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were unlikely to have been acting without sufficient care so long as the usual clinical procedures were followed; and any insurance which the defenders had taken out under which the pursuer might have claimed as a third party was unlikely to have covered the causally unusual alleged injury of the patient's developing an addictive personality.

#### D. CONCLUDING REMARKS

As the first and last of the above cases indicates, the difficulty in succeeding in a case of promise based upon the express conduct or words of the defender is often because such conduct or words fail objectively to disclose any promissory intent. Promise is an onerous obligation, and parties (whether commercial parties, doctors, or private individuals) do not typically intend to undertake unilateral undertakings in favour of others, so it should not be surprising that, where promise is argued, the claim often fails. Nonetheless, pleaders should not be deterred from averring promise as one of a number of alleged bases of a claim; the failure to include it in an appropriate case may represent a missed opportunity. As the second of the cases examined indicates, promise may also be *habile* for characterising some types of legal liability which have hitherto not been sufficiently clearly explained in the law. Though parties may not frequently intend to undertake promises in favour of others, there are some cases (such as partnership debts) where it may be entirely appropriate, in the interests of protecting a particular class of person, for the law to deem a unilateral undertaking to have been made, such a unilateral undertaking being most appropriately characterised as a promise.

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### The Lodge with Three Names: *Lubbock v Feakins*

There are two types of rectification: one relates to the rectification of defectively expressed documents<sup>1</sup> and the other to the rectification of inaccuracies in the Land Register.<sup>2</sup> In many but not all cases, rectification of the Land Register follows judicial rectification of a defectively expressed document. As the law stands, even where there is an inaccuracy in the Land Register the Keeper cannot rectify if rectification would adversely affect the registered proprietor in possession, unless the inaccuracy has been caused wholly or substantially by the fraud or carelessness of that proprietor.<sup>3</sup> The Keeper is, however, empowered to rectify an inaccuracy in the Register if a court or the Lands Tribunal for Scotland orders her to do so consequent upon the making

1 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8.

2 Land Registration (Scotland) Act 1979 s 9.

3 s 9(3)(a)(iii).

of a rectification order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.<sup>4</sup> In *Lubbock v Feakins*<sup>5</sup> the sheriff had to decide whether a lodge which had formed part of an estate had, first of all, been bought and sold in terms of missives, secondly (assuming it had not) whether it had been inaccurately included in the title sheet of that property and thirdly whether rectification of the Register was possible.

### A. THE FACTS

In 2002 the owners of an estate at Harwood near Bonchester Bridge, Hawick, decided to sell it under exception of Harwood Mill and the Lodge which was variously known as Clocker Lodge, The Clocker and Harwood Lodge. The Lodge itself was occupied by a former housekeeper in terms of a liferent agreement entered into in 1997. The estate agents who were instructed in the sale prepared particulars with a computerised plan. Instructions were given to the estate solicitors to enter into missives of sale of the estate under exception of Harwood Mill and The Lodge to Robin Feakins. Missives were concluded on 30 August 2002. The subjects were described as part of Harwood Estate and were shown on a plan annexed to the missives. Unfortunately the Lodge actually lay under the red delineating line on the plan with the word “Lodge” being within that red boundary line. On one interpretation of the missives the Lodge was therefore included in the subjects of sale.

However, by a fax of 15 August 2002 the estate solicitors advised Mr Feakins’ solicitors that “Clocker Lodge” and Harwood Mill were not included. The estate trustees executed a disposition in favour of Mr Feakins and the subjects conveyed were delineated and coloured red on a plan annexed. This disposition was then registered in the Land Register on 19 December 2002. The Lodge again lay under the red line on the title plan annexed to the disposition and was therefore included in the title plan in the property section of the title sheet registered under ROX 4028. In fact, the Lodge and the adjacent road were plotted on the title plan as being within the registered subjects. There was no exclusion of indemnity in the property section of the title sheet. The liferenter remained in possession throughout and Mr Feakins took over the insurance policy for the whole estate, which extended to the Lodge, in the belief that he owned it.

