled to grant servitude rights of access through the doorway.

[20] Besides, even if the KDL Doorway and temporary blockwork are Development Common Parts or Apartment Building Common Parts, the Developer had reserved the right to construct a doorway in the eastern wall and to grant servitude rights of access and egress through the doorway (clause 16.2.1(f)). The reserved rights are burdens on the Apartment Owners common ownership rights (cf. *PMP Plus Ltd* v *Keeper of the Registers of Scotland* 2009

SLT (Lands Tr) 2). Rights of ownership in the Common Parts had been conveyed to Apartment Owners subject to the reserved rights (cf. *Hanover (Scotland) Housing Association Ltd, Petitioners* 2002 SCLR 144, at paras 2, 9 and 10). The liquidator of PHG had confirmed that he would exercise the reserved rights by granting a servitude in favour of the proprietor of the Arcade if requested to do so by the first defender.

[21] The first defender was in a position to give the pursuer vacant possession of the Subjects notwithstanding the terms of clauses 5.2.3 and 5.2.4 of the Deed of Conditions. The first defender is heritable proprietor of the Car Park. In terms of their titles, which incorporate the rights and burdens set out in the Deed of Conditions, each of the Apartment Owners only have the right to use one Car Park Space (clause 5.2.3), and they have a right of vehicular and pedestrian access to the Car Park Spaces across the Car Park (clause 5.2.4). In fact, the Developer had allocated to each Apartment the use of a designated Car Park Space. That had "exhausted" each Apartment Owner's servitude right to park. None of the 18 spaces comprising the Subjects had been allocated to an Apartment. The Subjects had been cordoned off with metal bollards. The Apartment Owners' rights to park in a Car Park Space and their rights of access across the Car Park did not extend to the Subjects. Even if they did, the existence of servitudes did not prevent the first defender from giving the pursuer vacant possession of the Subjects. In that connection reference was made to *Holms* v *Ashford Estates Ltd* 2009 SLT 389, per the Opinion of the Court delivered by Lord Eassie at paragraph 49. In any case, the right to use a Car Park Space and the access rights across the Car Park were servitude rights which required to be exercised *civiliter*. The Apartment Owners had no need to use the Subjects for parking - each had been allocated a designated space elsewhere. They had no need to cross the Subjects to obtain access and egress from

their allocated Car Park Spaces. To date, none of them had asserted rights to use the Subjects for parking or for access and egress.

[22] If, contrary to the first defender's submissions, the court was not satisfied at this stage of the irrelevance of the pursuer's averments that the first defender could not give the pursuer vacant possession, a proof before answer would be necessary to establish whether as a result of the Apartment Owners' clause 5.2.3 and clause 5.2.4 rights the pursuer was evicted from the Subjects.

Counsel for the pursuer's submissions

[23] Mr Thomson submitted that the pursuer's first plea-in-law should be sustained to the extent of excluding from probation certain of the defenders' averments in Answers 6, 8, 9 and 10. Read short, the gist of those averments is that the first defender is able to perform all of the obligations imposed upon it by the missives, and, in particular, to grant entry to, and vacant possession of, the Subjects, and to grant the Disposition in terms which provide for the LAL Car Park Access; that the temporary blockwork is to keep the car park watertight and to prevent any ingress of soil, that it is not load-bearing and has no structural function, and it can be removed without difficulty to open up the KDL Doorway; that the temporary blockwork does not form part of the Development Common Parts or part of the Apartment Buildings Common Parts, and that none of the servitude rights of access and egress conferred on the individual properties in the Development by the Deed of Conditions interferes in any way with the LAL Car Park Access; but that even if the temporary blockwork is part of the Common Parts the first defender can get the Developer to exercise the rights reserved in clause 16.2.1(f) to grant to the proprietor of the Arcade a servitude right of access and egress through the eastern boundary wall.

[24] The missives should be construed by considering what a reasonable person in the position of the parties would have understood them to have meant at the time of contracting. Where the meaning of a provision is uncertain the law generally favours a commercially sensible construction (*Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749, at page 771). However, commercial common sense ought not to be used to override unambiguous language. Where the meaning of a provision is clear, that meaning should be applied (*Arnold* v *Britton and Others* [2015] 2 WLR 1593, at paras 17-19). The same principles apply *mutatis mutandis* to the construction of the Deed of Conditions, albeit it that it was a unilateral document executed by PHG rather than a bilateral contract.

