

THE CASE OF THE APOTHECARY'S TOMB

John and Joanna McCoach v The Keeper of the Registers of Scotland and City of Edinburgh Council, Lands Tribunal for Scotland, LTS/LR/2006/03, 19 December 2008 (unrep.¹)

Introduction

In the quiet Edinburgh street of Chamberlain Road, not far from Holy Corner, south of the Meadows, lies a modest monument to one John Livingstone. Sometime owner of the Greenhill Estate and reputed to be an apothecary and botanist, it seems that he died in 1645 of the Black Death. His "tomb" is a square area of four substantial stone walls, open to the sky and fronted by a garden. Not large, at about 24 feet across and in whole about 106 square metres, it is a pleasant place to rest in quiet contemplation of mortality in the face of global pandemics.

When first erected the tomb may have lain in open countryside, no less an authority than Lord Cockburn having observed that in his 1780's childhood there were very few fences south of the Meadows, and "the lands of Grange, Canaan, Blackford, Braid, Mortonhall and many other now enclosed properties, were all, except in immediate connection with the mansion houses, unenclosed"². Victorian development changed all that, and in 1851 there was a disposition of neighbouring land in Greenhill Gardens for a house to be built on that new street, the land being bounded partly by the walls of the tomb. Another disposition in 1856 was made in similar terms of subjects at 1 Chamberlain Road. The house on those subjects eventually became a nursing home, but in 2004 the owners decided to sell it. The buyers were Mr & Mrs

¹ The decision can be found on the Lands Tribunal's website: www.lands-tribunal-scotland.org.uk/decisions.

² 'Memorials of His Time', 1856, (new edition, TN Foulis, 1910)

McCoach for use as their home. The conveyance gave rise to a first registration of the subjects in the Land Register.

It must have surprised the deceased that his tomb thereafter became the focus of legal proceedings of some local notoriety³, and of no little legal complexity. The practitioner may wish to take special note of what the case tells us about the degree of carelessness which may justify the Keeper in rectifying a registered title under the Land Registration (Scotland) Act 1979 ("the Act"), and of what the Tribunal had to say about remedies had the appeal succeeded.

The power to rectify

It will be recalled that section 9 of the Act provides that the Keeper may "rectify any inaccuracy in the register by inserting, amending or cancelling anything therein"⁴. His power to do so is constrained by subs. 9(3) where rectification would prejudice a proprietor in possession. Where that applies he may rectify only in certain, enumerated circumstances. In this case only one was relevant: where "the inaccuracy has been caused wholly or substantially by the ... carelessness of the proprietor in possession"⁵. An appeal lies to the Lands Tribunal for Scotland under section 25 of the Act on any question of fact or law arising from anything done or omitted to be done by the Keeper under the Act.

The dispute

The case came forward as an appeal under section 25 of the Act against the rectification of the McCoach's title in favour of the Council. The McCoach's became persuaded that the tomb⁶ was within the garden of their new acquisition, and

³ E.g. Edinburgh 'Evening News' 4th February 2009

⁴ Land Registration (Scotland) Act 1979, section 9(1)

⁵ Section 9(3)(a)(iii)

⁶ I will use the word "tomb" to include both the walled area and the garden fronting it

accordingly registered a title showing it to be so. They were wrong. The Keeper came to the view, firstly, that there was an “inaccuracy” within the meaning of section 9 of the Act and, secondly, that the circumstances disclosed carelessness by the McCoach’s solicitors.

Mr and Mrs McCoach had an active competitor for ownership of the tomb. In 1984 it had come to the notice of the City of Edinburgh Council that the tomb was in disrepair and becoming dangerous. They looked for an owner upon whom they could serve an order. The adjacent proprietors disclaimed responsibility and no other owner could be found despite diligent inquiry. The local councillor, now the Edinburgh South MSP, Mike Pringle, became interested and after due consideration by the planning and development sub-committee it was resolved that the Council should register an *a non domino* title, which they eventually did in 1989. In the course of the next decade the Council gradually improved the tomb as a local amenity, putting in an opening and gate to Chamberlain Road, installing an iron gate to the tomb entrance, and carrying out landscaping. In July 1999 there was an official “opening”⁷ ceremony attended by Mr Pringle, by the Chair of the amenity association and by many local residents, including the then owners of 1 Chamberlain Road. The event was celebrated by a plaque fixed inside the south wall of the tomb, which narrates the history of the tomb and the circumstances in which the Council acquired title.

