**SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON**

**[2019] SC LIV 58**

A59/16

JUDGMENT BY SHERIFF S A CRAIG, ADVOCATE

in the cause

WEST LOTHIAN COUNCIL

Pursuer

against

TURCAN CONNELL SOLICITORS

First defender

and

THOMAS AITKEN CLARK and
TURCAN CONNELL (TRUSTEES) LIMITED

Second defenders

**Pursuer: Hogg; Solicitor**
**Defender: Wilson, Advocate; Instructed by Turcan Connell**

Livingston, 6 April 2016

The sheriff, having heard parties' procurators, grants the pursuer's motion to abandon the action against the first defender and finds the pursuer liable to the first defender for the expenses of the first defender incurred to date; grants pursuer's motion, opposed, for interim interdict in terms of the pursuer's first and second craves of the initial writ and in terms thereof interdicts ad interim the second defenders and/or any others acting for them or on their instructions from selling, transferring, negotiating for sale or concluding missives for the sale or transfer of or change of registration of title of any part of West Muir Farm, West Calder in terms of the feu disposition by the Lothian Regional Council in favour of

George Anderson Aitken Clark dated 7 November 1985 and recorded GRS (Midlothian) on 30 May 1986 now vested in the Second Defenders as executors; on defender's motion, opposed, certifies the cause as suitable for the employment of counsel; thereafter on defender's motion grants the defender leave to appeal in respect of the interim interdict.

**Note**

***Introduction and preliminary matters***

[1] This matter called as an opposed motion on the pursuer's motion for interim interdict. The pursuer was represented by Ms Hogg, solicitor, and both defenders by Mr Wilson, advocate. He had been instructed by them direct and was not accompanied by an instructing solicitor.

[2] Ms Hogg moved to abandon the action against the first defender. While that was not opposed there was argument about whether or not the pursuer should be found liable in expenses to the first defender. That was an issue resolved in favour of the first defenders and was not subsequently challenged.

[3] Separately, and at the end of all submissions, Mr Wilson moved for sanction for counsel. Again that was opposed by Ms Hogg but I determined that the matter was suitable for the employment of counsel and granted his motion. That was not subsequently challenged either.

[4] What is in issue between parties was the grant of interim interdict against the second defenders. The action having been abandoned against the first defender I will refer to the second defenders simply as "the defenders".

**Background**

[5] I heard detailed argument, was referred to several authorities (see below) and it was clear there were a number of areas of dispute between the parties. However, as this matter called at the very earliest stage of the action, without a fully adjusted set of pleadings and no evidence led, I required to address the issues on the ex parte representations and the documents to which I was referred. No doubt in due course parties will refine and hone their respective positions but, for now at least, the following points seemed tolerably clear and uncontentious.

[6] The defenders are the executors of the late George Anderson Aitken Clark. He was the heritable proprietor of property known as West Muir Farm which is in West Calder, West Lothian. As I understand it, Mr Clark purchased that property from Lothian Regional Council in the mid 1980's. The relevant feu disposition in his favour was recorded in the General Register of Sasines on 30 May 1986.

[7] One of the clauses in the feu disposition – clause SIXTH – contained a provision which, read short, was a right of pre-emption in favour of the disponer (Lothian Regional Council). It set out the framework for the exercise of the right and required the disponee (Mr Clark) to give the disponer notice in writing if he –

> "…desire(d) to dispose of the feu or a specified part thereof".

[8] Given the nature of the dispute I am here referring to Lothian Regional Council and Mr Clark as the disponer and disponee as a neutral way of characterising the relationship. In the feu disposition itself they are referred to, respectively, as the "superior" and the "feuar" and, of course, their legal successors would stand in their shoes.

[9] Although a matter said to be "not known and not admitted" in the defences, it is clear that West Lothian Council is the statutory successor to Lothian Regional Council in so

far as West Calder is concerned. Certainly all the actings between the parties appeared to recognise that to be the state of affairs, just as it appeared to be accepted that the defenders are the successors to Mr Clark.

[10] What was also not a matter of dispute was that the feu disposition was recorded prior to the abolition of the feudal system in Scotland. What was very much in dispute, however, was the effect of abolition on the pre-emption clause – clause SIXTH – and whether the defenders remained bound by that clause.