In 2003 Mr Feakins took legal advice and removed the Lodge from the insurance cover having been told that he was under no obligation in terms of a liferent to pay for insurance, this being the responsibility of the liferentrix. In November 2009 Mr and Mrs Feakins made a visit to the liferentrix and during the conversation Mr Feakins advised the liferentrix that he owned the Lodge. This came as a surprise to the liferenter who had thought that the property was still owned by the estate trustees. The trustees were advised and their solicitors then raised the matter with Mr Feakins’ solicitors. At the time of the raising of the action and thereafter the liferentrix was and is in occupation and Mr Feakins has again insured the Lodge. In so far as possession is

4 s 9(3)(b).

5 Jedburgh Sheriff Court 17 Feb 2012, available at [http://www.scotcourts.gov.uk/Opinions/AJ99\\_10.html](http://www.scotcourts.gov.uk/Opinions/AJ99_10.html).

concerned Mr Feakins lived and continues to live in Harwood House and he and his family farm the estate. The road outside the Lodge which is the only access is in daily use by Mr Feakins, his family and other parties and the hedgerows are maintained by Mr Feakins' family. The estate trustees sought declarator that the subjects known as Clocker Lodge with a servitude of access over the adjoining road and a servitude for a septic tank were not included in the property conveyed to Mr Feakins and subsequently registered under Title Number ROX 4028. The second defender was the Keeper of the Registers.

## B. THE MISSIVES AND THE DISPOSITION

The subjects were described in the offer of 18 July 2002 as including the whole houses, buildings and erections and the *solum* of any public roads. The qualified acceptance of 29 August 2002 in response to the offer stated that the subjects to be conveyed would be the subjects shown outlined in red on a plan annexed and signed as relative to the acceptance under exception of subjects which had already been conveyed away. No specific mention was made of the Lodge (under any name). There was also an "entire agreement" clause to the effect that the missives would at the date of conclusion represent and express the full and complete agreement between the seller and the purchaser and would supersede the previous agreement if any. The disposition described the subjects in the following terms:

Those parts and portions of the lands and estate of Harwood in the County of Roxburgh as also those parts of the lands of Shankendsiel in said County delineated and coloured red on the plan marked "plan 1" annexed and signed as relative hereto.

There was then a list of exceptions none of which related to the Lodge. The plan attached was a coloured A3 size version of the plan which had already been prepared by the estate agents and was on a scale of 1:25,000. The appellation "Clocker Lodge" was neither mentioned in the disposition nor shown as such on the plan.

## C. THE EVIDENCE

Andrew Lubbock, one of the estate trustees, explained the historical background to the ownership of Harwood Estates. He gave evidence to the effect that the Lodge had always been known as Clocker Lodge. Apparently the word "Clocker" is a term for a brooding hen. He could of course give no evidence as to the proper interpretation of the documentation and plans. His view, however, was that looking at the plan attached to the qualified acceptance no-one could actually determine whether the Lodge was on, outside or inside the red boundary line. So far as the plan attached to the disposition was concerned Mr Lubbock's view was that whether the Lodge was included or not was obscure.

The representative of the estate agents explained that the plan prepared by them for the draft sales particulars was merely a computerised draft for marketing based on the Ordnance Survey. Mr Feakins had submitted an offer at a very early stage before any public marketing. He explained that the draft sales particulars did not contain any express mention of the exclusion of Harwood Mill and Clocker Lodge, the view being

taken that such a statement might at that stage deter potential purchasers. He stated that the plan prepared had never been intended for use either in the missives or as an annexation to the disposition. The representative of the estate agents thought it was hard to see what was in and what was out by looking at the plans.

The solicitor who had acted in the sale confirmed that the instructions had been to exclude Clocker Lodge. The solicitor also advised that there had been a number of different versions of the sales particulars. The solicitor's view was that it was not clear from the plan attached to the qualified acceptance whether or not the Lodge was excluded. It was unfortunately not clear whether an A4 or an A3 plan had been the plan originally attached to the qualified acceptance. The solicitor did however have to concede that looking at the missives on the A3 plan it was possible to conclude that the Lodge was included. The solicitor also accepted that the subjects on or within the outer edge of the red line were normally to be regarded as included.

