



**SHERIFF APPEAL COURT**

**[2023] SAC (Civ) 17  
EDI-A184-20**

Sheriff Principal S Murphy KC  
Appeal Sheriff H K Small  
Appeal Sheriff T McCartney

**OPINION OF THE COURT**

delivered by Appeal Sheriff Thomas McCartney

in the appeal in the cause

**MRS ISABELLA PATON KERR LANGSKAILL**

Pursuer and Respondent

against

**MS TRACY-ANNE BLACK**

Defender and Appellant

**Defender and Appellant: Tosh, Advocate; Dentons UK and Middle East LLP  
Pursuer and Respondent: Middleton, Advocate; Lindsays LLP**

27 April 2023

**Introduction**

[1] The pursuer is the heritable proprietor of 2 St Ronan's Terrace, Edinburgh. Her late husband, Mr Robert Langskaill, purchased the property in 1962. Access to the cottage and its garden grounds at 2 St Ronan's Terrace is taken via a lane which runs east to west from the public road known as St Ronan's Terrace ("the lane").

[2] Since around 1962 the pursuer and her late husband have been in possession of the lane and acted as if heritable proprietor in various ways as set out on record.

[3] In or around 2010 Mr Langskaill discovered that his title did not include the lane. To resolve this position in 2011 he granted a disposition *a non domino* to the pursuer to include title to the lane. A disposition in 2012 re-conveyed a one half share of 2 St Ronan's Terrace (including the lane) to Mr Langskaill. Mr Langskaill's share reverted to the pursuer upon his death in 2015.

[4] The defender is the heritable proprietor of 63 Morningside Drive, Edinburgh. The lane is bounded on the north side by *inter alia* the gardens of the defender's property. The defender disputes that the 2011 disposition conveyed title to the lane.

[5] The defender has asserted that she holds a servitude right of access over the lane. The defender has applied for planning consent to *inter alia* create vehicular access from the lane and the construction works proposed by the defender require access over the lane.

[6] The foregoing is all as averred by the pursuer on Record which for present purposes require to be taken *pro veritate*. The pursuer further avers that the defender does not currently have a servitude right of access over the lane, any such right having negatively prescribed.

[7] Based on these averments, the pursuer craves declarator that the 2011 disposition by Robert Langskaill in her favour is habile to include the lane for the purposes of prescriptive possession, declarator that any servitude of access over the lane in favour of 63 Morningside Drive has negatively prescribed, and interdict orders against the defender from *inter alia* entering or encroaching onto the lane. There is a counter claim in which the defender craves declarators which substantially mirror the pursuer's craves.

[8] The action proceeded to debate, the pursuer having offered a proof before answer, in respect of the defender's preliminary pleas, the first being that the pursuer having no title or

interest to sue the action should be dismissed and the second being directed at the relevancy and specification of the pursuer's averments.

[9] Following debate, the sheriff concluded a proof before answer to be appropriate and pronounced an interlocutor accordingly. It is that interlocutor against which the defender appeals.

### **2011 Disposition**

[10] The description of the property in the 2011 by Mr Langskail to the pursuer is as follows:

“ALL and WHOLE that area or piece of ground with the dwellinghouse known as Two St Ronan's Terrace, Edinburgh, and other buildings erected thereon being the subjects described in Disposition by Mrs Elizabeth Austin in favour of Mrs Elizabeth Hardie dated Eleventh and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh (now Midlothian) on Twelfth, both days of May Nineteen Hundred and Twenty two and which subjects are shown delineated in red on the plan annexed and assigned as relative hereto”

[11] It is accepted by the pursuer that the property description in the 2011 disposition is inherently contradictory: it incorporates the verbal description contained within the 1922 disposition (which does not include the lane) and describes the subjects by reference to the plan annexed to the 2011 disposition (which does include the lane).

### **Submissions for Defender and Appellant**

#### ***Ground 1***

[12] The description in the 2011 disposition incorporates by reference the description of the subjects conveyed by the 1922 disposition, which is equivalent to the full insertion of the description contained in the 1922 disposition (Conveyancing (Scotland) Act 1874, section 61). The description also incorporates the plan.

[13] The description of the subjects conveyed by the 1922 disposition is a detailed verbal description (although it also contains a reference to a plan). It is also a bounding description. The subjects conveyed are described in part as “bounded .... by the lane”. The boundary of the subjects does not form part of the subjects. As a result, the subjects described in the verbal description contained in the 1922 disposition and incorporated by reference in the 2011 disposition exclude the lane. There is a manifest discrepancy between the verbal description by reference to the 1922 disposition and the plan annexed to the 2011 disposition which cannot be reconciled.

[14] The usual or general rule of construction of a disposition is that where there is an irreconcilable discrepancy between a detailed verbal description and a plan the verbal description prevails unless the plan is declared to be taxative.

[15] At debate, and in the Note of Appeal, the submission for the defender was that this rule is absolute. While that position was not maintained, it was submitted that it is a general rule or presumption which, to rebut, requires circumstances pertaining to the terms of the deed to be identified to provide a basis for further inquiry. In this case there are no circumstances averred which would justify a departure from the general rule that the verbal description should prevail. The sheriff does not identify any such averments. There is nothing to be gained from inquiry into the facts.