**The correspondence between parties concerning the pre-emption clause**

[11] On 17 December 2015 solicitors acting for the defenders wrote to the pursuer stating:

> "Dear Sirs
>
> **The Executors of the late George Anderson Aitken Clark**
>
> **Part of Hermand Estate (Lot 1), West Calder**
>
> We act on behalf of the Executors of the late George Anderson Aitken Clark ("the Executors"). Following the death of Mr Clark, the Executors are the uninfeft proprietors of the above mentioned subjects ("the Feu"). The late Mr Clark was the original feuar by virtue of a Feu Disposition granted by the Lothian Regional Council in his favour dated 7th November 1985 and recorded in the Division of the General Register of Sasines applicable to the County of Midlothian on 30th May 1986 ("the Feu Disposition"). We understand that West Lothian Council is the successor to any interest which Lothian Regional Council had under the Feu Disposition.
>
> As required in terms of the Feu Disposition, we hereby give you notice, on behalf of the Executors, that the Executors desire to dispose of that part of the Feu shown coloured red and brown (my emphasis) on the plan annexed, by way of a sale.
>
> If you have any queries, please contact Rachel Davies in the first instance.
>
> Yours faithfully."

[12] In the course of submissions I was given a coloured version of the plan I was told had been attached to that letter. There was clearly an area marked on the plan that was

coloured red. What was not obvious from that plan however was any area coloured brown. At no point in the hearing did anyone suggest that there was an area coloured brown shown on that plan or what that area might be. Certainly if there was an area coloured brown I could not see it.

[13] On 23 December 2015 the pursuer sent a reply to the defenders' solicitors. Inter alia it said:

> "I refer to your letter dated 17 December 2015 indicating that your clients wish to sell the land shown coloured red and brown on the plan annexed to your letter. The area coloured brown is not clearly visible on plan. Please confirm where this is located."

[14] The defenders' solicitors did not reply until 25 January 2016. That reply, which I will come to, did not address at all the question of what area was coloured brown. Indeed at no point in the course of the hearing was I told that the defenders or anyone acting on their behalf had ever told the pursuer where the area coloured brown could be found on the plan. Nor for that matter did the opinion of Professor Paisley (again, which I will come to) deal with the question that the pursuer had posed in the letter of 23 December 2015 – where is the brown area?

[15] No one had answered that question, and no one at the hearing could tell me either.

[16] I highlight this at the outset because I considered it a significant factor to be weighed in the balance of whether or not the pursuer was entitled to the interim remedy of interdict.

[17] The pursuer's position – put shortly – was that as it had never been told what area was being offered, the pre-emption process was not at an end, and, arguably, had never got underway. That was so whether or not its right to be offered the property was one based in the now abolished feudal law, in contract or quasi contract under the Title Conditions (Scotland) Act 2003.

[18] I found it surprising that this rather obvious point seems to have been completely overlooked, or avoided, by the defenders. After all it was they who had chosen to describe the area in question as one coloured "red and brown" but then only produced a plan marked in red. When asked to clarify the point they did not.

[19] For completeness, the pursuer's letter of 23 December 2015 continued:

> "As you are aware, the Council has a right of pre-emption in terms of clause (SIXTH) of the feu disposition recorded on 30 May 1986. The Council may be interested in exercising its right of pre-emption but will require to seek authority to do so. To allow the Council to consider its position, please issue an offer to sell in terms of section 84 of the Title Conditions (Scotland) Act 2003. This should include price and such other terms as would reasonably allow the Council to consider the offer.
>
> The offer should be open for acceptance for a period of twenty one days.
>
> I look forward to hearing from you.
>
> Yours faithfully,"

[20] As I've observed the pursuer did not hear from the defenders' solicitors until it received its letter of 25 January 2016. That letter did not address the question of where the brown area was. Instead what was said was this:

> "We thank you for your letter of 23 December 2015. That letter does not give the requisite notice in terms of the relevant Feu Disposition. The time limit within which you had to give the relevant notice has now expired. Your interest in the subjects of our letter of 17th December 2015 is at an end and our clients do not have to make an offer to you. We enclose a copy of the Opinion which we have received on this matter and which we have been authorised to send to you by Professor Paisley.
>
> Yours faithfully"

[21] Attached to the letter was an opinion by Professor Paisley, Professor of Scots Law at the University of Aberdeen. It was said to have been jointly instructed by "Turcan Connell and Maclay Murray and Spens LLP". Although not entirely clear, it was suggested at the hearing that Maclay Murray and Spens act for a third party which had some interest in finding out whether or not the pursuer had an enforceable right of pre-emption.

[22] The opinion is undated but must have been obtained prior to 25 January 2016, when the letter was sent.

[23] Both parties referred to Professor Paisley's opinion in the course of the hearing, taking what they would from it in support of their respective positions.