The liferentrix confirmed that the property had been known as "The Clocker" since July 1996 and that it was her that put up the "Harwood Lodge" sign. Until the visit of Mr and Mrs Feakins she had assumed that the estate trustees were the owners. Indeed while she paid for electricity and council tax, external repairs and maintenance were paid for by the trust.

Mr Feakins indicated that as far as he was concerned the price of £2.7 million included the entire estate with the exception of Harwood Mill. He did not believe that it had ever been brought to his attention that the so-called Clocker Lodge was to be excluded. It was his belief that the subjects known as Harwood Lodge were included although he was aware that it was occupied by the former housekeeper to Baroness Elliot. Mr Feakins' recollection was that his solicitor had not taken up with him the faxed letter from the estate solicitors of 15 August 2002 when they stated that neither Clocker Lodge nor Harwood Mill were included. Mr Feakins described himself as a "self made man". He was a man who tried to make sure that he got what he was supposed to get.

The Sheriff was disposed to accept that the fact that the Lodge had different names could have resulted in the confusion. It would not have been necessarily apparent to Mr Feakins that the Harwood Lodge occupied by the liferentrix was the same as the Clocker Lodge referred to in the fax.

Mr Feakins' solicitor confirmed that he had not taken instructions from Mr Feakins on the faxed letter from the estate solicitors of 15 August 2002 since the subjects to be conveyed were those shown on the plan attached to the qualified acceptance. He did not know where Clocker Lodge was but pointed out that the red boundary line went over the footprint of The Lodge and that the red line was within the subjects.

#### **D. THE SUBMISSIONS**

The estate trustees did not seek judicial rectification<sup>6</sup> of the missives and the disposition on the basis that the Lodge, by whatever name, was never intended to be sold. Instead they sought rectification of the Land Register, arguing that in terms

6 In terms of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

of the missives and disposition the Lodge was neither sold nor conveyed. It may be that the chances of rectifying both missives and disposition in terms of section 8 rectification were considered slim.<sup>7</sup> It was argued that the scale of the plan attached to the disposition precluded an accurate determination of whether the Lodge was included or excluded. Accordingly the disposition had to be regarded against the background of the parties' intention.<sup>8</sup> The missives contained an entire agreement clause, but counsel for the estate trustees argued that this did not in fact exclude extrinsic evidence as to the actual intention of the parties as a way to interpret the disposition.<sup>9</sup>

It was conceded that the court could not rectify the Land Register against a proprietor in possession unless the inaccuracy (assuming there was one) had been caused wholly or substantially by the fraud or carelessness of the proprietor in possession. Here it was obvious that Mr Feakins was not in physical possession of the Lodge. It was clear that Mr Feakins had natural (physical) possession of the entire estate apart from the Lodge. It was argued that he was in civil possession of the Lodge as the liferentrix was there by his tolerance, and that he was in natural possession of the adjacent road in the only way that a road could be possessed (by usage). There was an obvious difficulty in that the liferent rested on an unregistered minute of agreement to which Mr Feakins was not a party. It could hardly be argued that Mr Feakins was in some way bound by that agreement as a singular successor to ownership of the Lodge although one supposes that if he had notice of the agreement an element of personal bar might arise. The argument which was put to the sheriff was that it was open to the liferentrix to register the minute of agreement and thereafter to ask the Keeper to note her liferent as an overriding interest. If that happened it was argued that Mr Feakins would then become the fiar in which case he would clearly have civil possession. His tolerance of the liferentrix's possession was, it was argued, equivalent to civil possession.

## E. THE DECISION

The sheriff summarised the facts pointing out that it was not disputed that a mistake had been made in as much as the trustees never intended to sell the Lodge. Moreover, the estate solicitors had pointed out in the fax of 15 August 2002 that Clocker Lodge was not included. The Sheriff, however, did point out that the exclusion of Clocker Lodge was not actually specified expressly in the missives nor the disposition and everything was left to an interpretation of the plans attached to both these documents. The sheriff accepted that the plan in the property section of the title sheet included the Lodge and the adjacent road.

