SHERIFF APPEAL COURT

[2002] SAC (CIV) 2
FTW-B92-18

Sheriff Principal D C W Pyle
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal by

ARDNAMURCHAN ESTATES LIMITED

Pursuers and Appellants

against

MICHAEL MACGREGOR & KAREN MACGREGOR

Defenders and Respondents

Pursuers and Appellants: Mure QC; Murray Beith Murray
Defenders and Respondents: J.T.Young, advocate; Currie Gilmour & Co

24 February 2020

Introduction

[1] Amongst other features of note, the Ardnamurchan peninsula contains within it the most westerly point of mainland Great Britain, Corrachadh Mòr. The issue in this appeal is

whether a disposition granted by the respondents in favour of themselves relative to part of that peninsula is a valid one.

[2] By disposition dated 11 May 1994 and registered in the General Register of Sasines for the county of Argyll on 27 June 1994 (hereinafter referred to as "the 1994 Disposition"), the respondents, for no consideration, disponed to and in favour of themselves a piece of ground extending in total to 5,000 square yards or thereby at Glenborrodale, Acharacle (hereinafter referred to as "the subjects").

[3] More than twenty years later, in 2018, the appellants commenced proceedings against the respondents in Fort William Sheriff Court. They sought decree against the respondents for the production and reduction of the 1994 Disposition; declarator that the respondents are not the heritable proprietors of, and had no interest in, the subjects; and declarator that (i) the appellants are the heritable proprietors of subjects edged in red on the title plan for title number ARG20467; and (ii) those subjects had not been subject to possession that is adverse to that entitlement entitling the Keeper to exclude indemnity in terms of section 12(2) of the Land Registration (Scotland) Act 1979.

[4] The respondents lodged a counterclaim, in terms of which they sought declarator that they are the heritable proprietors of the subjects; declarator that the title sheet relative to title number ARG20467 is inaccurate within the meaning of section 65 of the Land Registration (Scotland) Act 2012, in so far as showing the appellants as heritable proprietors of the subjects; and declarator that, failing decree being granted in terms of the preceding craves of the counterclaim, the respondents have a heritable and irredeemable servitude right of way over the subjects.

[5] After sundry procedure, a debate proceeded before the sheriff at Fort William. Shortly thereafter, the sheriff issued a written opinion. The sheriff distinguished, on what she described as "narrow grounds", the decision in *Board of Management of Aberdeen College* v *Youngson* 2005 SLT 371; held that the 1994 Disposition was not *ex facie* invalid; repelled the second and third pleas in law for the appellants in the principal action; sustained the second plea in law for the respondents; and excluded from probation certain of the appellants' averments in article 3 of condescendence and, in effect, allowed the parties a proof of their remaining averments, reserving the question of expenses.

[6] The averments which the sheriff excluded from probation neatly encapsulate the issue which fell to be determined by the sheriff and before this court. They are as follows:

> "There has been no valid *a non domino* Disposition of the disputed subjects, the 1994 Disposition by the (respondents) in favour of themselves being invalid. Therefore all possession of the disputed subjects enjoyed by the (respondents) is not based on a habile title and cannot establish their ownership of it."

The appeal

[7] The appellants contend that the sheriff erred in holding that, firstly, the instant case could be distinguished from *Board of Management of Aberdeen College*; and, secondly, the 1994 Disposition was *ex facie* valid. The appellants contend that issues of validity of the 1994 Disposition could be ascertained simply by reference to the deed itself. The appellants argue that the sole purpose of the 1994 Disposition was to create title to something to which previously the respondents had no title.

[8] The respondents contend that the sheriff was correct to distinguish the decision in *Board of Management of Aberdeen College*. The respondents contend that, if the sheriff was incorrect in so doing, *Board of Management of Aberdeen College* was in any event wrongly decided, it failing to properly interpret and apply the term "invalid *ex facie*" within the

meaning of section 1(2) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The respondents contend that the 1994 Disposition is not invalid *ex facie* within the meaning of section 1(2) of the 1973 Act; and that it is a habile foundation writ for the purposes of positive prescription.

