Scottish Court Service

Court Reference A7/15

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE at DUNDEE

Judgment of **SHERIFF GEORGE ALEXANDER WAY**

In the Cause

VEHICLE CONTROL SERVICES LIMITED,
2 Europa Court Sheffield S9 1XE **PURSUERS**

against

CARLY MACKIE,
66 Unicorn Court, West Victoria Dock Road
DUNDEE DD1 3BH **DEFENDER**

13th January 2017.

The Sheriff having resumed consideration of the cause, finds the following facts proven or admitted or agreed:

1. The property at Rivercourt, West Victoria Dock Road Dundee is part of a major new build development on the Waterfront District of the City of Dundee. It consists of a variety of styles and designs of property in blocks but they are united by the overall plot with interconnected parking places and common and amenity grounds. Some units have integral garages that form part of the heritable title of that dwelling; some have dedicated parking spaces that form part of the heritable title of that dwelling and some only have access to communal or adjacent parking spaces with appropriate heriitable servitudes of access and egress.

2. The title to the overall subjects is registered in the Land Register and the burdens are set out in a Deed of Conditions. The Land Certificate for 66 Unicorn Court, part of the said development is title number ANG1566 dated 21st July 2008. This is produced in the Inventory for the Defenders 6/3/1 of Process. This contains the burdens that

include, inter alia, the overall maintain of the properties, the parking space areas and the common property. The title and the burdens bind the tenant by demise of the landlords interests to him as long as the lease is extant.

3. The defender is the daughter of the tenant of that property and she has lived with her parents at the subjects from time to time. She has also lived away in places like London. She has no right or title in her own name to the said subjects in any manner.

4. The said Deed of Conditions creates a management scheme for the subjects that provides for the owners to take decisions rendered necessary by the burdens clauses therein by majority vote. The Deed also sanctions the appointment of managers of factors to act upon authority delegated to them by the majority who voted to apppoint them. Clause 4.10 of the said Deed provides for the appointment of managers or factors. Clause 4.10.1 empowers the managers to order, arrange and execute any common or mutual operations, maintenance and repairs etc of the common property of the development, of a block or plot together with the parking spaces. They shall use their own judgment and may employ labour.

5. In addition Clause 4.10.1.2 of the said Deed empowers the managers to exercise the whole rights and powers which may be competently exercised by a majority of those present at any quorate meeting of the proprietors provided for this in the Deed of Conditions. Factor4You were appointed to act as factors by Minute of a Meeting of the relevant proprietors held at the Apex Hotel Dundee on 7th April 2011. A copy of the Minute is produced at 5/2/1 of Process.

6. The property is private and there is no public right to park cars. The Deed of Conditions restricts parking within the property even for the proprietors: no vehicle may park save in a garage or designated parking area. There was insufficient parking in the locale and the parking within the property was not closed off by gates and could by accessed by any vehicle. Proprietors could not park their own cars from time to time and the factors were expected to address this management issue.

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7. The factors entered into contracts with the pursuers to povide a parking management solution within the property and associated developments dated 27th March , 4th May , 31st August and 4th September 2012 (5/4;5/5 and 5/6 of Process). The contracts, inter alia, set out a parking control scheme based upon the issue of permits to the proprietors of the property. There was no charge for such permits: they were to identify vehicles that were authorised to park on the property. The permits could be used by proprietors for any vehicle. The permit secheme was intended to allow enforcement of aprking control by staff employed by the pursuers. Any vehicle that did not display a permit would be deemed to be parking without right and a notice would be attached to car windscreen.

8. The pursuers scheme entailed warning all those parking upon the property that a parking protection scheme was in operation and the terms of vehicular entry. Eight signs were prominently displayed around the entrance points to the property. These informed all who entered with a vehicle, that the property was private and that if they chose to park they did so subject to the terms and conditions set out on the notices. Those terms were that parking was restricted to vehicles displaying appropriate permits and onlyin designated areas. Some areas, for safety reasons were excluded from use as parking places to all persons.

9. The Notices also stated that failure to display a permit rendered those parking to a parking charge. The Charge was £100.00 per day or part thereof. This charge would be reduced to £60.00 if paid within 14 days of the date of issue.

10. The defender is the daughter of a tenant within the property. The tenant has a designated garage. The tenants rights are derived from those of his landlord who is a proprietor within the property. The landlord is bound by the Deed of Conditions. In any event the defender, as a casual resident within the household of the tenant, has no right or title to sue the parking areas of any kind. Her father could have sought a permit for her to use but did not do so.

