OUTER HOUSE, COURT OF SESSION

[2020] CSOH 58

P897/19

OPINION OF LORD TYRE

In the petition of

PHG DEVELOPMENTS SCOT LIMITED (IN LIQUIDATION),

Petitioner

for

an order under section 8(1)(b) of Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 rectifying a Deed of Conditions granted by the petitioner dated 3 December 2014 and registered in the Land Register of Scotland under Title Number MID51821 on 12 May 2015.

Petitioner: Lindsay QC; Ennova Law LLP
No appearance for First to Fifty-Sixth or Fifty-Eighth Respondents
Fifty-Seventh Respondent (Lothian Amusements Limited): Thomson QC; DLA Piper Scotland LLP

9 June 2020

Introduction

[1] The petitioner ("PHG") is a company in members' voluntary liquidation which was formed to complete a development of 55 residential apartments on a site, to which I shall refer as the Kilns site, to the south-east of Harbour Road, Portobello. In this petition, PHG seeks rectification of a Deed of Conditions executed by it in 2014 to grant and regulate, among other things, common ownership of a boundary wall, and rights of access to and use of parking spaces in a car park in the basement of the apartment building. The 55 apartment

owners, a company called Danvic Scotland Limited which is currently the proprietor of the basement car park, and the Keeper of the Registers of Scotland were called as respondents but none has entered appearance. The only respondent to enter appearance and contest the petition is Lothian Amusements Limited ("LAL"), the proprietor of an adjacent development site ("the Arcade"). The stated purpose of the rectification is to enable PHG to implement obligations under missives entered into between an associated company and LAL in 2013, in relation to access to and use of some of the car parking spaces by owners of apartments in the Arcade.

[2] The action came before me on the procedure roll for debate of the relevancy of the parties' respective averments. Due to Covid-19 restrictions, the debate was conducted by means of written submissions and a telephone conference.

Background

The Car Parking Missives

[3] In 2013 the Kilns site was owned by a company called The Kiln's Development Limited ("KDL") under the control of Mr Daniel Teague. It was originally intended that the Arcade site would be developed as apartments immediately adjacent to the Kilns site, although in the event the Kilns site development proceeded and the Arcade did not. In contemplation of the Arcade development proceeding, KDL and LAL entered into missives ("the Car Parking Missives") on 9 August 2013, in terms of which KDL sold to LAL 18 car parking spaces, identified on a plan annexed to the missives, in a car park to be constructed in the basement of the Kilns site development. The sale price was £400,000. The missives provided for the grant by KDL to LAL of various rights of pedestrian and vehicular access to the car park and to the spaces being sold. Those rights included a servitude right of

pedestrian access ("the LAL Car Park Access") through a doorway to be formed in the eastern wall of the car park, being the wall adjacent to the Arcade site. Once constructed, the doorway was to be temporarily blocked up by KDL until such time as LAL completed the Arcade development.

[4] The Car Parking Missives provided for deeds of conditions to be executed by both KDL and LAL. KDL's deed was to cover the Kilns site development, under exception of the 18 car parking spaces, and LAL's deed was to cover the Arcade plus the 18 car parking spaces. The terms of the respective deeds were to be agreed and the deeds themselves were to be executed and delivered as soon as possible, and in any event within 21 days after conclusion of the missives, to the parties' respective solicitors for registration in the Land Register.

The Deed of Conditions

[5] After the decision had been taken for the two developments to proceed independently, PHG was formed as a vehicle to complete the Kilns site development. PHG has also at all material times been under the control of Mr Teague. PHG proceeded to execute a Deed of Conditions dated 3 December 2014 which was registered in the Land Register on 12 May 2015, before the registration of any of the dispositions of apartments within the development. In certain respects the terms of the Car Parking Missives were not adhered to. The timescale in the missives was not met. Although PHG avers that drafts of the Kilns site Deed of Conditions were sent to the solicitor then acting for LAL, this is not admitted and it is not averred that its terms were agreed. Perhaps more significantly, the Deed of Conditions bore to apply to the whole of the Kilns site, including the 18 car parking spaces.