[16] In support of the submission that there is such a general rule of construction, reference was made to *Drumalbyn Development Trust v Page* 1987 SC 128, and to various textbooks, JM Halliday, *Conveyancing Law and Practice in Scotland* (2<sup>nd</sup> edition, 1997) Volume 2, paragraphs 33.11 to 33.13, WM Gordon, *Scottish Land Law* (2<sup>nd</sup> edition, 1999) paragraph 4.08, GL Gretton and KGC Reid, *Conveyancing* (5<sup>th</sup> edition, 2018) paragraphs 8.29 and 12.22. In addition reliance was placed upon an observation by Lord Hodge in the Privy

Council (Guernsey) case of *Lovering v Atkinson* [2021] 1 P & CR 18 (paragraph 30) and an English Court of Appeal decision in the case of *Druce v Druce* [2004] 1 P & CR 26.

[17] In short, the subjects conveyed by the 2011 disposition are described in the verbal (bounding) description. That description excludes the lane. It is not habile to include the lane. The pursuer is not entitled to declarator as first craved. The sheriff ought to have held that the pursuer's averments in support of that crave were irrelevant, sustained the defender's plea in law to that effect and dismissed the first crave for declarator.

### *Ground 2*

[18] The sheriff erred in holding that possession alone could constitute sufficient title and interest to sue in respect of the remaining craves in the principal action (declarator that any servitude of access over the lane in favour of the defender's property had negatively prescribed and interdict against encroachment etc.).

[19] A bare possessor has no right to possession. He has merely the right not to be dispossessed other than by consent or legal process. Bare possession is not sufficient to sue for any petitory or possessory remedy other than in an action founded on spuilzie (ejection), which this action is not.

[20] Apart from the case of spuilzie, remedies for the protection of possession can be held only by the owner of the property or by one, such as a tenant, who derives his title from the owner.

[21] In order to have title to sue for declarator or interdict, the pursuer would require to show (1) a legal title to the lane and (2) possession for seven years following upon that title.

[22] So far as any legal title is concerned, the pursuer relies only upon the 2011 disposition. It is not capable of giving the pursuer any right to possession of the lane

because the land conveyed by the 2011 disposition is not habile to include the lane. As a result, the pursuer does not have title to sue for declarator or interdict in the terms sought in the remaining craves of the principal action.

### **Submissions for Pursuer and Respondent**

#### ***Ground 1***

[23] Internal inconsistency in the description of property within a disposition does not prevent that disposition being a foundation writ for prescription. Ownership can be acquired by prescription over land capable of falling within either construction. The case of *Auld v Hay* [1880] 7R 663 was the leading authority. From that case three propositions can be taken: 1) the question of what a description is habile to include depends entirely on the terms of the disposition itself, extrinsic evidence is not admissible; 2) in deciding what a description is habile to include, the court is not concerned with the true construction; 3) if a description is capable of more than one meaning, possession resolves the ambiguity.

[24] Since it is possession which resolves any ambiguity, that requires proof. While the 2011 disposition contains a bounding title it is not one that is capable of identifying the boundary with precision due to the discrepancy between the verbal description and the plan. As demonstrated by the case of *Nisbet v Hogg and Another* 1950 SLT 289 the question is whether the description is capable of including the area to which the dispute relates. In that case inclusion of the disputed area was one of the two possible constructions and therefore sufficient as a founding title.

[25] It was noted that the defender had departed from their previous position that there was an absolute rule that a verbal description prevails over a plan. In the absence of an

absolute rule, the 2011 disposition is capable of including the lane. Therefore the sheriff correctly concluded that a proof before answer was required.

### ***Ground 2***

[26] Bare possession, if proved, is capable of establishing title and interest regardless of whether the pursuer produces any title at all. The sheriff was correct to conclude that in order to properly determine the question of title and interest evidence requires to be heard. The pursuer offers to prove possession as averred in condescence 4.

[27] From the authorities it can be seen that the issue is not one of title to sue, but rather onus of proof. The older authorities dealing with issues arising in respect of possessory judgments are of little assistance in respect of craves for interdict. The case of *GCN (Scotland) Ltd v Gillespie* 2020 SLT 185 supports the proposition that the law has never required a title for an interdict action, possession is sufficient for title and interest to sue.

### **Discussion and Decision**

[28] The law as to whether a title is habile for the purposes of prescriptive possession is set out in *Auld v Hay* as follows:

“Whether the title founded on be one on which possession for forty years can establish a right of property depends solely on the terms of the written charter or disposition itself, and neither on extrinsic evidence nor on possession. A habile title does not mean a charter followed by sasine, which bears to convey the property in dispute, but one which is conceived in terms capable of being so construed. The terms of the grant may be ambiguous, or indefinite, or general, so that it may remain doubtful whether the particular subject is or is not conveyed, or, if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance, that is enough, and forty years’ possession following on it will constitute the right to the extent possessed.”