11. The parties have agreed by Joint Minute that the defender parked her car registration number SV02 XGG as per the Schedule (5/11 of Process) in parking area

wuthin the property and that notices were affixed in consequence. They are agreed that if liability were established quantum is correctly stated as £24,500.00.

Finds in Fact and :Law

1. The property being private the proprietors are entitled to restrict parking therein and to set terms and conditions for all those who choose to do so.

2. The proprietors by virtue of the Deed of Conditions may take decisions affecting the common or amenity parts of the property by majority vote.

3. The proprietors may by majority vote delegate their powers to factors or managers.

4. The proprietors validly retained the services of Factors4You and delegated to them management powers to exercise the proprietors rights under the Deed of Conditions.

5. In exercise of the powers validly delegated to them Factors4You entered into contracts to operate parking management controls to the pursuers.

6. The pursuers scheme was based upon a system of permits to identify to their staff, vehicles that the proprietors, through their delegated managers, accepted had the right to enter the property and park and those that did not. Prominent warning signs stated that all those who sought to park on the property but did not display a permit agreed to pay a parking charge.

7. The signs created a contractual offer that the parking vehicle accepted by thereafter parking on the property. The defender was aware of the parking restrictions and the terms of the pursuers signs. The defender is bound by that contract and incurred the parking charge on each occasion.

8. The defender refused to pay the parking charges not because she was unware of the parking scheme or the terms of the notices or the financial consequences of parking at any time, but because she did not believe that the charges were valid in law.

9. The parking charges flow from a valid contract between the pursuers and the defender and she is liable for them.

THEREFOR: Finds the Defender to be in breach of contract and liable to the pursuers in the agreed sum of £24,500.00 (Twenty four thousand five hundred pounds Sterling) and discerns against the Defender for payment to the Pursuers and grants decree against the Defender for payment the said sum of £24,500.00 with interest theron at the rate eight per cent per year from the date of decree until payment, together with the expenses of the cause, save in so far as they may have already been dealt with, as taxed and remits the accounts to the Auditor of Court to tax and report.

Sheriff at Dundee

Note

(One) This was an elaborately prepared case with a considerable procedural history. I had the benefit of numerous Inventories and a helpful Joint Minute. I heard oral testimony and the agents had generously prepared written submissions that rendered their oral presentation brief and to the point. I am grateful to them both for their professionalism in case where it was obvious that deep rooted sentiments and personal discord overlaid the more prosaic issue of land title, delegated powers and contracts.

(Two) I first heard from Martin Attwood VCS executive technical director of the Pursuers. He explained that his primary functions were as Data Controller and legislative compliance officer of the company. He dealt with Contact administration. He negotiated the contracts let by Factors4You as agents for the owners of the

properties in question. He was given access to the site and confirmed that the land was privately owned with no public rights of way. Certain access routes were capable of being taken over by the local authority (and indeed were so later) but at the inception of the contracts all was private. This contract was let against a backdrop of a new build development where the planning permission had quite deliberately (as I understand it) stipulated conditions that would mean that there would inevitably be insufficient parking spaces for every dwelling and certainly not for guests and tradesmen as well. This is a "green" policy of the local authority to cut vehicle emissions and the like. Some houses have actual garages with heritable title, some have dedicated parking spaces again with heritable title and there are common parking areas owned jointly by all.

(Three) He explained that there are many ways that private parking areas can be restricted. There are systems using electronic gates with pass cards etc. but these are very expensive options and may raise issues of technological stability. They are more common in commercial sites. The system chosen by the factors was low tech, relatively inexpensive and proven to work. This was to use signs to create a system where people are warned that they are entering upon private land where parking is controlled by the pursuers and that they offer to admit them only on the published terms. The drivers accept the offer by entering on the land and parking a vehicle. In this case, they erected 8 prominent signs at the strategic entrance points. The decision was taken that the factors themselves would supply owners with parking permits to display on their vehicles. This would remove from the pursuers any responsibility for the allocation of parking spaces but would allow enforcement of the will of the proprietors to defend their parking spaces as the pursuers patrol staff would know that

a vehicle was authorised. Thus, vehicles would be authorised not persons. This is, essentially the only practical way to make such a system work. Even, say, a system of recorded registration numbers were used that would not deal with visitors, trades and lead to delays when owners changed, borrowed or hired vehicles.