[24] The opinion is in two parts. The first narrates the historical position as far as the feu disposition was concerned, highlighting in bold a specific part of clause (SIXTH) as follows –

> "There is reserved in favour of the superiors a right of pre-emption of the feu or any part thereof in the events and on the terms and conditions following namely: (One) in the event that the feuars may at any time desire to dispose of the feu or a specified part thereof whether by way of sale, transfer, exchange or otherwise, (not being a disposal by way of heritable security or mortgage or lease) the feuars shall give to the superiors notice in writing of their desire to do so: (Two) if after the feuars have given notice as aforesaid, the superiors shall desire to repurchase the feu or such specified part thereof and shall give to the feuars within twenty one days of receipt from the feuars of the said notice, a notice in writing signifying such desire then the feuars shall forthwith reconvey or otherwise retransfer the feu or such specified part thereof to the superiors for a price equal to the current open market value of the feu or such part thereof as the case may be…"

[25] In other words, Professor Paisley quoted from clause SIXTH and the parts shown in bold above were the parts he highlighted in his opinion.

[26] In the first part of his opinion, at paragraph 1.7, he explained he had been asked:

> "…if this letter (i.e. the pursuer's letter of 23 December 2015) complies with the emboldened part of the pre-emption as above."

[27] In the second part he offers his opinion on that issue.

[28] It is clear Professor Paisley was focusing on the pursuer's response to the letter of 17 December 2015. However he does not touch on the terms of that letter itself or what was (or was not) shown on the plan attached.

[29] Professor Paisley goes on to discuss the abolition of the feudal system, stating that a pre-emption right is no longer a real burden and is "merely contractually enforceable". He says that he

> "…accepts that the pre-emption stated above is potentially one to which the provisions of Title Conditions (Scotland) Act 2003, s 84 apply…"

and goes on to consider whether the pursuer's letter of 23 December 2015 was sufficient to constitute a

> "…notice in writing signifying a desire to repurchase the feu or such specified part thereof…"

[30] He concluded that it did not, highlighting the use of the words "may be interested" but that authority would have to be sought. As he put it:

> "They (the pursuer) may wish to do so [acquire the part of the feu] – but they may not."

[31] He continues:

> "Your clients [the defenders and the interested third party] are entitled to know whether the Council wish to purchase or not according to the terms of the pre-emption. The notice, in terms of the clause must make the position of the Council clear. This notice sent by the Council is not even the signification of a desire to purchase subject to certain conditions. It is a statement that the Council do not know if they wish to purchase because they do not know if they have authority to do so. Consequently, the Council have failed to respond appropriately and the executors do not require to make an offer."

[32] To summarise that opinion, it is to the effect that the defenders were free of any obligation they might have in terms of clause (SIXTH) because of what were interpreted to be the equivocal terms of the pursuer's response to the defenders' letter of 17 December 2015.

[33] At the risk of repetition however what the opinion does not consider is whether the defenders' initiating letter (ie the letter of 17 December 2015) itself complied with the defenders' obligations under clause SIXTH. Specifically, it does not consider whether the reference to the area "desired to be sold" as an area coloured "red and brown" on the map attached to the letter is sufficient to meet those obligations in circumstances where there is no brown area shown.

[34] Notwithstanding that the feudal system has been abolished it was clear from the papers before me that there is an extant dispute between the parties about their respective rights and obligations, and whether they had been extinguished. The pursuer says they have not because of the (still unanswered) flaw in the letter of 17 December 2015. The defenders say they have and have done all that was required of them; having not received a timeous unequivocal response they are free to sell to anyone.

[35] It was the defenders' position that the writ as pled did not make out a *prima facie* case even if there was such a dispute. Mr Wilson spent some time taking me through the history of the abolition of the feudal system, drawing my attention to, inter alia, the differences in two editions of Stair, Volume 6 – one published before abolition and the more recent version. He also referred to *Guthrie*, pointing out that as the pursuer had not re-allocated the pre-emption right it was no longer a real burden on the property, he said. It was Mr Wilson's position that the pursuer was therefore in error to plead:

> "The present proceedings have as their object in rem heritable property being an area in West Lothian more generally known as West Muir Farm…"

It was not a claim in rem; there was no longer a real right in the property, he said.

[36] Relying on *Gillespie* Mr Wilson argued that I required to consider the defenders' position, and their defences, in deciding whether or not to grant an interim interdict.

[37] I have no difficulty with that proposition and, indeed, both parties were at pains to draw to my attention a considerable volume of documents, not just the pleadings. There was no suggestion from either Ms Hogg or Mr Wilson that I should not have regard to the correspondence and the opinion prepared by Professor Paisley, as well as the pleadings, when considering whether interim interdict should be granted.

[38] I accept (per *Gillespie*) that if there was doubt about the pursuer's case which was "sufficiently substantial" it would not be reasonable to grant the "judicial security" of an interim interdict.