[25] On a proper construction of the Deed of Conditions the KDL Doorway and the temporary blockwork are part of the Development Common Parts. They are part of the eastern wall which encloses the Car Park. The Car Park and the walls which enclose it are parts of the Development which were "intended to serve all of the Apartments within the Development". The Car Park itself (which, broadly speaking, is limited to the surfaces of the car park, access ramps etc, see the definition in clause 1.1) is excluded from the definition of Development Common Parts, but the walls which enclose it are not excluded. Nor do those walls fall within any of the other exceptions to the definition. In particular, the car park walls (including, in the case of the eastern wall, the KDL Doorway and the temporary blockwork) are not "other parts of the Development for which alternative provisions are stipulated for within this deed". There is no alternative provision in the Deed of Conditions which stipulates that the car park walls, or the KDL Doorway and the temporary blockwork, are to be anything other than Common Parts. Clause 16.2.1(f) does not contain any such alternative provision. The pursuer's primary position is that the walls of the car park are Development Common Parts.

[26] In his Note of Argument Mr Thomson suggested that if the eastern wall was not a Development Common Part it could be an Apartment Building Common Part because it was part of the "whole structural frame of the Apartment Buildings" (para (o) of the definition in clause 1.1). That submission was adopted but not further developed in oral submissions.

[27] It followed that the walls of the car park are Common Parts which are owned in common by the Owners of the Apartments (in terms of clause 2.9 if they are Development Common Parts) or by the Owners of the Relevant Apartment Building (in terms of clause 2.1 if they are Apartment Building Common Parts).

[28] If the east wall, including the KDL Doorway and the temporary blockwork, is the common property of the Owners of all of the Apartments (or of the Owners of the Apartments in Block 7), neither the first defender nor PHG have any right to encroach upon it or grant a servitude right of access through it. The reservation in clause 16.2.1(f) enables the Developer to grant to the owners of the Arcade servitude rights (i) relating to a right to knock through the eastern wall to create a doorway between the car park and the Arcade; and (ii) of pedestrian access through the doorway. The right to grant such servitudes could have been exercised while PHG remained the owner of the wall. However, it was no longer the owner - the Apartment Owners have title to the wall. By way of example, reference was made to the Title Sheet for one of the Apartments (Flat 2, 19 Bridge Street MID158773). The description in the Title Sheet indicates that the subjects are the Apartment "together with the whole rights common, mutual and exclusive and others, including the servitude rights, specified in the Deed of Conditions together also with the subsisting rights to real burdens" including the burdens specified in that Deed. The Deed of Conditions is also entry 4 in the Burdens Section of the Title Sheet. The Title Sheets for all of the other Apartment Owners are in similar terms. In each case the registered title includes the rights of common property

referred to in the Deed of Conditions. The Owners registered titles cannot now be altered or derogated from by a purported exercise by PHG of the rights reserved by clause 16.2.1(f). Reference was made to *PMP Plus Ltd* v *Keeper of the Registers of Scotland, supra,* at paragraphs 14, 55-58, 87; and *Lundin Homes Ltd* v *Keeper of the Registers of Scotland* 2013 SLT (Lands Tr) 73 at paragraph 44.

[29] There is little authority as to what the expression "vacant possession" generally means in the context of a sale of heritage. Such authority as there is (*eg Lothian & Borders Farmers* v *McCutchion* 1952 SLT 450; *Stuart* v *Lort-Phillips* 1977 SC 244; *Scottish Flavour Ltd* v *Watson* 1982 SLT 78) is not in point because it involves consideration of physical intrusion on the subjects by persons with no right to be there. By contrast, the problem here is that the Apartment Owners have title to park on the Subjects and to exercise rights of access over it.

[30] On a proper and sensible construction of the missives a reasonable person in the position of the parties at the time of contracting would have understood "vacant possession" to mean that on the date of entry the Subjects would be unoccupied and that no one other than the pursuer would be entitled to park on them or to have access over them.

[31] It follows that the first defender was not in a position to give the pursuer vacant possession. In terms of the titles each of the 55 Apartments enjoys a servitude right to park one vehicle in a Car Park Space in the Car Park. The servient tenement is the whole Car Park, not the Car Park under exception of the Subjects, and not a particular allocated Car Park Space. Moreover, each of the Apartments has a right of vehicular and pedestrian access to the Car Park Spaces across the whole Car Park. The Apartment Owners have registered titles which include those servitude rights. As a result the first defender was not able to give the pursuer vacant possession.