It is unfortunate that this plaque seems to have been overlooked by the appellants when they viewed their proposed purchase in mid-2003, or before taking entry in mid-March 2004. By then the new deed plan transposed from the foundation title description wrongly showed the tomb within their title. Indeed, it seems that they did not see the plaque until 28th March, 2004. By that time, of course, they had their disposition and shortly thereafter they applied for registered title.

⁷ I understand the deceased was not, however, disturbed.

Matters came to a head when the appellants resisted public access to the tomb. They removed the plaque, locked the gates, planted fast-growing conifers and erected fencing. The Council objected, and applied to the Keeper for rectification of the appellants’ title, to exclude the tomb. The Council claimed title to the tomb fortified by prescriptive possession. After appropriate investigation the Keeper agreed, and decided to rectify. The ground for rectification was the alleged carelessness of the appellants in terms of section 9(3)(a)(iii) of the Act. The appeal ensued.

What the Tribunal had to decide was:

- was there an inaccuracy
 - o i.e. was the appellants’ title habile to include the tomb so that there was no inaccuracy;
 - o and had the Council acquired a good title by prescriptive possession;
- Were the appellants “a proprietor in possession” (if they were, there was no dispute that they had been prejudiced by rectification);
- was the inaccuracy caused wholly or substantially by their carelessness (or, perhaps more accurately, by the carelessness of their solicitors);
- if the appeal succeeded, what should the Tribunal do about it: order re-rectification, or should the remedy be indemnification (probably not a financially attractive proposition in the circumstances)?

The decision

By the end, the appellants conceded the issue of inaccuracy, in particular because their title was not habile to include the tomb. The Tribunal came to the view that the Council did acquire title to the subjects by prescriptive possession, so that the appellants’

title was doubly inaccurate, but the concession made that superfluous⁸.

Had the appeal succeeded the Tribunal were of a mind to “recall the Keeper’s decision to rectify and order him to restore the inclusion of the subjects in the title sheet”⁹.

On what might be regarded as the central issue, the Tribunal decided, however, that the appeal failed, holding that the inaccuracy was caused substantially¹⁰ by the carelessness of the appellants, through their solicitors’ actings.

Inaccuracy

The Tribunal in the appeal found that there was indeed an inaccuracy, and one that could have been discovered by anyone who took the time to check the title against the foundation writ. The main clue was the measurement of the frontage of the McCoachs’ registered title, which at about 126 feet exceeded by some way the measured boundary of 92 feet along Chamberlain Road referred to within the founding title (a disposition of 1938 which repeated verbatim the description of 1856).

The nature of the inaccuracy had a bearing on the issue of carelessness, because whereas there was no real suggestion that the appellants were careless in failing to discover the Council’s recorded Sasine title, it was found that there was carelessness in examining the foundation title.

Proprietor in possession

The Keeper took no issue with the appellants being a proprietor in possession of the tomb, having made his decision to rectify on the basis of an assumption that they were indeed a proprietor in possession. The Council did, however, take up this issue, claiming that the Council’s possession continued

⁸ Accordingly I shall not examine that issue in detail, but I recommend the text of the decision itself to those interested in the nature and degree of use required to establish possession of a public amenity.

⁹ Decision, page 3

¹⁰ NB – not “wholly”

throughout, even after the appellants took entry, and that this was not interrupted even by the erection of the barriers excluding them and the public.

The Tribunal narrowly and “not without difficulty” concluded that the appellants had done “just enough” to establish that they were in possession. The erection of the barriers to entry indeed did not contribute to their possession, immediately having been civilly resisted by the Council. But under reference to Kaur v Singh 1999 SC 180 and Safeway Stores plc v Tesco Stores Ltd 2004 SC 29 the Tribunal looked at the actual possession of the tomb, its occupation and use, in terms of the appellants’ physical control and intent over the relevant period. That period was from the date of entry to when what has been described (in Safeway) as the “tennis match” of contradictory assertions of right began. This on the facts was in two phases. The first was a lengthy period during which the appellants were not living in their house whilst they had extensive conversion works done. The second was the period between their moving in and when the first rally began in the tennis match with the Council. In phase one the Tribunal found that the subjects continued to be publicly accessible. In phase two the appellants became aware of the intrusion. In phase one the public access was neutral¹¹. In phase two they took active steps to resist it. Throughout, the appellants were found to have had the necessary intent, the mental *animus* of the owner, being conscious that their registered title included the tomb. It was not argued that there was any requirement that they be in good faith¹², or that any question of fault was relevant. No

¹¹ Note that the Tribunal had already decided that enjoyment of the amenity provided by the tomb was not civil possession by the Council, so this did not act to exclude possession by the appellants.