(Four) The parking areas were divided into authorised parking bays and areas where parking is prohibited entirely for access and safety reasons. As well as the wall signs, there are painted double yellow lines and ground lines to indicate "no parking at any time" areas. Mr Attwood proposed that none of the decisions re these areas were arbitrary: all were to prevent obstruction, aid the flow of vehicles and enhance safety. Some of the "no parking" double yellow lines that the pursuers had applied were adopted by the local authority in 2014 and thereafter those prohibitions had legislative effect. The defender defied that as well but only for a brief time. She seemed to acknowledge the authority powers yet the reason for the prohibition (prevention of obstruction and public safety) was precisely the same whether we painted the lines or Dundee City Council.

(Five) The defender breached the contract in two ways: she parked in parking spaces without a permit and she parked in clearly designated "No Parking" areas. She has accepted this and in the Joint Minute quantum is agreed if liability is established. She had raised the issues she has with the pursuers. She knew perfectly well what the signs displayed and that she was parking in breach of the conditions. She stated that (effectively a protest position) that parking charges were illegal and unenforceable in Scotland and that she could park where she liked as her father's guest. Her father's

tenancy came with a proper garage linked to the title and so far as the pursuers were aware he parked his car there. The permit system only works if all those with the right to park use them. The pursuers cannot protect amenity and the limited parking available for the proprietors without them. The defender is not the tenant. The defender's car was an additional burden on the parking facilities and she was the same as any other interloper. She was offered a permit by the factors (at a reasonable charge I think) but she refused on principle.

(Six) The pursuers next witness was Mr. Robert Adams the factor and principal of Factors4You. He explained that he was no longer the factor but was at the relevant dates. He confirmed that he was appointed by requisite majority of the proprietors and had been charged by them to protect restricted parking amenity. This was a real problem as the development is part of the Waterside regeneration project in Dundee. This entailed the creation of new amenities, recreational facilities, restaurants and the like. Pressure on public parking was acute so people park on other people's private property. He fully corroborated the pursuers evidence that he had accepted their proposed scheme as both necessary but also practical and economic. He was clear that he acted under delegated power to act as agent for the proprietors in terms of the Deed of Conditions and in particular para 10 thereof. He had agreed with the pursuers that there be "no parking at any time" areas: these were to protect and preserve access and safety (e.g. emergency vehicle access) no prohibition was simply aesthetic and no decision was arbitrary.

(Seven) He described how he kept control of the contract. If proprietors /residents had a problem they dealt with me and I took matters up with the pursuers. He could and

did, instruct them to cancel “tickets” for valid reasons. He realised that the defender had “issues” with the parking regime. She was entirely aware of what she was doing. She was protesting against what she believed was an illegal scheme of some kind. She was quite clear about that. He tried to discuss matters with her. He tried to resolve her parking needs by offered her a parking permit at a fee of £40 per month. This was on an adjacent site where another block ws planned but was as yet, unbuilt. The local authority had conceded that until the block was actually built a car park was at least useful, neat and maintained rather than a waste ground. She would not accept this. Mr Adams believed that the defender was waging a personal “crusade” to prove the parking scheme was illegal or unenforceable. This closed the pursuers oral testimony.

(Seven) The defender declined to give evidence but her father Mr. Hill, did so. He stated he was the father of defender and tenant in the development. He confirmed he had the use of garage under his lease. The defender had been living in London but had come back to live with us in September 2013. She has her own car. He accepted that he told her to park in the development. He did so as he believed that the factors had no authority to create the parking scheme or contract with the pursuers. He understood that private parking charges were not legally binding. He agreed that Dundee City Council did take over some double yellow line areas into public control. They stopped parking there when they learned this because the council have legislative authority to restrict parking and levy charges. He and the defender do not think the Factors have such power and accordingly neither can the pursuers. He was perfectly candid in his evidence that the defender just ignored the parking notice and the charges levied on principle. This concluded the oral testimony.

THE SUBMISSIONS

(Eight) The agents submitted Written Submissions. They are available in Process and should be referred to for their full terms and I hold them as incorporated herein for the sake of brevity. However, for the sake of narrative continuity I will set out the essential elements of each side position. In many ways, their positions are simple polar opposites. The pursuers submit that the proprietors have the right to protect their private property and restrict access to it as they see fit. They could install gates or other barriers (rising bollards perhaps) but elected to use a lower "tech" solution as proposed by the pursuers, with physical signs and regular foot patrols. Compliance was enforced by levying charges for unauthorised parking. The pursuers argue that the proprietors having power may delegated this to their appointed factors. They did so by majority vote. The factors entered into a valid contract with the pursuers and thereby defended the proprietor's rights in their property. The pursuers then created a system of signs and permits as described above. Anyone entering into the property would see the signs and would then have a decision to make; proceed to park or not. In the event that they parked they had by that action accepted the offer made to them. If they displayed a valid parking permit then parking was free but if not then the contractual charge of £100.00 (reduced for prompt payment) was due.

