Liability for maintenance of amenity open space

Greenbelt Group Ltd v John Walsh & Anr [2019] SAC (Civ) 9.

When a housebuilder produces a development of any significant size, it very often includes an area or areas of amenity open space. The immediate issue that arises from that is how is the open space is to be managed once the development is complete, or partly completed and who will be responsible for paying for the costs of the maintenance and upkeep necessary.

There are two generally accepted and commonly employed solutions to this issue. One is to convey all of the land in question in due course to house purchasers and thereby place a responsibility on individual proprietors to maintain the open space which is then owned by them in common. The other solution is to convey the open space to a third party, typically one of the Green Belt Group of companies, and get it to carry out the maintenance necessary. The third party thereby given the responsibility of managing and maintaining the common ground is then reimbursed by levying a charge on the proprietors of the development. The house buyers therefore pay for the maintenance of land that they do not own. This is known as the land-owning model of property maintenance and falls to be contrasted with the common-ownership model described first.

It was the land-owning model which was brought into sharp focus by the present case. Greenbelt, who owned the amenity land at the Ardler Development in Dundee raised small claims proceedings against two proprietors for non-payment of the maintenance fees levied by it. After a hearing, the Sheriff accepted an argument that the title conditions were unenforceable because they created a monopoly contrary to section 3(7) of the Title Conditions (Scotland) Act 2003. As a result, he held that the individual proprietors were not liable to pay the maintenance charge arising from the maintenance burden and dismissed the action against them.

The sums involved were relatively minor (£500 and £1300) but the principle of the right to enforce payment is clearly very important for the continued operation of the land-owning model of maintenance. Accordingly, Greenbelt appealed the decision of the Sheriff and employed senior and junior counsel to argue its case.

In order to reach a decision, the Sheriff Appeal Court required to consider an earlier Lands Tribunal case called *Marriott & Anr v Greenbelt Group Ltd* LTS/TC/2014/27 which considered a broadly similar title condition. In that very extensively argued decision, the Tribunal was split. It held by a 2:1 majority that such a burden did not create a monopoly, it merely reflected one because by definition land ownership

inherently results in a monopoly. The dissenting legal member held that the clear wording of the Act struck at the title condition in question, however beneficial it might be that a third party exists to carry out land management operations without requiring individual proprietors to organise that function among themselves.

The Sheriff in *Walsh* was therefore persuaded to agree with the minority opinion in *Marriott.* However, the Sheriff Appeal Court decided to restore the position of the majority in the earlier Lands Tribunal case and stated:

"As was observed by the majority in *Marriot*…the ownership of land is inherently monopolistic. The 'monopoly' complained of in the present cases exists by virtue of the appellant's ownership of the Open Ground; it was not created by Clause Thirteenth of the Deed of Conditions. Clause Thirteenth of the Deed of Conditions burdened the respondents with an obligation to pay their respective shares of the cost of maintenance of the Open Ground, no more."

An interesting point is that *Marriott* was in fact lost by Greenbelt on a very technical point unrelated to the monopoly argument in that it was not possible to ascertain the burdened land with sufficient certainty from the constitutive deed. The Sheriff Appeal Court held that the land in *Walsh* had been identified with sufficient certainty by reference to a title plan (unlike Marriott where identification had been by reference to a planning permission). The clause was nonetheless uncertain in relation to the future extent of the burden if further development were to take place. However, that was not deemed to be so uncertain as to invalidate the clause complained of.

So, it seems that the land-owning model for maintenance of amenity ground has again been rescued. It does, however also appear that there may yet be further legal developments to come in relation to this issue.

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