[6] It is unnecessary for the purposes of this opinion to set out at length any of the clauses of the Deed of Conditions. They can be found at paragraphs 7 to 11 of the opinion of Lord Doherty to which I refer below.

[7] PHG proceeded to complete the development on the Kilns site, including the basement car park. The doorway in the eastern wall of the car park was constructed and blocked up with temporary blockwork in accordance with the Car Parking Missives. Work was completed in about July 2015. The 55 apartments were sold to individual proprietors and their titles were registered in the Land Register. A specimen copy disposition lodged as a production contains the following description of the subjects sold and references to the Deed of Conditions:

> "ALL and WHOLE that ground floor flatted dwellinghouse known as [address] the location of which dwellinghouse is delineated in red on the plan annexed and executed as relative hereto (but excepting therefrom such parts thereof as are Common Parts (as that term is defined in the Deed of Conditions aftermentioned)); Which subjects form part and portion of ALL and WHOLE the subjects Harbour Road, Edinburgh and being the subjects registered in the Land Register of Scotland under Title Number MID51821; Together with (One) the fittings and fixtures therein and thereon; (Two) our whole right, title and interest therein and thereto; and (Three) the whole rights, common, mutual and exclusive (if any) and others more particularly described in the Deed of Conditions aftermentioned; And, there are imported the terms of the title conditions specified in the Deed of Conditions dated 3 December 2015 [sic] to be registered in the Land Register of Scotland under Title Number MID51821…"

The LAL action

[8] In September 2018, LAL raised a commercial action in the Court of Session seeking damages from KDL and Mr Teague as guarantor for loss and damage it claimed to have sustained as a consequence of KDL being in material breach of the Car Parking Missives. By then the contractual date of entry had passed, LAL had resiled from the missives, and indeed was no longer the proprietor of the Arcade site. After adjustment of the pleadings, a

debate on the relevancy of two aspects of the pleadings was heard by Lord Doherty. LAL contended that KDL was unable to comply with its obligations in two respects. Firstly, it could not grant LAL entry to and vacant possession of the 18 car parking spaces because in terms of the Deed of Conditions all of the owners of apartments in the Kilns development had been given rights to park there as well as access and egress across them. Secondly, it could not grant a disposition to LAL that included a grant of the LAL Car Park Access because in terms of the Deed of Conditions the eastern wall of the car park was common property of the apartment owners. KDL contended firstly that it was able to grant entry to and vacant possession of the car parking spaces and, secondly, that the doorway and temporary blockwork were not common property or, in any event, that in terms of the Deed of Conditions PHG had reserved a right (in Condition 16.2.1(f)) to grant servitude rights to Arcade proprietors without the consent of the Kilns apartment owners, and was entitled to knock through a doorway in the eastern wall and grant servitude rights of pedestrian access through it. KDL sought dismissal of the action. LAL sought to have various averments by KDL excluded from probation.

[9] In his opinion dated 2 July 2019 (*Lothian Amusements Ltd* v *The Kiln's Development Ltd and Anor* [2019] CSOH 51), Lord Doherty decided the two points debated substantially in favour of LAL. As regards the car parking spaces, he held that on a proper construction of the Deed of Conditions, the servient tenement in relation to both the servitude of parking and the servitude of access and egress was the entire car park. Each apartment owner had acquired, by his split-off disposition, a servitude right to use one parking space anywhere in the car park, and a servitude right of access and egress over *inter alia* the 18 Arcade spaces. Accordingly, LAL's averment that KDL was unable to grant it entry to and vacant possession of the parking spaces was relevant for enquiry. A submission by KDL that the

servitude rights of each apartment owner had been discharged or restricted to a space expressly allocated to that apartment, and did not extend to the 18 Arcade spaces none of which had been allocated to any apartment, could not be addressed because it had not been pled.