[39] *Gillespie* approved of the obligation on a judge (per Lord Drummond Young in the earlier case of Barry D Trentham Ltd) to scrutinise a pursuer's claim to determine if it met the "substantial hurdle" of being a prima facie case in the sense of a "good arguable case", albeit that appears to be in the context of a motion before service where there had not yet been appearance or argument by a defender. What I also take from Gillespie is that if there is a defence that is a matter to which I must have regard.

[40] I did.

[41] It was Mr Wilson's position the pursuer had not made out a prima facie case as it referred to rights in rem as the object of the action. If this matter went to debate on those pleadings the defenders would be entitled to decree of absolviter, he said.

[42] That was a criticism of the pursuer's averments in article 1. That is the jurisdictional article. In answer to article 1 the defences admit, inter alia, that the court has jurisdiction. The feu disposition is referred to for its terms. There is then a blanket denial. There is no explanation in that part of the defences that there is no right in rem (for the reasons argued before me) and no reference to the other answers, particularly answer 2.

[43] That might be an appropriate point of criticism to be taken by the pursuer if this was a formal debate.

[44] However, this was not a debate. Both parties made it clear that I could, and indeed must, consider all of the documents they placed before me. That included Professor Paisley's opinion to the effect that although the purser may no longer have a real right enforceable against the world, there may be one which would be subject to the Title

Conditions (Scotland) Act 2003. What that suggested is that the defenders recognise there might exist a right in contract, or in the form of a quasi-contract, between the parties enforceable inter se and which would be exercised in accordance with the terms of clause (SIXTH) and the 2003 Act.

[45] That was not the case that the pursuer pled, said Mr Wilson, so they had not made out a prima facie case.

[46] I did not agree.

[47] As I have observed the stage at which this matter called meant there was no definitive set of pleadings and both parties' written pleadings could be the subject of criticism. However I was not persuaded that the writ did not make out a case which could be read as one in contract or quasi contract.

[48] The writ referred, quite properly, to the feu disposition and made reference to the parties using the terminology "superior" and "feuar". That is hardly surprising given that any rights or obligations the parties have derive from that disposition, and the disposition uses that language and terminology. I note that the defences use the same language as the pursuer.

[49] The writ goes on to set out, at length, the terms of the correspondence between the parties, some of which I've referred to.

[50] While the first article of condescendence refers to rights in rem, it is clear the other articles discuss the background to the litigation including that correspondence. It explains that the pursuer considers the notice issued by the defenders in December 2015 to be deficient. It is clear that the pursuer argues it has a right to receive proper or effective notice and the failure gives them a remedy.

[51] It is equally tolerably clear that the defenders considered there to be some kind of obligation on them to issue a pre-emption notice – cf the second paragraph of their letter of 17 December 2015 where they say:

> "As required [my emphasis] in terms of the Feu Disposition, we hereby give you notice…"

[52] In the defences they say:

> "…notwithstanding the abolition of the pursuers' rights as Superiors, the second defenders have complied with the provisions of the pre-emption clause, being clause SIXTH of the Feu Disposition."

[53] The defences then refer to the notice sent in December 2015, and to the plan, and say that in terms of clause SIXTH the pursuer had 21 days to signify its desire to repurchase "the specified part of the feu" but failed to comply. I note that does not make reference to the alleged defect in the notice highlighted in the pursuer's letter of 23 December 2015 although it does refer to that letter.

[54] Answer 3 continues:

> "Any right of pre-emption formerly held by the pursuer over the specified part of the feu was thereby extinguished." [my emphasis]

[55] The defenders then refer to the terms of Professor Paisley's opinion and incorporate it *brevitatis causa*.

[56] The defenders appear to assert that it was the failure of the pursuer to provide an unequivocal commitment to purchase that caused the extinction of any right that it had. That is not pled as an esto case but instead is an explanation which follows the general denial in answer 3. The defenders appear to peril that extinction on the pursuer's equivocation rather than asserting that it had no right at all. If that defence is correct it presupposes that the defenders have fully met their obligation to give notice. For the reasons given it was far from clear that they had done so.

[57] Returning to the writ, the first three pleas in law set out the basis for the pursuer's reasonable apprehension and refer to the balance of convenience. Those are pleas supporting the granting of interim orders rather than addressing the merits of the action itself.

[58] Plea in law 4 provides:

> "The pursuer being entitled to receive a notice specifying the part of the land the [second] defenders' desire to sell and that notice being capable of full and unequivocal acceptance as detailed in the feu disposition…the [second] defenders should be required to issue such notice to the pursuer and specific implement should be granted as craved for."