Decision and reason

Introductory observations

[32] The missives seem to have contemplated (see clause 10 and the definition of Deed of Conditions in clause 1) that the first defender would execute a Deed of Conditions relating to the Larger Site (which did not include the Subjects - see the definition of Larger Subjects in clause 1); and that contemporaneously with that the pursuer would execute a Deed of Conditions relating to the Subjects and the LAL Property. In fact the Deed of Conditions executed by PHG relates to the whole of the Development (including the Subjects), and the pursuer has not executed a Deed of Conditions relating to the Subjects or the LAL Property.

[33] The pursuer avers that the first defender is in material breach of the missives in two respects. First, that it was not able to fulfil its obligation to deliver a validly executed Disposition which includes the grant of the LAL Car Park Access (clauses 1 and 9.2). Second, that it was not able to fulfil its obligation to give the pursuer entry to and vacant possession of the Subjects (clause 2). The defenders aver that the first defender was and is able to grant the LAL Car Park Access; and that it was and is able to give vacant possession.

[34] From the pursuer's perspective, it might be thought that the root cause of the second mentioned breach is that between the conclusion of missives and the date of entry new servitudes burdening the Subjects have been created. The title to the Subjects at the date of entry was not the same as at the date of the missives. Had the warrandice normally implied in missives of sale of heritage been implied here (see eg Reid, *Warrandice in the Sale of Land*, in *A Scots Conveyancing Miscellany,* p 152 at pp 162-4; Reid, *The Law of Property in Scotland*, paras 701- 6, 708), a case might have been made that the first defender had breached the warranty that after the conclusion of missives the seller would not act in a way which caused prejudice to the title to be conferred on the purchaser (Reid, *supra*, para 706). I think

it worthwhile to clarify that it is not the pursuer's case that there has been such a breach. Rather, while the pursuer does complain about the change in the title, it maintains that because of the change the first defender was in material breach of its obligation to give vacant possession.

[35] In testing the relevancy of each party's averments I require to treat the averments of fact as being *pro veritate* (*Jamieson* v *Jamieson* 1952 S.C. (H.L.) 44, per Lord Normand at p 50, Lord Reid at p 63).

The suggested breaches

[36] I find it convenient to deal first with the parties' averments relating to the obligation to give vacant possession.

Breach of the obligation to give vacant possession?

[37] In *Cumberland Consolidated Holdings* v *Ireland* [1946] KB 264, Lord Greene M.R., giving the judgment of the Court of Appeal, opined at p 271:

> "...[T]he right to unimpeded physical enjoyment is comprised in the right to vacant possession."

Later on the same page he observed that for a physical impediment to prevent vacant possession:

> "It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property."

In *Stuart* v *Lort-Phillips, supra* the Second Division expressed its approval of those (and other) observations: see the Opinion of the Court delivered by Lord Justice-Clerk Wheatley at pp 253-254. At p 254 the Court concluded:

> "...the threatened physical impediment to the exercise of the right of actual occupation must be a substantial one affecting a substantial part of the subjects."

[38] Cusine and Paisley, *Servitudes and Rights of Way*, paragraph 1.77, state the position a little differently. They opine that if sale subjects are burdened by a servitude which involves such a high degree of possession by the dominant tenement that it excludes the proprietor of the servient tenement to an unduly burdensome extent, there may be a failure to give vacant possession. In my view some qualification of that proposition is required. If missives provide for vacant possession to be given, but at the time of contracting the purchaser has actual or constructive knowledge of a servitude, it would be difficult to maintain that "vacant possession" meant possession on a title which was free of that burden.

[39] I agree with Mr Thomson that the words "vacant possession" ought to be given the meaning which a reasonable person in the position of the parties would have ascribed to them when the missives were concluded. What would the notional reasonable person have understood them to mean in the circumstances? At that time the Subjects were not burdened by the servitudes which clauses 5.2.3 and 5.2.4 of the Deed of Conditions made provision for. It is not suggested that the reasonable person would have contemplated that the servitudes would be granted before the date of entry. Nor is it maintained that this is a case where it may be said that the pursuer expressly or impliedly consented to submit to the servitudes.