[10] As regards the LAL Car Park Access, Lord Doherty held that LAL's argument that the whole of the eastern wall was common property in terms of the Deed of Conditions was well founded. It was part of the Development Common Parts as defined. The question was whether Condition 16(2)(1)(f) in the Deed of Conditions entitled PHG to knock through the doorway and to grant servitude rights of access through it, even though PHG no longer owned it. The apartment owners might be personally bound to authorise and permit PHG to exercise the rights reserved in the Deed of Conditions, but that might in turn depend upon whether any of the original apartment owners had sold on to singular successors. Lord Doherty did not consider that he was in a position to determine those issues without factual clarification and further submissions.

PHG's application for rectification

[11] Against that background, PHG has brought the present application under section 8(1)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") for rectification of the Deed of Conditions. PHG avers that Condition 16.2.1(f) was drafted with the aim of ensuring that KDL's obligations in terms of the Car Parking Missives could be complied with in full. When the Deed of Conditions was first drafted, it had been understood by all parties that the eastern wall would be a mutual wall between the Kilns site and the Arcade. It was only because of LAL's unexpected refusal to allow the foundations for the eastern wall to be built on both sides of the boundary that it had moved

to being entirely within the Kilns site. This had made it possible for PHG to inadvertently and unintentionally make the doorway a common part of the Kilns site development. Moreover, PHG had not intended to grant to the Kilns site apartment owners any right to park on the Arcade car parking spaces or any right of access or egress over them. It had intended that the Deed of Conditions would not prevent the obligations imposed by the Car Parking Missives from being fulfilled, and that it would remain possible to convey the Arcade car parking spaces with vacant possession and with access being taken to them through the doorway.

[12] In these circumstances, PHG avers that the Deed of Conditions failed to express accurately its intention as the grantor of the Deed of Conditions at the date on which it was executed. In an appendix to the petition, the Deed of Conditions is set out with various amendments which PHG avers are necessary in order for the deed accurately to express its intention as grantor, and to remove any uncertainty regarding its ability to implement its obligations to LAL under the Car Parking Missives.

[13] PHG further avers that it is unnecessary to seek rectification of the dispositions granted to the apartment owners, and for this reason it was also unnecessary to obtain their consent in terms of section 8(3A) of the 1985 Act. Alternatively, and in any event, the failure of any of the apartment owners to enter appearance or lodge answers to the petition constituted the necessary consent for the purposes of section 8(3A).

[14] In its answers to the petition, LAL avers that PHG's subjective intention as averred regarding Condition 16.2.1(f) was not supported by an objective construction of the terms of the Deed of Conditions as a whole. The petition was incompetent and, in any event, rectification should be refused. The apartment owners had, in good faith, acquired real rights of common property in the wall and servitude rights over the Arcade car parking

spaces which could not be taken away without their consent by rectification of the Deed of Conditions. Section 8(3A) required a positive act of giving consent and was not satisfied by silence alone. Rectification of the Deed of Conditions without rectification of the split-off dispositions would have no practical effect.

Statutory provisions

[15] Section 8(1) of the 1985 Act provides as follows:

> "Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made; or
>
> (b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,
>
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention."

The present petition proceeds under section 8(1)(b): in other words, it is founded upon the intention of the grantor of a document rather upon the common intention of parties to an agreement. Section 9 has no application to rectification of deeds registered in the Land Register.

[16] The general rule, in section 8(4), is that a document ordered to be rectified under section 8 has effect as if it had always been so rectified, ie the rectification operates retrospectively. This, however, is subject to section 8A, inserted by the Land Registration (Scotland) Act 2012 ("the 2012 Act"), which provides that an order for rectification in respect of a document which has been registered in the Land Register may be registered in that

register, and does not have real effect until so registered. In other words, although rectification of the document is retrospective, the real effect of the rectification is not.

[17] Section 8(3) as amended by the 2012 Act provides, so far as relevant to this petition, that:

> "…in ordering the rectification of a document under subsection (1) above (in this subsection referred to as 'the original document'), the court may, at its own instance or on an application made to it and in either case after calling all parties who appear to it to have an interest, order the rectification of any other document intended for any of the purposes mentioned in paragraph (a) or (b) of subsection (1) above which is defectively expressed by reason of the defect in the original document."