The sheriff narrated the terms of section 9 of the 1979 Act in full and then went on to consider whether there was an inaccuracy in the Register. The evidence in relation

7 See the comments in G H Gretton and K G C Reid, *Conveyancing*, 4<sup>th</sup> edn (2011) para 20-03.

8 See *Holdsworth v Gordon Cumming* 1910 SC (HL) 49

9 Reference was made to *Macdonald Estates plc v Regenesis* (2005) *Dunfermline Ltd* 2007 SLT 791 at 825.

to the plan attached to the disposition only came from witnesses who were actually involved in the transaction none of whom could be said to be experts in the reading or examining of plans. Some witnesses had referred to a miniscule kink or indentation in the red line at the point where the Lodge lay. Most of the witnesses saw the kink as affecting the road rather than the Lodge. The sheriff pointed out that ownership of the road was not the issue. The sheriff accepted the evidence of the selling estate agent and the solicitor who acted for Mr Feakins to the effect that the Lodge was either under or within the red line. In dealing with the proposition that (assuming the disposition plan was ambiguous) reference could be made to the plan attached to the missives the difficulty was that no-one seemed clear as to which plan was attached to the qualified acceptance. Indeed it seems as though the original plan was not produced. Nevertheless, the plans which were produced were no improvement on the plan attached to the disposition. Assuming that both disposition and missives plans were ambiguous the Sheriff then referred to the entire agreement clause in the missives, and held that this precluded establishing the objective intention of the parties other than by looking at the missives themselves. In any event there was no common understanding between the parties in relation to the Lodge.

Perhaps the most challenging issue was whether or not Mr Feakins enjoyed civil possession of the Lodge. The concept of a proprietor in possession for the purposes of rectification has of course caused difficulty.<sup>10</sup> It was conceded that what amounted to possession had to be tailored to the nature of the subjects. In looking at possession of a farm or a whole estate one would not necessarily expect actual daily possession of every square metre. Indeed, in *Tesco Stores Limited v Keeper of the Registers of Scotland* it was argued that possession of the majority of an estate was equivalent to possession of the whole. In this case however it was conceded that any possession on the part of Mr Feakins had to be civil possession standing the liferentrix's occupation.

The sheriff held that Mr Feakins could be construed as a proprietor in possession of the estate including the Lodge and listed certain facts and circumstances which "had a bearing" on the issue of possession. These facts were as follows: (a) Mr Feakins acquired the estate, lived in the main house, farmed the estate and was in possession of the estate taken as a whole; (b) there were 13 individual houses or cottages on the estate quite apart from the Lodge; (c) the previous insurance cover taken out by the estate trustees was continued by Mr Feakins and this included the Lodge; (d) Mr Feakins took advice from his solicitor as to his responsibilities to the liferentrix, something he would not have done if he had not thought he was the owner; (e) having received legal advice to the effect that as owner he did not have liability for the insurance he cancelled the insurance cover but allowed the liferentrix to remain in occupation; (f) having seen the minute of agreement on which the liferent was based and being unsure of the situation Mr Feakins reinsured the Lodge in case he was bound to do so; (g) the most prominent natural boundary of the Lodge was the hedge bounding the road and the natural boundary of the estate was the road; (h) the liferentrix never herself believed that she owned the Lodge; (i) the estate trustees had

<sup>10</sup> See *Kaur v Singh* 1998 SC 233; *Tesco Stores Limited v Keeper of the Registers of Scotland* 2001 SLT (Lands Tr) 23.

no title to the Lodge and so the liferentrix could not have occupied it civilly on their behalf; (j) it was not disputed during the proceedings that Mr Feakins had title to and possession of the road bordering the Lodge; (k) the Lodge lay between the road bounding it and the remainder of the estate, and Mr Feakins was in natural possession of the road and the estate which surrounded the Lodge.

It is perhaps significant that none of the factors listed by the sheriff in his judgement are adverse to the notion that Mr Feakins had civil possession of the Lodge. There would, I think, have been little doubt that the liferentrix herself believed that the owners were the estate trustees at least up to the time of Mr and Mrs Feakins' visit to her. Another point against the proposition that Mr Feakins had civil possession of the Lodge is that the liferent, so called, was constituted in a minute of agreement between the estate trustees and the liferentrix; Mr Feakins obviously was not a party to the original agreement but more importantly neither was he a party to any new agreement with the liferentrix at the time of his purchase. Accordingly the liferentrix's right to occupy depended on the minute of agreement. Although the right of occupancy was referred to as a liferent it only created a personal right of occupancy which would not have bound singular successors of the estate trustees.