The relevant statutory provisions

[9] Insofar as relevant, section 1 of the 1973 Act is in the following terms:

> "(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed –
>
> (a) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in –
>
> (i) that land; or
>
> (ii) land of a description habile to include that land; or
>
> …
>
> then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge.
>
> (2) Subsection (1) above shall not apply where –
>
> (a) possession was founded on the recording of a deed which is invalid *ex facie* or was forged;
>
> …
>
> (3) In subsection (1) above, the reference to a real right is to a real right which is registrable in the Land Register of Scotland or a deed relating to which can competently be recorded; but this section does not apply to real burdens, servitudes or public rights of way."

[10] There are two separate issues for consideration in this appeal. First, is the 1994 Disposition invalid *ex facie* (see section 1(2)(a))? Second, if the 1994 Disposition is valid *ex facie*, is it sufficient in respect of its terms to constitute in favour of the respondents a real right in the subjects (see section 1(1)(a))?

The first issue

[11] As noted above, see paragraph [2], the 1994 Disposition was by the respondents, for no consideration, in favour of themselves. The question for this court is whether the 1994 Disposition is or is not a fundamental nullity?

[12] The question of what constitutes a nullity was considered by a court of seven judges in *Scott* v *Scott* 1924 SC 309. Counsel for both parties each accepted that the analysis in *Scott* on this point remained good. At page 323, the Lord Justice Clerk (Alness) addressed the question as follows:

> "… it is obviously imperative to ascertain, with as much precision as may be, what is an intrinsic and what is an extrinsic nullity. How are they to be defined? It is difficult to furnish an exhaustive definition; but one can at least say, on a survey of the examples given in the authorities, that a deed which is intrinsically null may be described as a deed which suffers, on the face of it, from an incurable defect in its essentials. The deed must *per se* afford complete and exclusive proof of its nullity. It must be, in short, a self-destructive title."

[13] There was no dispute before the sheriff, or before this court, that a person cannot enter into a contract with himself, see, for example, *Clydesdale Bank plc* v *Davidson* 1998 SC (HL) 51, per Lord Hope of Craighead at 55 A to B. The effect of such a deed is succinctly described by Lord Dundas in *Church of Scotland Endowment Committee* v *Provident Association of London Ltd* 1914 SC 165 at page 171:

> "It is quite clear that the attempt made by Mr Simpson to create these ground-annuals by means of a so-called contract with himself was ineffectual. A man cannot by any deed constitute a debt by himself to himself, with or without security. The so-called contract,— a piece of conveyancing which I confess I do not appreciate at all—is plainly inept and void as an operative instrument."

[14] The respondents submit (and the appellant accepts) that there are exceptions to this. For example a party can contract with himself in different capacities or involving different legal persona (e.g. as executor or trustee a party may dispone property to himself as an

individual). A party may also contract with himself where he is one of a group on the other side of the contract (provided the rights created are owed jointly and severally or severally).

[15] The respondents do not aver that any exception applies in this case. They argue that for the purposes of positive prescription, it is irrelevant whether any of the exceptions actually applied (or were even likely to have applied) at the time of the 1994 Disposition or not. The mere possibility means the deed is not invalid *ex facie*.

[16] To suggest that the mere possibility of an exception to the general rule applying is sufficient to overcome the apparent *ex facie* invalidity of the 1994 Disposition is a curious proposition, particularly in circumstances where the respondents have no averments which might be said to support such a proposition. In support of this argument the respondents sought to place reliance upon the *dicta* of Lord Gillies in *Thomson* v *Stewart* (1840) 2 D 564 at 570.

[17] The decision in *Thomson* turned upon the validity of a bill of exchange granted by a married woman. The pursuer argued that a bill by a married woman *stante matrimonio* was intrinsically and inherently a nullity; the defender contended that although it appeared on the face of the bill that it was granted by a married woman *stante matrimonio* that was not an intrinsic nullity. The debt might be good on various suppositions. Lord Gillies noted that a bill by a married woman was not always, and in every case, an absolute nullity. That falls to be contrasted with the position in the present case where the respondents have contracted with themselves in the same capacity. *Thomson* does not support the respondents' argument and is distinguishable.