As regards documents registered in the Land Register, however, section 8(3A) provides as follows:

> "If a document is registered in the Land Register of Scotland in favour of a person acting in good faith then, unless the person consents to rectification of the document, it is not competent to order its rectification under subsection (3) above."

Argument for LAL

[18] On behalf of LAL, it was submitted that PHG's approach, that it could seek to rectify the Deed of Conditions alone without engaging the protection afforded by section 8(3A) of the 1985 Act, was misconceived. If it was PHG's position that rectification of the Deed of Conditions would not affect the titles of individual apartment owners, then the petition would have no practical consequences and should be dismissed as irrelevant. If, on the other hand, it was PHG's position that rectification of the Deed of Conditions would merely lead to administrative "correction" of the titles of the apartment owners, then the petition was also irrelevant. Following rectification of the Deed of Conditions, it would be the duty of the Keeper of the Registers of Scotland, under section 21 of the 2012 Act, to register the rectified deed against the titles of the apartment owners, who would thereby be deprived

without consent of the very protection conferred upon them, as persons who acted in good faith, by section 8(3A).

[19] The proper mechanism by which to "correct" the titles of the apartment owners was by rectification, under section 8 of the 1985 Act, of their split-off dispositions by inserting references to the rectified Deed of Conditions. Had PHG sought to do this, the apartment owners would have had a right to veto the "corrections" of their dispositions by virtue of section 8(3A). It could not be right that PHG could by-pass that protection by seeking rectification of the Deed of Conditions alone and leaving it to the Keeper to deal with the titles of the apartment owners. It followed that it was not competent for the court to pronounce the orders sought in the petition without the consent of the apartment owners.

[20] As regards PHG's averments that the apartment owners had consented to rectification by failing to oppose the granting of the order sought in the petition, those were also irrelevant. Persons protected by section 8(3A) must positively give up their rights rather than being required to defend them through litigation. That was the nature of the protection. PHG's analogy with tacit relocation was not apt; there was no presumption of consent in section 8(3A).

[21] PHG's averments were also irrelevant for the following reasons. Mere assertion that a unilateral deed did not reflect the grantor's intention was insufficient. Proof of grounds for rectification was an inherently difficult task: a "stiff hurdle" (*Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* 2013 SLT 729, Lord Hodge at para 47). The court's power to order rectification was discretionary. Carelessness on the applicant's part could be a bar to rectification. It was incumbent on an applicant to make averments in support of the exercise of the discretion in its favour which negated carelessness on the part of itself or its agents. The remedy was not available where the terms of a deed had produced a result which the

grantor regarded as unsatisfactory because some factual or legal circumstance had been overlooked. In the present petition, PHG's averments amounted to no more than bare assertion. They provided no basis for enquiry as to whether the Deed of Conditions failed accurately to express its intention at the time of the grant. PHG was not a party to the Car Parking Missives. It was not (and could not be) averred that the Deed of Conditions was granted pursuant to the missives. There was no explanation of how an "unexpected refusal" could lead to an error of expression in relation to common property. In any event the averments provided no sound basis for the wholesale recasting of the Deed of Conditions as set out in the appendix to the petition, and no factual basis for the particular changes proposed.

[22] In oral argument it was additionally pointed out that the Deed of Conditions was not in the terms agreed by KDL and LAL in the Car Parking Missives, and so it could not be averred that its purpose was to implement obligations under those missives.

Argument for PHG

[23] On behalf of PHG it was submitted that the petition was competent and relevant. LAL's reliance upon section 8(3A) was mistaken because that subsection only applied to orders for rectification under section 8(3), ie orders for rectification of "any other document" which was defectively expressed by reason of the defect in the "original document". PHG only sought rectification of the Deed of Conditions, ie the original document, and so neither subsection (3) nor subsection (3A) was engaged.