(Nine) They referred to the authority of the decision of Thornton v Shoe Lane Parking 1971 QB 163- 169G and that of Sheriff Principal (later The Hon. Lord) MacPhail QC in University of Edinburgh v Onifade 2005 SLT 63 where he stated (under reference to the famous "ticket" case of McCutcheon v MacBrayne) :

"*The pursuers notice made it plain that their position was that anyone who parked on their property without a permit would pay a fee of £30.00 per day on that account.*

The defender by parking his vehicle on their property without a permit made it plain that he was accepting that position. It is nothing to the purpose for him to maintain that he did not intend to pay because he considered that the pursuers were not entitled to make the charge specified...".

The defender was simply wrong in her analysis of the contractual chain of authority that this had led her to take a position on the ground that rendered her liable to sucj substantial charges. She admits she parked without a permit, on the property that the pursuers were contracted to protect. She had no better right or title to do so than any other interloper or stranger no matter what her belief might be. She was liable in the agreed sum of £24,500.00 and decree with expenses must follow.

(Ten) The defender focussed on the question of authority to contract. The main thrust of submissions was that the factors could have no power and authority to contract with the pursuers than the owners themselves. In the defender's submission, the powers of the owners relate to maintenance, repair and preservation. Nowhere is there power to levy financial penalties. There is power to tow away vehicles that actually cause obstruction and the like but that is a different mischief and the remedy is both express and clearly appropriate. The defender's agent concedes that there is a power (submission paragraph **m**) that authorises the doing of "any other matter which the convenors of the meeting shall consider desirable for the benefit of the parking proprietors or any part thereof. The defender, however, submits that this would require proof of a motion or resolution of the proprietors and no evidence of this was advanced. In brief then the factor had no power or authority to contract with the pursuers and therefor the pursuers had no mandate. The pursuers contract being invalid they, in turn, could not enter into any contract to offer or indeed restrict

parking on the property. The defender was not in breach of contract as there was no contract in the first place. She should be assoilzied with expenses in her favour as taxed.

DISCUSSION AND OPINION

(Eleven). I prefer the submissions of the pursuers on all points. The defender has, in my judgment, entirely misdirected herself on both the law and the contractual chain in this case. I reject the analysis of the defender's agent. The pursuers have a valid contract. The proprietors have a legitimate interest arising from their title to the land to protect their property and their amenity. Parking is not only an amenity but a valuable commodity in modern life. The proprietors, therefore, have a patrimonial interest in managing the efficient use of the available parking space. The Deed of Conditions gives the proprietors the power to act by majority vote and to fully delegate their collective power and authority to managing agents. This they did when they appointed Factors4You. The delegation is of all their powers whilst the factors mandate is in place. I reject the defender's submission that to act to protect the parking amenity would require another vote. The normal rules of agency would apply and the factors had, in my opinion, sufficient mandate already. The owners, in any event must have been well aware of the parking restriction scheme as not only were there prominent notices all over their property but the factors issued permits to them which were used. The defender chose to ignore this.

(Twelve) The factors then acted in a perfectly ordinary manner to use their delegated powers to hire labour to implement their mandated duties. The engagement of the pursuers was a perfectly proper use of the factors ostensible authority. The pursuers

scheme was simple and cost effective. The charges are nothing more than a legitimate mechanism to create a potential revenue stream to meet costs that would otherwise be borne by the proprietors themselves and without which those services were unlikely to be viable. The Supreme Court touched on this is the "Parking Eye" case (**ParkingEye Limited (Respondent) v Beavis (Appellant**) UKSC 2015/0116) where Lords Neuberger and Sumption referred to the objectives of owners protecting parking amenity and funding it through user charges thus:

"*These two objectives appear to us to be perfectly reasonable in themselves"*

I respectfully agree.

(Thirteen) I, therefore, hold that the proprietors have the right to collectively protect their private property and to delegate this function to managers or factors. The factors, accordingly, had the power to engage the pursuers. The pursuers were entitled to devise a scheme, agreed with the factors, to achieve the objects of the contract and to raise potential revenue thereby users who did not comply with the contractual offer made to them on entry upon the subjects in a vehicle. No submission was made to me as to the financial propriety of the scale of the charges or any question of so called "penalty clause" payments: indeed, quantum was agreed. I, for the reasons given, find in favour of the pursuers and have pronounced decree accordingly. I have awarded expenses to follow success according to the usual rule.