[18] In our opinion, the 1994 Disposition is invalid *ex facie*. It is unnecessary to look beyond the 1994 Disposition to reach such a conclusion. It affords complete and exclusive proof of its nullity – it purports to dispone the subjects from the respondents to the respondents in exactly the same capacity. The defect is intrinsic.

Board of management of Aberdeen College

[19] In light of the conclusion we have reached on the first issue, it is unnecessary for this court to reach a conclusion on the correctness or otherwise of the decision in *Board of Management of Aberdeen College*. Nevertheless, recognising the binding nature of a decision of this court (see section 48(1) of the Courts Reform (Scotland) Act 2014), it is appropriate that we comment upon it.

[20] Unlike a decision of this court, a decision of a judge sitting in the Outer House is not binding upon a sheriff, see *Sheriff Court Practice* (3rd ed.) at 18.08. Such a decision is, however, persuasive. To that extent, the sheriff's treatment of the decision in *Board of Management of Aberdeen College* was correct. The same cannot be said of her decision to distinguish it.

[21] In our opinion, *Board of Management of Aberdeen College* was correctly decided. Whilst it would appear that this court had the benefit of a wider citation of authority (particularly *Scott*) than was the case in *Board of Management of Aberdeen College* that does not detract from the soundness of the conclusion reached by the Lord Ordinary in that case. We are fortified in that opinion by the fact that the Lord Ordinary's analysis in *Board of Management of Aberdeen College* was accepted by another Lord Ordinary in *Kenneil* v *Kenneil* 2006 SLT 449 at 455 F – G.

[22] Not only is *Board of Management of Aberdeen College* correctly decided, it is, in our opinion, indistinguishable from the present case on its facts, insofar as they are relevant to

the issue the sheriff was asked to decide. Neither the existence of a special destination in the designation of the disponees; nor the purported grant of a new servitude right of access in the 1994 Disposition formed a basis upon which the decision in *Board of Management of Aberdeen College* could properly be distinguished. The sheriff erred in so doing.

The second issue

[23] In light of the conclusion we have reached on the first issue, it is unnecessary for this court to reach a conclusion on the second issue, subsection (1) of section 1 of the 1973 Act having no application where possession is founded on the recording of a deed which is invalid *ex facie* (see section 1(2) of the 1973 Act). If we had concluded that the 1994 Disposition was *ex facie* valid, we would have concluded that the recording of it was not sufficient in respect of its terms to constitute in favour of the respondents a real right in the subjects.

[24] The requirements for the transfer of ownership of land are described thus at paragraph 613 of volume 18 of the *Stair Memorial Encyclopaedia*:

> "As a general rule, two things are required for the transfer of ownership, namely (1) some positive act, the nature of which varies with the type of property, for example … the granting and registration of a disposition (for land), accompanied by (2) the intention of both parties, the intention of the transferor to be divested and the intention of the transferee to be invested."

The respondents cannot, at the same time, intend (i) to be divested of property; and (ii) to be invested in the same property. There is no transfer of ownership in such circumstances. A disposition, such as the 1994 Disposition, in which the same party is both disponer and disponee is not sufficient in respect of its terms to constitute in favour of the disponee a real right in the land in question.

Disposal

[25] We shall allow the appeal; recall the interlocutor complained of; and sustain the second and third pleas in law for the appellants in the principal action. As a consequence, we shall grant decree as first and second craved in the principal action. We shall also sustain the appellant's first plea in law in the counterclaim to the extent of excluding from probation the first three sentences of statement of fact 14 of the respondents' counterclaim and by deleting in the first plea-in-law for the respondents in the counterclaim the words, "the 1994 disposition, which failing" where they occur in line two thereof.

[26] As invited by parties, we shall reserve meantime the question of expenses.