[24] The only documents registered in favour of the apartment owners were the split-off dispositions. The Deed of Conditions was not registered in favour of the apartment owners; it was a unilateral document which set out the conditions and real burdens under which the

apartments were to be held. It was not necessary to rectify the dispositions in favour of the apartment owners. Rectification of the Deed of Conditions had retrospective effect, and so the references to it in the dispositions would be deemed to be references to it as rectified. The Keeper would note the court order against the title sheets of the apartments, but the title sheets themselves were not "documents" for the purposes of section 8(3A), and the 2012 Act had clarified that this process did not amount to rectification of the Register (as opposed to rectification of a deed). A letter had been received from the Scottish Government Legal Directorate intimating that the Keeper had considered the petition and would not be entering appearance, and reminding PHG's agents that they would have to apply to have the decree registered against all affected title sheets. While not determinative, this was an indication that the Keeper considered that the correct course of action was being followed. The interests of the apartment owners were fully protected by service of the petition on them.

[25] In any event if consent of the apartment owners under section 8(3A) was necessary, it had been obtained. Failure to appear and to oppose the petition was not mere silence on their part. By deciding not to lodge answers, they clearly and unambiguously consented to the proposed rectification. Failure to lodge answers was analogous to a landlord's or tenant's failure to give notice of termination of a lease, resulting in tacit relocation. There was nothing in section 8(3A) to require an explicit expression of consent. An informed decision not to lodge answers to a petition setting out in full what was sought by way of a court order was perhaps the clearest possible indication of consent, and was superior to obtaining written or oral expression of consent that might proceed upon an imperfect understanding of what was being proposed.

[26] The petition set out a relevant and sufficiently specific case for rectification, and LAL's submission to the contrary was without merit. Careless drafting was not a bar to rectification. PHG's case was that the language used in the Deed of Conditions was the language that it had intended to use, but that that language had not brought about the legal result which PHG had intended to achieve: cf *Bank of Ireland* v *Bass Brewers*, 1 June 2000, unreported, Lord Macfadyen at paragraph 22. The first question was therefore to consider the substance of what the granter intended to achieve, and not just the form of the document by which he intended to achieve it. The second question was whether the document expressed accurately the intention already identified. That was the approach taken in the petition. Firstly, it was averred that as grantor, PHG intended that the apartment owners would have no rights over the Arcade parking spaces, that the doorway would not form part of the common parts of the Kilns site development, that the Deed of Conditions would not prevent the obligations imposed by the Car Parking Missives from being fulfilled, and that it would remain possible to convey the parking spaces to LAL with vacant possession and access to them through the doorway. Secondly, it was averred that the legal effect of the language actually used in the Deed of Conditions did not achieve the result that PHG intended to bring about because, according to Lord Doherty's decision, it gave the apartment owners servitude rights over the parking spaces, and made the doorway common property, making it impossible for the obligations imposed by the Car Parking Missives to be fulfilled. There was nothing in the overall structure of the Deed of Conditions that gave rise to an inference that PHG had intended to bring about those results. In the context of an application for rectification, PHG's averments were relevant and sufficiently specific. The terms of the order sought were focused on removing the servitude rights over the parking

spaces and withdrawing the doorway from common ownership. With those amendments, the rectified provisions would fit neatly with the rights reserved in Condition 16.2.1(f).

[27] As regards the exercise of the court's discretion in terms of section 8(1), if it was proved that a document failed accurately to express the intention of the grantor at the date of the grant, the remedy of rectification should not be withheld unless it was inequitable for an order to be made: *Britannia Invest A/S* v *Scottish Ministers* 2018 SLT (Sh Ct) 133, Sheriff Holligan at paragraphs 60-61 and authorities cited there. There was nothing in the circumstances of the present case that made it inequitable to grant the order sought. LAL averred no prejudice to it. Nor, as a matter of practicality, would the apartment owners be prejudiced. It was averred, with the support of an affidavit from Mr Teague, that each apartment owner had been allocated a specified car parking space. The Arcade spaces had not been allocated and were in fact obstructed by bollards. It was unnecessary for any apartment owner to cross them to reach his or her allocated space. Allowing pedestrian access through the doorway would not interfere with the apartment owners' use of their allocated spaces. Any carelessness on the part of the drafter of the Deed of Conditions did not render rectification inequitable.