¹² *Ex hypothesi*, the party who acts on the faith of the register in a case of doubtful title or a title which becomes open to challenge could always be charged by the challenger with

such argument would have been to the point. The matter thus came down to whether there was demonstrated the necessary degree of possessory control over the subjects, and on the facts the Tribunal just found that there was.

Carelessness

The onus here was on the Keeper and the Council. They argued that there had been carelessness by the appellants' solicitors. The appellants accepted that any such carelessness could be imputed to them¹³.

The main issues of law raised under the heading of carelessness concerned, firstly, what was the required standard of care? Secondly, what duties of care had the solicitors by way of examining title? Thirdly, what were the duties of care in submitting the application for registration?

The factual issues raised by the evidence were, firstly, what reliance could be placed upon a property definition report ("PDR") that had been provided to the appellants' solicitors by the seller's solicitors, and, secondly, to what extent could the founding title to the appellants' subjects be said properly by the appellants' solicitors at the time of application for registration to have been 'habile' to include the tomb¹⁴. It was clear from the evidence that doubt had been raised about whether the tomb was within the subjects before the application for registration. Mrs McCoach had drawn her solicitors' attention to the Council's plaque before registration, and had sought their advice.

On the meaning of 'carelessness', thoughts run immediately to a possible analogy with

having registered in bad faith, but that is not the test.

¹³ A concession which it is respectfully submitted was correctly made. See Wilson.

¹⁴ It was accepted eventually that on no view could it be said to include the tomb once one had considered the measured boundary along Chamberlain Road, the measured areas, and/or had taken into account the neighbouring titles.

the law of negligence, in particular professional negligence on the part of the solicitor. All three parties referred to Wilson v The Keeper of the Registers¹⁵ and Dougbar Properties Ltd v The Keeper of the Registers¹⁶. In the former, an Extra Division pointed to the necessity of specifying as a matter of relevancy what carelessness consisted in, which imported the need to set out the appropriate standard of care. Hunter v Hanley¹⁷ was referred to and, the case being one of carelessness on the part of solicitors, it was stated that there would have to be evidence of departure from a usual and normal practice or that the alleged failure was one which no professional conveyancer of ordinary skill would have committed if acting with ordinary care. In Dougbar, Lord MacFadyen found it not necessarily helpful to look to the concept of negligence and preferred to characterise an act or omission as careless for the purposes of section 9(3)(a)(iii) if it was one which is reasonably foreseeably likely to result in an inaccuracy in the register, and if some step is open to the applicant by which he or she could obviate the risk of inaccuracy. It was a matter of fact and circumstance. As between these two approaches the appellants naturally leant towards the Wilson dicta, as expressing what could be presented as a higher barrier to establishing carelessness, although arguing that not every act of negligence would necessarily be careless, whereas the respondents leant towards Dougbar.

The appellants argued that the appellants' agents had conducted the transaction to the standard reasonably to be expected of ordinarily competent solicitors. The agents had applied themselves to the question of the extent of their clients' title. They had clear searches. They had relied upon the PDR. They had reached a reasonable view that the title was habile to and did include the tomb, and they had answered the questions contained in the Form 1 application in an appropriate manner and to the standard of the

¹⁵ 2000 SLT 267

¹⁶ 1999 SC 513

¹⁷ 1955 SC 200

ordinarily competent solicitor. In any event, any carelessness by the appellants' agents had not wholly or substantially caused the inaccuracy; that had been caused at least substantially by the carelessness of the Keeper's employees.

The Keeper commended Dougar in comparison with Wilson, emphasising that the standard of care is to be applied under section 9 to the acts or omissions of the proprietor in possession, who may be a lay person. In any event in the present case the appellants' agents had failed the standard under either approach. The Council broadly echoed the Keeper's submissions, but added that when looking at the standard of care of a solicitor the relevant care was that for the accuracy of the register, not for the interests of the client.