[40] In my opinion, in those circumstances the reasonable person would have understood "vacant possession" to involve the purchaser being given possession and control of the Subjects, with no unexpected impediment which was liable to substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property.

[41] I am also of the view that if, as the pursuer maintains, the servitudes did burden the Subjects at the date of entry, then the first defender would be in breach of the obligation to give vacant possession. In my opinion that would be the result whether one adopts the

approach derived from *Cumberland Consolidated Holdings* v *Ireland* and *Stuart* v *Lort-Phillips* or the approach suggested by Cusine and Paisley. Taking the former approach it seems to me that the servitudes of parking would be an impediment which was liable to substantially prevent or interfere with the pursuer's enjoyment of the right of possession of a substantial part of the Subjects: fifty-five Apartments would each have the right to park in a Car Park Space anywhere in the Car Park, including on the Subjects. It is more moot whether, taken in isolation from the parking servitudes, the servitudes of access would amount to such an impediment. However, in my view the combined effect of the servitudes of parking and access would result in a greater interference than the servitudes of parking on their own. Taking the Cusine and Paisley approach, I think it can be said that the servitudes would involve such a high degree of possession by the dominant tenement that they would exclude the proprietor of the servient tenement to an unduly burdensome extent. My caveat (see para 38 *supra*) would have no application to the facts of the case - there was no actual or constructive knowledge of the servitudes. The servitudes complained of did not exist at the time of contracting, nor was it even contemplated that they would be created.

[42] So do the servitudes burden the Subjects? The pursuer maintains that each of the 55 Apartments is a dominant tenement having the servitude right to park described in clause 5.2.3 of the Deed of Conditions; that the servient tenement is the whole of the Car Park (ie including the Subjects); and that the servitude right is to park one car there (in any space the Apartment Owner may choose). In other words, that in terms of the titles the servient tenement is an unreserved car park, and each Apartment has the right to park a car in any space on a first come first served basis. The pursuer further founds upon the fact that the Apartments each have the servitude right described in clause 5.2.4, *viz* of vehicular and pedestrian access to the Car Park Spaces across the whole of the Car Park (including the

Subjects). It maintains that since the Subjects are burdened with these servitudes the first defender is unable to give the pursuer vacant possession.

[43] The defenders maintain that in each case the servient tenement is a single allocated Car Park Space. Mr Lindsay suggests that that is the proper construction of clause 5.2.3, but I did not understand him to develop any argument in support of that contention. Rather, he founds upon what actually happened after the servitudes were created. He maintains that each of the Apartments were allocated a numbered space, none of which were any of the 18 spaces which comprise the Subjects. He argues that the consequence of that is that each Apartment's servitude right to park was restricted to its allocated space, and that no Apartment has any right to park in a space on the Subjects.

[44] In order to resolve this aspect of the dispute the first step is to determine the proper construction of the relevant provisions of the Deed of Conditions. Clause 5.2 is not a model of good drafting. Nevertheless, I am satisfied in relation to both the servitudes of parking and the servitudes of access and egress that the servient tenement is the entire Car Park, including the Subjects. In my opinion that is the ordinary and natural meaning of the language used. The split-off dispositions of the Apartments conveyed those servitudes to the Apartment Owners (the dispositions incorporated the relevant provision of the Deed of Conditions). Each Apartment obtained a servitude right to use one Car Park Space anywhere in the Car Park and a servitude right of access and egress across the Car Park to the Car Park Spaces. In terms of the registered titles for the Apartments and the Subjects, the Subjects are part of the servient tenement which is burdened by the servitude rights.

[45] The second step ought to have involved consideration of the relevancy of the defenders' averments relating to the allocation of spaces, and the effect that admission by the pursuer of any of those averments had on the relevancy of its own averments.

Surprisingly (given that it formed a major plank of the defenders' submissions), the defenders have no averments relating to this issue - there is only a bald averment that the first defender is able to give vacant possession. The defences are silent as to the allocation of parking spaces and the consequences thereof.

[46] In a commercial action succinct pleadings are generally encouraged. Usually, provided the essence of a case or defence is set out, and fair notice of it is given in the pleadings or some other document, that will suffice. Parties are expected to take a pragmatic and sensible approach. Where a matter can be dealt with properly and fairly without the need for unnecessarily elaborate pleading, that should be done.