Decision

Protection of apartment owners' rights

[28] Section 8(1)(b) of the 1985 Act differs from section 8(1)(a) in that it is concerned with the unilateral intention of the grantor of a document, whereas section 8(1)(a) is concerned with documents which either express an agreement or give effect to an agreement already reached between two or more persons. As Gretton & Reid point out *(Conveyancing*, 5th ed 2018, at paragraph 21-05), it is now accepted that the boundary between deeds falling within

sub-paragraph (a) on the one hand and sub-paragraph (b) on the other is not delineated by whether the deed is unilateral in form: as the authors note, most conveyancing deeds are unilateral in form. The relevant distinction is whether or not the deed gives effect to an earlier agreement; if so, it will fall within sub-paragraph (a). A deed of conditions may, depending upon the circumstances, fall into either category. For example, the case of *Sheltered Housing Management Ltd* v *Cairns* 2003 SLT 578, which was a successful petition for rectification of a deed of conditions for a sheltered housing complex, proceeded under section 8(1)(a) because, although it bore to be granted by the developer and was therefore unilateral in form, the deed gave effect to a minute of agreement entered into between the developer and a company which had from the outset administered and managed the complex.

[29] The Deed of Conditions with which this petition is concerned is similarly unilateral in form. But in contrast to the deed in *Sheltered Housing Management Ltd* v *Cairns*, it is also unilateral in substance because it did not give effect to any earlier agreement between PHG as developer and any other person. It was executed and registered at a time when none of the apartment owners had acquired a registered title to his or her apartment. Nor was it granted to give effect to the Car Parking Missives; all that PHG offer to prove in these proceedings is that it was not intended to interfere with implementation of the missives. In these circumstances I am satisfied that the application is correctly made under section 8(1)(b) and that the issue to be determined is whether or not it failed to express accurately the subjective intention of PHG at the time when it was granted. This is of significance in relation to analysis of the rights of the persons who in due course acquired ownership of the apartments.

[30] It is inherent in the nature of applications under section 8(1)(b) that the effect of rectification will often be to take away from a grantee something which was given in terms of the document that is now said to be defective, and moreover to take it away with retrospective effect. For that reason the court is expected to give very careful scrutiny to the evidence led in support of the applicant's assertion that the document failed accurately to express the grantor's intention. If it appears that a grantor has simply had a change of mind, or now wishes that he or she had done something differently, there is insufficient legal basis for rectification. As the Scottish Law Commission observed in their report recommending the enactment of what became sections 8 and 9 of the 1985 Act (*Report on Rectification of Contractual and Other Documents*, Scot Law Com no 79 (1983), para 3.8):

> "The principal difference between contractual and unilateral writings, for the purposes of rectification, relates to the proof of the intention which it is claimed has been defectively expressed… In the case of unilateral writings proof of the grantor's intention will be inherently more difficult, for he is less likely to have communicated with any other party. It may therefore be difficult to establish what his true intention was and to what extent this has been misrepresented in the writing. Moreover, a court would not be satisfied that a document was defectively expressed purely on the basis of an assertion that the writing was not what the grantor had intended."

[31] If, however, an applicant for rectification does succeed in satisfying the court that the intention of the grantor (who may or may not be the applicant) has been misrepresented in the document, the court may order rectification even though this will operate to the detriment of the grantee. The protections afforded by the 1985 Act to the grantee, in addition to the onus incumbent on the applicant, are (a) the right to enter the court process and oppose the application, and (b) the discretion of the court to refuse rectification even if satisfied that the grantor's intention was not accurately expressed. But the point to emphasise is that the existence of prejudice does not give the grantee a right to veto

rectification. Prejudice may be relevant to the exercise of the court's discretion as to whether or not to grant the order sought, but it is not a bar to an application under section 8(1)(b).

[32] LAL's principal argument is founded upon the terms of section 8(3) and (3A). In my opinion, PHG's submission that these subsections have no relevance to the circumstances of the present case is well founded. The purpose of subsection (3A) is to protect the interests of a party to a document, other than the "original document", which has to be rectified as a consequence of the rectification of the original document. In the Scottish Law Commission's *Report on Land Registration*, Scot Law Com no 222 (2010), the Commission's recommendation to enact what became section 8(3A) was made in the context of protection of third parties in good faith. The example given, at paragraph 29-26 of the report, is of the heritable creditor of a disponee. In the circumstances of the present case, the apartment owners are not third parties, in good faith or otherwise. Rather, they are grantees who, by virtue of the combined effect of the Deed of Conditions and the dispositions in their favour, have obtained rights which PHG now asserts that it was not its intention to grant to them.