The Tribunal found that Wilson and Dougar Properties were not essentially contradictory. "Carelessness" would not encompass all situations of delictual negligence. Each case must indeed be viewed in its own facts and circumstances. The relevant care is indeed that for the accuracy of the register entry: the solicitor is not fulfilling a duty to his client, rather the client through the solicitor is under a duty of care in relation to the application for registration. Hence there was the requirement that it be reasonably foreseeable that inaccuracy would ensue from the allegedly careless act or omission.

The Tribunal expressed some dissatisfaction with the evidence of fact, which for various reasons did not include the evidence of anyone who was originally involved in either the conveyancing transaction or the application for registration. One could only speculate about what had happened. The appellants' solicitors had relied upon a PDR instructed by the selling solicitors, but there was doubt as to what the searchers had been asked to do and as to what they had done. What could be said was that, there being a glaring error of measurement in the one measured boundary (to the south, along Chamberlain Road), the searchers did not check that measurement.

Opinion evidence from Professor Rennie was that it was a fundamental duty of the purchasing solicitor to examine the title and accurately transpose the property description for registration. In case of doubt, lineal measurements should be checked by appropriate professionals. A PDR, which normally was an exercise of comparing plans, could not be relied upon unless the solicitor was entitled to take the view that the description with boundary measurement had been compared to the OS plan by the searchers. In the present case he was not so entitled. After learning of what the plaque said about the Council's ownership the answer to question 14 in the Form 1 application was inadequate; the Keeper's attention should have been drawn to the competing claim. The purchasing solicitors having described the Sasine description as vague, Professor Rennie doubted that it was but would have expected detailed analysis where there was such a dispute or doubt. The description was not habile to include the tomb and the solicitors' argument, by which they had concluded that it was, was not rational¹⁸.

Donald Reid, solicitor, opined as the appellants' expert that their solicitors had been entitled to rely on the PDR as resolving any doubts about title to the tomb. It entitled them to proceed to apply for registration in the usual way. They were entitled to assume that the verbal property description had been considered and compared

¹⁸ They had argued that where the description described the East boundary as bounded "by the walls of the old tomb", that could mean bounded by the farthest side of the farthest walls so that the nearest walls and the tomb and garden were within the subjects being acquired. Cf. Houston v Barr 1911 SC 134 per Lord Dundas at 140: "The general rule of construction is quite settled (I quote Lord Rutherford Clark's words in *Currie v Campbell's Trustees* [(1888) 16 R 237 at 241], 'That what is described as the boundary of a feu in the feu disposition which creates it is by that very fact excluded from the feu.'" See also Butt v Galloway Motor Co Ltd 1996 SC 261.

with the OS map. They should not be judged with hindsight, and if the searchers took a risk in verification that was not the solicitor's problem. He did not accept that any answer to the Form 1 questions was careless.

The Tribunal noted that the circumstances called for particular care: highly unusual subjects; indications of third party interests; an acknowledged doubt¹⁹; a first registration including the transposition of a verbal description to a plan; and a description that was not a full bounding description²⁰. At the stage up to an including the solicitors' decision to proceed on the basis that the purchase would include the subjects it was not careless to have taken the view that there had been an adequate search for competing titles. Nor was it careless for them not have looked at the neighbouring titles. It was, however, careless for them to omit to examine the foundation title and compare the description to the OS map²¹. Had they done so they could not have taken the view that it was habile to include the tomb. In any event it was for them to resolve what was, essentially, a legal issue for the solicitor concerned. Mr Reid's expert opinion assumed that they had done so, whereas the evidence was that they had not. The solicitor could not abdicate that responsibility to the searcher by way of reliance on the PDR. Nor, indeed, was it clear on the evidence that the PDR had resolved all doubt. It was clearly foreseeable that insufficient care in the examination of the title might result in inaccuracy.

Looking secondly at the stage when the solicitors completed the Form 1 application, it was found not careless in the circumstances to answer

question 3²² in the negative. It may have been wrong, but was not careless. The negative answer to question 14²³ was, however, both wrong and careless. No matter what he thought about the additional information that might be disclosed, the solicitor was required to consider whether the Keeper might regard the additional information²⁴ as material, and whether its non-disclosure might lead to inaccuracy. In the circumstances the information should have been reported so that the Keeper could carry out his investigation on an informed basis.