[29] Applying that to the present case, we conclude that notwithstanding doubt arising from the inconsistency between the verbal description and plan as to whether the lane is or is not conveyed, the 2011 disposition is susceptible of a construction which would embrace a conveyance of the lane.

[30] It is not a rule of law that in the event of discrepancy a verbal description prevails over a plan. Properly understood, the various textbook references on which the defender relies do not set out strict rules of law in respect of construction. Rather they set out what has been gleaned from various decided cases in respect of disputed boundaries as to what are the most reliable indicators of the true boundaries. Thus in older authorities a description by reference to fixed physical boundaries has been found to provide more reliable definition of a boundary than a plan the accuracy and quality of which could vary. There have developed certain broad presumptions as to what is the more reliable description of a boundary, but they are not rigid rules of law.

[31] This conclusion is supported by Rankine, J (4<sup>th</sup> edition), *The law of Land Ownership in Scotland* where it is stated at page 104-105:

“A plan docketed and referred to in the titles ‘is fully as good as any words describing ‘the line of boundary’.’ The same rules apply to it as it to other bounding titles; and it will depend on the circumstances of each case whether the plan shall prevail over other descriptions, or be held as superseded. Much depends on the purpose for which a plan is referred to in a conveyance.”

[32] The approach to be taken where there is an inconsistency between boundaries is described in JM Halliday, *Conveyancing Law and Practice in Scotland* (2<sup>nd</sup> edition, 1997)

Volume 2, paragraphs 33.13 as follows:

“If the matter becomes an issue the court will endeavour to ascertain the true intention of parties, and may admit extrinsic evidence as to the circumstances of the transaction and evidence of possession. Absolute rules as to which alternative is to prevail cannot be formulated since circumstances differ, but from the decisions of the courts certain broad presumptions may be deduced.”

[33] An Extra Division of the Court of Session considered the issue of subjects described by reference to a plan in the context of a disputed boundary in the more recent case of *Rivendale v Clark* 2015 SC 558. In the opinion of the court delivered by Lord Drummond Young it was stated at paragraph 30:

“In our opinion that reference to the plan must have a purpose. First, the general rule is that so far as possible the full wording of a clause in a disposition should be given effect, and the reference to the plan is an integral part of the description of the subjects in the dispositive clause. Secondly, the plan in question was professionally prepared, and for that reason it appears to be intended to fulfil a significant role in the disposition. Thirdly, and most importantly, without the plan the disposition was completely imprecise as to the subjects conveyed, and the obvious purpose of incorporating a plan was to denote the extent of those subjects. The reference would have no point otherwise. The dispositive clause must in our opinion be construed in the light of that clear objective.”

[34] The submission for the defender that on the face of the 2011 disposition the plan is subordinate to the verbal description does not stand up to scrutiny. The 2011 disposition describes the property by reference to the bounding description in an earlier disposition and by reference to a plan. There are no words to the effect that one is to prevail over the other.

[35] It is not without significance that, as was pointed out by counsel for the pursuer, none of the authorities to which we were referred dealt with the issue of title and interest to sue as a preliminary matter, but were decisions following evidence.

[36] In *Drumalbyn Development Trust v Page* 1987 SC 128, which involved a dispute between the neighbouring proprietors as to the line of a mutual boundary the sheriff dismissed the defences as irrelevant following debate on the basis that the description of the subjects by reference to a plan was a bounding title and no right of property could be acquired beyond the bounds of it. The Court of Session allowed the appeal on the basis that where there was an inconsistency or ambiguity evidence was required to determine the boundary. A proof before answer was allowed on the whole averments, including the

defender's plea in law that the pursuer had no title or interest to call for removal of a fence situated on land belonging to the defender.

[37] We consider that our conclusion is consistent with the decision of the First Division of the Inner House in *Nisbet v Hogg and Another* 1950 SLT 289. That was an action for declarator and interdict relating to a triangular piece of ground to which there was no reference in the description by boundaries in the disposition. Nonetheless the reference, after the bounding description in the disposition, to inclusion of "the whole rights and pertinents thereof, including all rights in any way competent to us as trustees foresaid in and to the triangular area of ground" was held to be susceptible of a meaning inconsistent with the description of the principal subjects being interpreted as confined within inflexible boundaries and it is also susceptible of the meaning which is consistent with the actual and exclusive possession of the pursuer and his authors.

[38] If followed in that case that prescription had the effect of construing the title upon which possession followed and of removing any ambiguities which may have attached to the description of the property in that title. This appeal followed upon the sheriff's decision at a proof before answer which had been allowed by the sheriff after debate.

[39] We have concluded that the sheriff correctly appointed the cause to a proof before answer on the basis that whether a plan (whether taxative or not) or a verbal description prevails is a matter of circumstances and habile for enquiry.

[40] The second ground of appeal based upon possession alone as insufficient title and interest is premised upon the 2011 disposition not being capable of providing any legal title. Given our decision on ground one of the appeal, the second ground of appeal does not require further consideration at this time.

[41] The appeal is refused. It was agreed that expenses should follow success. Therefore we shall find the defender liable to the pursuer in the expenses of the appeal which has previously been sanctioned as suitable for junior counsel.