[33] Nor, in my opinion, is there any need for PHG to seek an order for rectification of the dispositions in favour of the apartment owners. If an order is granted for rectification of the Deed of Conditions, the deed will have effect as if it had always been in its rectified terms. The references to the Deed of Conditions in the dispositions would therefore be deemed retrospectively to be to the deed in its rectified terms. There is nothing in the terms of the dispositions which would require consequential amendment. It is, of course, the case that in terms of section 8A an order for rectification would not have real effect unless and until registered in the Land Register, and that it would therefore be necessary, as the letter from the Scottish Government Legal Directorate pointed out, for an application to be made to

register any court order against all of the apartment owners' title sheets. But that is all that would be required in order to give (prospective) real effect to the rectification of the deed.

[34] For these reasons an order for rectification could in my opinion be pronounced without the consent of the apartment owners. The question of whether they have in any event consented by failing to oppose the present application does not therefore arise for determination. Had it done so, I would not have held that mere failure to contest the petition constituted consent for the purposes of section 8(3A). Neither the 1985 Act as amended nor the Scottish Law Commission's 2010 report contains any guidance as to nature of the consent required to satisfy section 8(3A). However, I accept LAL's submission that what is envisaged is either express consent or consent that can reasonably be implied from the whole facts and circumstances, and that mere acquiescence is insufficient. In my opinion consent cannot be implied simply from the fact that the person concerned has not intimated and maintained opposition to a court application. There may be other good reasons why the person may not, as a matter of choice or otherwise, appear to contest the order: concern regarding legal expenses is an obvious one. I agree with LAL's submission that tacit relocation, being founded upon implied contract, does not afford an appropriate analogy.

Relevance of averments of failure to express intention

[35] I am also satisfied that PHG has pled a relevant case for rectification of the Deed of Conditions in terms of section 8(1)(b). The passage founded upon by PHG from the opinion of Lord Macfadyen in *Bank of Ireland* v *Bass Brewers* is in the following terms:

> "It seems to me that it is plain that the sub-section directs the court to consider first what the grantor intended by way of the creation, transfer, variation or renunciation of rights. That is, in my view, concerned with the substance of what the grantor intended to achieve as well as the form of the document by which he intended to achieve it. The natural form of the answer to the question to which the provision

> invites attention is that the grantor intended to bring about a particular legal result rather than that he intended to grant a document expressed in particular words. Once the content of the grantor's intention has been identified, attention turns to the document as actually expressed, and the question that must be addressed is whether it expresses accurately the intention already identified. That question can in my view be paraphrased by asking whether the legal effect of language actually used in the deed to express the grantor's intention is to achieve the result that the grantor intended to bring about. To exclude rectification where the language used is the language that the grantor intended to use but the legal result is different from the legal result that the grantor intended to achieve would reduce the role of the remedy to little more than the correction of clerical errors. There is, in my view, no reason in the language of the provision to read it in such a narrow way. Section 8(1)(b) no doubt covers cases where there is a discrepancy between the language used in the document and the language that the grantor intended to use, although I doubt whether rectification would be granted if the discrepancy in language did not produce a difference in legal effect. In my opinion, however, it also covers cases where the language used is precisely the language that the grantor intended to use, but that language does not bring about the legal result that the grantor intended to achieve thereby."

These observations were referred to and applied by Lord Turnbull in *Nickson* v *HMRC* 2017 SC 50. For my part, I also respectfully agree with and adopt them. One must, however, be careful, as Lord Turnbull pointed out in *Nickson*, to distinguish between, on the one hand, a failure to achieve the legal result that the grantor intended to bring about by execution of the document and, on the other hand, a failure to achieve some associated or consequential legal right or wider purpose beyond that to be effected by the document. Only the former falls within the scope of section 8(1)(b).

