

Case Law Spotlight

Forbo-Nairn Ltd v Murrayfield Properties Ltd [2009] CSIH 94.

The Civil Appeal Court of the Court of Session (otherwise known as “the Inner House”) recently issued a decision clarifying how commercial contracts ought to be construed. The dispute concerned the sale of four acres of land in Kirkcaldy. In addition to the sale of the subjects themselves, the missives also dealt with an area of land to be retained by the sellers to the North of the sale site and a further area of adjoining land which the purchasers might also have purchased at a later date. A clause was inserted to the effect that the purchasers, or any of their nominees or subsidiaries, were prohibited from developing the subjects or any part of the adjoining land for housing. To that end, the purchasers were required to draft and execute a deed of conditions inserting a burden over the subjects and the adjoining land to give effect to that restriction in use. The sellers sought and obtained a formal declaration from the Court that the obligation was a real burden which ran with the land. The purchasers argued that the obligation was only a personal one which affected them and their nominees or subsidiaries only and not successors in title, which argument was rejected by the Court. They appealed against that decision and their appeal was heard by three judges. Reference was made to a decision of Lord Drummond Young called *Emcor Drake and Scull v Edinburgh Royal Joint Venture* 2005 SLT 1233 which sets out 7 canons of construction in relation to commercial contracts and which formed the basis of the original Court decision. At appeal, the Inner House approved that decision but formed its own determination on a more straightforward basis. By reference to the House of Lords case of *Bank of Scotland v Dunedin Property Investment Company* 1998 SC 657, it held that if the meaning of the whole clause of a contract is plain by being given its ordinary meaning, then the matter finishes there without the need to consider the other canons of construction. They only come into play if there is an ambiguity or uncertainty or if there is a mistake in the contract which is readily identifiable. In this case, references to “restriction on use” as that expression is understood in conveyancing and planning terms does not focus on the parties to the bargain but, rather, it runs with the land and therefore includes successors in title. If that were not the case, the purchasers could easily avoid the obligation by transferring title to a third party. That would not be a commercially sensible interpretation and cannot have been intended by the parties to the transaction.

Such a restriction was of course a great disadvantage to the purchasers, but as the Court also recognised in the *Emcor* case, it must be alive to the position of both parties to the contract and accept that a provision may be the result of compromise or that one party may simply have made a bad bargain. The Court must give effect to the parties' bargain and cannot substitute a different one from that which the parties have made.

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