[47] However, in my view the defenders' submissions relating to the allocation of Car Park Spaces (and the consequences of that allocation) do not satisfy those requirements. The essence of this defence has not been set out in the defenders' pleadings, and fair notice of it has not been given there or in any other document. Indeed, it seems that the issue was first raised by the defenders very shortly before the debate (in their Supplementary Note of Argument (no. 20 of Process).

[48] Had the facts founded upon by the defenders been sufficiently clear from their written and oral submissions it may have been possible to seek to determine whether the circumstances were at least capable of providing a relevant defence. If, in addition, the pursuer had been in a position to indicate which (if any) of those alleged facts were admitted it might also have been possible to reach a view as to the effect, if any, those admissions had on the relevancy of the pursuer's averments. Unfortunately, neither of those conditions are satisfied.

[49] The defenders' submissions lack clarity as to the precise nature and consequences of what is said to have occurred. I am unclear what PHG or the first defender is said to have

done; whether it is maintained that the proprietor of the servient tenement unilaterally restricted the rights to park to allocated spaces, or whether the Apartment Owners agreed expressly or impliedly to a partial discharge of their rights. It is unclear what, if anything, the defenders propose to do to alter the relevant titles in the Land Register, or whether they maintain that any such alteration is unnecessary.

[50] Given the lack of clarity as to the facts founded upon, the pursuer has not been apprised as to what the defenders say are all of the salient facts, and it has been in no position to admit or deny those facts. There has not been any proper opportunity for it to consider what the defenders say happened, to seek further specification if required, or to recover any relevant documentation which may exist and which it may need to see in order to make appropriate averments in response.

[51] While I am conscious that Mr Thomson did not found upon the absence of averments by the defenders on this issue, but chose to rely rather on the proposition that the defenders' submissions could never amount to a relevant defence, I am not satisfied that I am well equipped to determine whether that proposition is correct given (i) the unclear factual basis upon which the defenders' submissions are based; and (ii) the fact that the legal submissions for both parties were not as fully developed as they might have been.

[52] Finally, if the servitudes do burden the Subjects, I am not persuaded that it assists the defenders in challenging the relevancy of the pursuer's averments that the dominant proprietors' exercise of the servitudes must be *civiliter*. The requirement entails that servitudes must be exercised in the way which is least burdensome to the servient tenement consistently with full enjoyment by the dominant tenement of the rights conferred (*Alvis* v *Harrison* 1991 SLT 64, per Lord Jauncey at p 67; Cusine and Paisley, *supra*, pp 513-514). Here the pursuer's position is that full enjoyment of the servitudes involves the right to park on

the Subjects and to have access over them to Car Park Spaces. The *civiliter* requirement may not be used to cut down the extent of a servitude. It is concerned with the manner of the exercise of a servitude right, not with the prior question of the extent of the right (*Moncrieff* v *Jamieson* 2005 1 SC 281, per Lord Hamilton at para 73; 2008 SC (HL)1, per Lord Rodger of Earlsferry at para 95; Cusine and Paisley, *supra*, para 12-183).

[53] In the result, I am not persuaded that the pursuer's averments relating to breach of the obligation to give vacant possession are irrelevant. In my view they are suitable for inquiry.

[54] I am also of the view that if the defenders wish to rely on a proposed defence that the contentious servitudes have been partially restricted or discharged, and do not burden the Subjects, they will require to seek leave to amend the defences in order to make appropriate averments relating to that defence.

[55] In those circumstances it is unnecessary at this stage to say much about the law relating to the restriction or partial discharge of a servitude. It is clear that a dominant proprietor may agree, expressly or impliedly, to a partial discharge or restriction of a servitude (Cusine and Paisley, *supra,* paras 17.01, 17.02, 17.04, 17.05, 17.07-17.13). It is more moot whether the servient proprietor of a car park may unilaterally restrict a dominant proprietor's right to park to an allocated space. Cusine and Paisley (*supra*, at para 12.33) posit that there is an arguable basis - by analogy with a servient tenement's rights to relocate the exercise of servitudes of bleaching, pasturage and grazing - for saying that the servient proprietor of a car park may regulate or relocate the exercise of a right of parking. After reviewing the authorities (paras 12.24 - 12.32) the authors continue:

> "Subject to the caveats we have expressed in the previous paragraphs,...we are of the view that there may remain circumstances where the power to relocate the exercise of a servitude over a relatively large area may be capable of exercise today in relation to servitudes other than bleaching, pasturage or grazing...In our view a strong

> candidate in this regard is a right of car parking (whether granted as a servitude, right of common interest or a real condition...) where the right is stated to be confined to one single unspecified and unallocated car parking bay within a greater defined area containing... a number...of parking bays...In our view, the whole greater defined area is the servient tenement in terms of the deed of grant and, until further action is taken by the servient proprietor, the dominant proprietor may park in any one of the bays...provided he occupies only one bay at a time. We take the view that it remains open to the servient proprietor to allocate a single bay chosen by the servient proprietor and located within the greater defined area to the dominant proprietor and this will have the effect of discharging all other parts of the greater defined area from the servitude."

That view seems to proceed on the basis that the proprietor of the servient tenement is entitled to relocate the exercise of the servitude (provided the conditions the authors discuss in para 12-24 are satisfied).

[56] Counsel did not refer me to the relevant passages in Cusine and Paisley or to the authorities which they discuss, and I have not had the advantage of submissions in relation to them. In those circumstances, and because the defences as they stand it do not raise the issue, I prefer to reserve my opinion on the views expressed in those passages.

LAL Car Park Access

[57] The LAL Car Park Access which the first defender undertook to include in the Disposition of the Subjects is a servitude right "over and across the KDL Doorway, the lift, the stairwell and stairs which form part of the Larger Subjects". The location of "the lift, the stairwell and stairs" referred to was not clarified in submissions, and the pursuer does not aver (and Mr Thomson did not submit) that those items were Common Parts. The pursuer avers that the wall (including the KDL Doorway and the Temporary Blockwork within it) which encloses the Car Park on its eastern side is a Common Part.

[58] Mr Lindsay did not suggest that the descriptions of Development Common Parts and Apartment Building Common Parts in the Deed of Conditions did not adequately

identify the areas concerned. It was not maintained that the split-off dispositions to Apartment Owners which conveyed that common property (by means of express reference to the Deed of Conditions) were a nullity in respect of the conveyance of those Common Parts (*cf PMP Plus Ltd* v *Keeper of the Registers of Scotland, supra*; and *Lundin Homes Ltd* v *Keeper of the Registers of Scotland, supra*).

[59] Mr Thomson's primary submission is that the whole of the eastern wall is part of the Development Common Parts. In my opinion that proposition is well founded. The eastern wall may be said to serve the Car Park as a whole, and to be intended to serve all Apartments within the Development because it is an essential part of the structure of the Development, and because the Car Park and its walls serve all of the Apartments.

[60] The KDL Doorway's lintel and frame are weight bearing. Objectively, the KDL Doorway may be thought to have two purposes, namely (i) it forms an integral part of the eastern boundary wall of the car park (which boundary will also become the physical boundary between the Development and the Arcade should the Arcade be developed), although not within the car park as defined in the Deed of Conditions; and (ii) it is intended to provide a means of communication between the Car Park and the Arcade if the Arcade is developed. In my opinion purpose (i) provides a sufficient basis for concluding that the KDL Doorway is intended to serve all Apartments within the Development, just as the rest of the wall serves those Apartments. The fact that the missives provide (see the definition of Disposition in clause 1) that the proprietor of the Larger Subjects is to be responsible for a 52/70th share of the cost of maintenance, repair and renewal of the LAL Car Park Access is an indication of the importance of purpose (i) to all of the Apartments in the Development and is consistent with the view that the doorway serves them. The fact that the doorway may also be said to be intended to serve the Arcade development does not detract from that.

Given the very close links between the defenders and PHG (see para 3, *supra*), in my opinion the terms of the missives form part of the factual matrix which the notional reasonable person in the position of PHG would have been aware of at the time the Deed of Conditions was granted.

[61] Although the Car Park itself (i.e. essentially only the surfaces of the car park, access ramps etc.) is intended to serve all of the Apartments, it is specifically excluded from the ambit of Development Common Parts, as are other specified parts of the Development and "any other parts of the Development for which alternative provisions are stipulated in this deed". In my view the other parts referred to are parts for which alternative provision in respect of ownership and/or liability for maintenance has been made. In my opinion the KDL Doorway is not such a part. Clause 16.2.1(f) reserved to PHG the right to grant to the proprietor of the Arcade:

> "servitude rights over any part of the Development in relation to ... (f) a right to knock through any part of the eastern boundary wall of the Car Park and form and/or construct a doorway...and grant...servitude rights of pedestrian access through the doorway...".