[36] In the present application, as I have already noted, PHG avers that it intended that the apartment owners would have no rights over the Arcade parking spaces, that the doorway would not form part of the common parts of the Kilns site development, that the Deed of Conditions would not prevent the obligations imposed by the Car Parking Missives from being fulfilled, and that it would remain possible to convey the parking spaces to LAL with vacant possession and access to them through the doorway. In my opinion the first and second of those averred intentions are sufficient to address the first of Lord Macfadyen's

two requirements, namely identification of the grantor's intention by way of creation of rights. I am less convinced that the latter two averred intentions would of themselves be sufficient to make available remedy of rectification under section 8(1)(b); they appear to me to fall foul of the distinction drawn by Lord Turnbull in *Nickson*, with which I also respectfully agree, between results intended to be brought about by the document itself and other wider purposes or results. But that is immaterial as, in my view, PHG's averments of absence of intention to create servitude rights over the Arcade parking spaces or common ownership of the doorway are sufficient to set up the first of the necessary elements of an application under section 8(1)(b).

[37] PHG further avers that it was held, in terms of Lord Doherty's opinion, to have created the servitude rights and rights of common ownership that it maintains that it did not intend to create. That, in my opinion, is sufficient to address the second of Lord Macfadyen's requirements, namely that the intention already identified has not been expressed accurately in the Deed of Conditions. As both of the requirements are met, a relevant case for rectification under section 8(1)(b) has, in my opinion, been pled.

Other relevancy issues

[38] In my opinion, none of the other criticisms of PHG's case made by LAL is of such weight as to preclude enquiry. I reject LAL's submission that the case amounts to no more than bare assertion of defective expression. In this context, the averments that I have held to be insufficient of themselves to justify an order for rectification, ie that the Deed of Conditions was not to prevent the obligations imposed by the Car Parking Missives from being fulfilled, and that it was to remain possible to convey the parking spaces to LAL with vacant possession and access to them through the doorway, provide a factual explanation of

why the deed fails accurately to express the grantor's intention. PHG's averments as to how it came about that the doorway was, as it claims, inadvertently included in the common parts are also relevant by way of explanation of how the grantor's intention came to be defectively expressed.

[39] I do not regard it as either necessary or appropriate to address at this stage any matters concerning the exercise of the court's discretion as to whether or not to grant an order under section 8. It may be arguable that considerations such as carelessness on the part of PHG or its agents, or the nature and extent of any prejudice that would be caused to any person by the proposed rectification, are relevant to the exercise of the discretion, but these are matters that ought to be canvassed, if at all, after enquiry. Nor is it necessary at this stage to consider the specific amendments to the Deed of Conditions that PHG wishes the court order to make, beyond confirming that I reject LAL's contention that each proposed amendment requires to be the subject of specific averment.

Further procedure

[40] I have mentioned that PHG lodged an affidavit by Mr Teague; an affidavit by the solicitor who completed the drafting of the Deed of Conditions was also lodged. It is often possible for the court to proceed to make findings on the basis of affidavit evidence. The present petition, however, came before me on the procedure roll for debate of preliminary pleas, and senior counsel for PHG conceded that it would not be competent for me to proceed to consider the merits of the application on the basis of the affidavit evidence alone. Senior counsel for LAL confirmed in any event that he would wish an opportunity to test the evidence presented by PHG in relation to alleged defective expression of intention.

[41] Having regard to the onus incumbent on an applicant for rectification under section 8(1)(b) to satisfy the court that the order sought should be made, I consider that the appropriate course of action is to allow a proof before answer on the petition and answers as adjusted, leaving parties' preliminary pleas standing. Senior counsel for PHG suggested that if I decided the matters debated in his favour, as I have, certain of LAL's averments should be excluded from probation. I am not convinced that this is necessary, as the averments identified are largely statements of law in relation to the operation of section 8(3A). I will, however, hear parties on it before pronouncing an interlocutor.

[42] I shall put the case out by order for discussion of further procedure and any other outstanding matters. Questions of expenses are reserved.