Causation

On whether the appellants' agents' carelessness caused the inaccuracy the Tribunal found that in law it is enough that the carelessness was a real cause of substance as opposed to something negligible or slight, and that there might be circumstances in which the Keeper's carelessness was the overwhelming cause. Here, however, the applicants' solicitors had more information than the Keeper, were familiar with the circumstances and aware of the issue, yet added the erroneous plan to the conveyance: theirs was the substantial cause of the inaccuracy.

Remedy

Although the appeal failed, the Tribunal indicated, for the first time, what would be its preferred approach to remedy in a successful appeal. The appellants had sought reduction of the Keeper's decision. The Keeper and the Council both submitted that reduction was not available, being within the privative jurisdiction of the Court of Session and incompetent because what was sought was rectification of the title sheet, something that

¹⁹ Including evidence that the selling solicitors had initially held the view that the tomb was excluded.

²⁰ It had only one measured boundary plus the overall area. The PDR comparison exercise was thus technically impossible in terms of a report giving full assurance.

²¹ Which, on the evidence, was to hand.

²² Whether there was any person in adverse possession of the subjects or any part.

²³ Whether there were facts or circumstances material to the right or title of the applicant which had not already been disclosed.

²⁴ i.e. in this case the information disclosed by the plaque that the Council had a title.

the Tribunal could achieve only by ordering the Keeper to rectify. There was however no present inaccuracy that could justify rectification under section 9. The remedy available to the appellants was compensation by a claim under indemnity.

The Tribunal expressed a view that its powers in exercise of its statutory jurisdiction included, not the remedy of reduction, but the power to recall or quash the Keeper's decision and to order him to restore the register to the position it was in before his erroneous decision. They took an analogy to the revocation of firearms licences, and appeals against correction by an Assessor of errors in the valuation roll for rating purposes. Such remedies would not restore inaccuracy to the register because *ex hypothesi* if the Keeper had no entitlement to rectify the register in the first place, the registration system tolerated the alleged inaccuracy; to fail to restore the register to the status quo ante after an erroneous decision by the Keeper would arguably itself mean the register was inaccurate. The breadth of the appeal jurisdiction under section 25 allowed the Tribunal to reverse what had been done, and the Council's position was not relevant: "Quite simply, this is not rectification, but the exercise of an appeal jurisdiction."

With the greatest respect, it is difficult to understand what the Tribunal means to imply by this. The breadth of the appeal jurisdiction should not be confused with the breadth of the remedial powers conferred. The view taken of the breadth of the appeal jurisdiction sits uncomfortably with the terms of section 9(2) which confers upon the Lands Tribunal the power to order rectification, and the terms of section 12 which deals with indemnification as a matter for the Keeper.

Although *ex hypothesi* the decision to rectify was wrong, the Tribunal must surely take the register as they find it at the date of the appeal. To say otherwise is to say that the register cannot be relied upon pending the result of any appeal. If the Tribunal can strike down a rectification and thus directly alter the register it appears to go further than can be achieved by decree of reduction, and


appears to ignore the real right of the party then registered with the protection of the statute²⁵. There is no statutory provision for recall of the Keeper's decision. To quash the decision seems a semantic breath from what is truly a reduction, and there is great risk in taking power by analogy with statutes which contain express powers²⁶. The express power given by the 1979 Act is the power to order rectification. If rectification is not available in the instant case that is not ground to be inspired with alternative powers.

These are difficult issues and would merit being revisited in an appropriate case.

Lessons

In the meantime, the case is helpful in informing practitioners with regard to their duties of care, particularly in reminding them of the solicitor's overriding responsibility to examine titles and to resolve reasonable doubts. We are also reminded of the duty to give adequate disclosure in answer to the Form 1 questions so that the Keeper may carry out his duties in an informed way. Simply 'taking a view' that what he doesn't know won't hurt him may simply mean that the party hurt ends up being the solicitor's client.

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The logo for Murray Stable, featuring the words "murray stable" in a blue, lowercase, sans-serif font. The word "murray" is on the top line and "stable" is on the bottom line, with a thin blue horizontal line above the word "stable".

²⁵ Short's Tr v Keeper 1994 SC 122

²⁶ E.g. the power to give directions as the court thinks fit, such as to restore a licence, under Schedule 5, Part III, of the Firearms Act 1968, or the power of the Valuation Appeal Committee to direct that an entry be made in the valuation roll following a complaint under section 22 of the Local Government (Scotland) Act 1966.