It did not make alternative provision as to the ownership and/or maintenance of the KDL Doorway. It merely reserved a right to grant servitude rights.

[62] If the KDL Doorway is not a Development Common Part, I am not persuaded that it is an Apartment Building Common Part. In my view, giving the words "the whole structural frame of the Apartment Buildings" in paragraph (o) of the definition their ordinary and natural meaning, they do not include the KDL Doorway. Mr Thomson did not argue that they fell within any other part of the definition of Apartment Building Common Parts.

[63] It follows that in my opinion the pursuer's averments that the KDL Doorway is a Development Common Part are relevant; but its averments that the doorway is an Apartment Building Common Part are irrelevant.

[64] The pursuer avers that since the KDL Doorway is common property, neither the first defender nor PHG can grant servitude rights of access through it. The correctness or otherwise of that proposition may depend upon a proper analysis of the effect of clause 16.2.1(f).

[65] In principle, the grant by a party of a servitude over land which it does not own is void as *a non domino*. That is a difficulty for the defenders' contention that PHG continues to be entitled to grant a servitude through the KDL Doorway even if it no longer owns it. Two possible solutions to that difficulty require to be considered. Neither of them appear to have been canvassed in *PMP Plus Ltd* v *Keeper of the Registers of Scotland* or *Lundin Homes Ltd* v *Keeper of the Registers of Scotland*, *supra*.

[66] First, the Apartment Owners may be personally bound to authorise and permit PHG to exercise the clause 16.2.1(f) rights. Arguably, they ought to be treated as having effectively granted PHG a mandate or power of attorney to grant servitudes over their property. (See eg the submissions of counsel for the defenders in *Holms* v *Ashford Estates Ltd*, *supra*, at para 42. Ultimately the court did not require to decide the point because the pursuers did not argue that the defenders lacked title to exercise the relevant power: see the Opinion of the Court delivered by Lord Eassie at para 47. See also Reid and Gretton, *Conveyancing 2008*, p 133 at p 147-148; and the commentary on *Holms* v *Ashford Estates Ltd* in Reid and Gretton, *Conveyancing 2009*, p 180, at pp 182-183.)

[67] Second, if any of the Apartment Owners had sold on by the date of entry there would be no contractual relationship between PHG and the singular successors. The

defenders would have to argue that PHG's reserved right is a real right which affects the KDL Doorway and may be enforced against singular successors. In their commentary on *Holms* v *Ashford Estates Ltd* Reid and Gretton (*supra*, pp 182-183) acknowledge the arguments for the contractual enforcement of reservations like clause 16.2.1(f), but they describe the possibility that such reservations may give rise to real rights as "a more difficult question". They note that two centuries ago there was a practice, particularly in family transactions, of disponers reserving the power to burden the land being disponed with a subsequent heritable security, and that in certain circumstances it appears that such a faculty to burden was real. They continue:

> "Bell wrote that[1]:
>
> 'It may appear to be anomalous, and contrary to feudal principles, that a disponer who divests himself, or a third party who never was feudally invested, should have power to grant a precept on which infeftment may proceed. But the principle is this, that the conveyance to the disponee is limited by a condition, *viz*. that the disponer shall still retain the power of constituting a real security over the lands, by his own act, or by the act of another appointed by him, and named in the deed.'
>
> Whether - 200 years later - that principle could now be extended to the grant of other real rights, such as a servitude, is uncertain but must perhaps be regarded as doubtful."
>
> [1] Bell, *Commentaries* I, 40-41.

[68] Neither the pursuer nor the defenders aver whether at the date of entry any of the Apartment Owners were singular successors of a first purchaser. Clarification of that matter is required. Moreover, neither party referred me to the passage in Bell or to Reid and Gretton's commentary. I have not had the advantage of fully developed submissions on the issue of whether the right reserved is real or personal. In those circumstances I do not think I am in a position at this stage to determine that issue.

Disposal

[69] I shall put the case out by order to consider (i) the appropriate interlocutor to give effect to my decision; (ii) any motions which may be made in relation to the expenses of the debate; (iii) further procedure.