[59] I read that as being at least *prima facie* capable of supporting the type of claim referred to by Professor Paisley. It also makes it clear that the pursuer's apparent equivocation is at least in part associated with the deficient notice given by the defenders.

[60] It would, of course, be inappropriate for me to attempt to reach a concluded view at this stage of the case on any of the issues of law raised in the writ, defences or at the hearing before me. Instead, I have to make a preliminary evaluation of the strength of the parties' pleaded cases (as supplemented in oral argument and reference to documents) and decide if there is a prima facie case made out. If there is then, in the light of that assessment, I must decide whether it is more convenient to grant interim interdict or to withhold it.

[61] I was satisfied that the pursuer had set out a prima facie case sufficient for the purposes of considering its motion for interim interdict.

[62] I was also satisfied that the defenders had not set out a defence that was so obviously a whole answer to the claim or which raised the sort of substantial issue that was sufficient to counter the "good arguable case" set out by the pursuer.

[63] The defenders did not attempt to address the apparent flaw in the initiating letter so I still do not know what area was being offered to the pursuer. If I cannot identify it then,

on the face of it, there appears to be a deficit in the process which involved the offering of pre-emption rights to the pursuer and the alleged failure to take them up, which is what the defenders rely upon.

[64] In considering the question of the balance of convenience, I was satisfied that it lay with the pursuer.

[65] If the interim interdict was not granted that would have the practical effect of determining the competing claims. Standing the position that it adopted, the defender would be free to offer the property for sale to the whole world, taking, of course, the risk that the court would ultimately find in its favour. If the property was sold to a third party at arm's length any possibility of the pursuer purchasing it would be completely lost.

[66] If the pursuer was correct and it had a pre-emption right but the process had either not been properly commenced or had not been extinguished, it would be significantly prejudiced if the defender was free to sell. Its only remedy would be one of damages, and there would be inevitable difficulty in calculating or estimating the measure of damages. How would one calculate the loss of an opportunity to purchase an area of ground when it was wholly unclear what area that was?

[67] Moreover if the pursuer is correct then the matter could easily be remedied by the defenders recommencing the pre-emption process. There is a clear unwillingness to take that simple route out of this dispute. I was not told if there was a purchaser ready to buy; there were no pleadings about that matter and no submissions made to the effect that the defenders would be substantially adversely affected by being prohibited from selling without recourse to the pursuer in the first instance.

[68] There may be a purchaser in the wings, just waiting to buy as soon as the pre-emption issue is resolved. There is a hint of that in the papers – the joint instruction of

Professor Paisley, and the defenders waiting for 21 days to pass before replying to the pursuer's letter of 23 December, and even then ignoring the defect which had been highlighted to them. There is a faint whiff of opportunism about that.

[69] However that is simply speculation and I was not told that the grant of interim interdict would inconvenience the defenders in that way.

[70] Drawing this all together, I was satisfied that the pursuer had set out a *prima facie* case and that the balance of convenience favoured the granting of the interim orders sought, refusal of which would, in effect, determine the matter. I therefore granted the interim interdict which has the effect of preserving the status quo and does not place the pursuer in a position whereby it was left with an unsecured claim enforceable at some future unknown date when the information to calculate it might be difficult to obtain.

[71] The pursuer could not be said to have delayed unreasonably in seeking interim interdict, the present action having been raised with reasonable expedition once it was clear that the defenders were determined to proceed. The pursuer has acted in good faith by asking (properly, in my view) for clarification of what was on offer. Although it might not amount to bad faith on the defenders' part, the failure to provide that clarification suggests a lack of candour on its part.

Susan A Craig

Sheriff of Lothian and Borders

**Authorities**

[1] Abolition of Feudal Tenure etc. (Scotland) Act 2000 sections 1 & 17

[2] Title Conditions (Scotland) Act 2003 sections 82 – 84

[3] *Gillespie* –v- *Toondale Ltd* [2005] CSIH 92 paras 12 & 13

[4] Stair Memorial Encyclopaedia Vol 6 1988 Edition para 520

[5] Stair Memorial Encyclopaedia Vol 6 Reissue (undated) para 164

[6] Walker – The Law of Civil Remedies in Scotland p 224 – 228

[7] S Scott Robinson – The Law of Interdict, 2nd Edition Chapter 17

[8] Scottish Law Commission Report on Real Burdens, Scot Law Com No 181

SE/2000/189, part 10 p 204 – 225

[9] Scottish Government Guide to the Abolition of Feudal Tenure Act 2000 and the Title Conditions (Scotland) Act for Housing Associations, Chapter 2