## F. CONCLUSIONS

Two important issues arose in this case. In the first place there was the question of the extent of the subjects bearing to be conveyed. In the second place there was the question of whether or not rectification of the Register was possible which in turn depended on whether or not Mr Feakins was to be regarded as a proprietor in possession. In relation to the first question it is perhaps odd that no expert witness was called by either side in relation to the interpretation of the plans and in particular the question of whether it was the outer edge of a red line or the inner edge which was the legal boundary. Some guidance is offered on the Registers of Scotland website.<sup>11</sup> What is said there is that "occasionally" red edging is applied "externally" to the boundary defining the subjects. This could happen where the red edge covers another colour reference or important detail near to a boundary. For this reason it should not apparently be assumed that the registered extent includes up to the outer edge of the red but rather the registered boundary is the line (firm or pecked) to which the red line has been applied. Given that the guidance uses the word "occasionally" the assumption presumably is that in the vast majority of cases it is the outer edge of the red line which is the legal boundary but this is not stated in terms. In some cases there are notes in the property section which indicate that the boundary is the outer face, inner face or mid line of a particular boundary feature. Such a statement would override any presumption to be applied arising from the width of the red line. It seems to have been accepted in the case that it was the outer edge of the red line which fixed the legal boundary. The question of rectification would only have arisen if it had been accepted there was an inaccuracy in the Land Register in the first place. Since the

<sup>11</sup> See Registers of Scotland, *Agency Conventions Regulating Plans References*, available at [www.ros.gov.uk/pdfs/plans\\_ref.pdf](http://www.ros.gov.uk/pdfs/plans_ref.pdf).



sheriff did not accept that there was an inaccuracy the question of possession was actually academic.

Logically however certain things are clear: (a) Mr Feakins did not have natural possession of the Lodge at any time; (b) the occupancy arrangements set out in the minute of agreement did not bind Mr Feakins who could presumably have demanded that the liferentrix vacate; (c) since Mr Feakins' claim that the liferentrix was possessing for him depended on some legal relationship between her and him he could not be said to be in civil possession.

The sheriff took the view that at the point the liferentrix was advised of Mr Feakins' ownership claim she possessed by way of the licence, permission or more appropriately the tolerance of Mr Feakins and that tenuous link was enough for her possession to be regarded as civil possession for him. It would have to be said in support of that theory that even where natural possession is claimed the extent of that possession can be very slight indeed.<sup>12</sup> However, where civil possession is concerned it is not the extent of the possession which is relevant; it is the legal nature of that possession and the need for it to be dependent on a more substantial right vested in another person such as ownership. If one were to regard the liferentrix here simply as a squatter but nevertheless someone who might be said to have a moral claim to remain in possession which Mr Feakins was prepared to respect it is difficult to see how that could have amounted to civil possession.

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## Right of Appropriation and Legal Change

The EC Directive on financial collateral arrangements ("FCD")<sup>1</sup> allowed Member States to introduce legislative provisions to permit,<sup>2</sup> on the occurrence of an enforcement event and subject to specific conditions set out in the security document,<sup>3</sup> the collateral taker to realise the financial collateral by way of appropriation.<sup>4</sup> This was an attempt to improve the legal certainty of financial collateral arrangements and to ensure that certain provisions of insolvency law that would inhibit the enforcement procedures did not apply to such arrangements.<sup>5</sup>

12 *Hamilton v McIntosh Donald Limited* 1994 SLT 793. See R Rennie, "Possession: nine tenths of the law" 1994 SLT (News) 261.

1 Council Directive 2002/47 on financial collateral arrangements OJ 2002 L168/43.

2 Art 4(3) FCD. It should be noted that in implementing the Directive, no Member State made use of the option not to recognise appropriation as a method to enforce financial collateral.

3 That is, the parties' agreement on enforcement by appropriation and on valuation of the financial instrument (art 4(2) FCD).

4 Art 4(1) FCD.

5 FCD, recital 5.