

SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT INVERNESS

[2021] INV 61

INV-A103-18

JUDGMENT OF SHERIFF IAN HAY CRUICKSHANK

in the cause

MARGARET ALISON DALRYMPLE DOUGHERTY

Pursuer

against

LINDA MARGARET TAYLOR

Defender

**Pursuer: Logan; The MacKenzie Law Practice, Inverness**

**Defender: Thomson; Harper MacLeod LLP, Inverness**

Inverness, 19 August 2021

**Introduction**

This case relates to a residential boundary dispute, to the correct location of the same, whether or not there has been an encroachment and whether prescriptive possession, if established, is determinative. The dispute brings into sharp focus the issue of Sasine title versus Land Registered title. Historic conveyancing descriptions, deed plans, CAD Drawings and cadastral mapping all appear to provide differing conclusions. The disputed boundary varies in width but, at the widest disputed point, represents less than one metre of differing opinion. So far as resolution of the dispute is concerned, the parties remain miles apart.

**Findings in Fact**

The Sheriff, having resumed consideration of the cause, Finds the following facts to have been admitted or proved:

- (1) The pursuer is Margaret Alison Dalrymple Dougherty, otherwise known as Alison Dougherty (hereinafter “the pursuer”). The pursuer resides at Rosefield, 110 [ ] Road Inverness [ ] (hereinafter referred to as “110 [ ] Road”). She has resided at 110 [ ] Road since 1970. She resided there with her husband, Frank Dougherty until his death in 2002. The pursuer’s son resided at the property between 1970 and 1990. Title to the property is now in the sole name of the pursuer. Her title thereto is registered in the Land Register of Scotland under Title Number INV[ ]. This followed a voluntary registration on 25 February 2015.
- (2) The defender is Linda Margaret Taylor (hereinafter “the defender”). The defender resides at 108 [ ] Road, Inverness [ ] (hereinafter referred to as “108 [ ] Road”). The defender purchased the property at 108 [ ] Road and took entry on 6 April 1990. Her title thereto was originally in joint names with her then partner, John Murray Steven. Mr Steven transferred his whole right, title and interest in the property to the defender in June 2007. The defender’s title thereto is recorded in the Division of the General Register of Sasines applicable to the County of Inverness on 28 August 2007.
- (3) The pursuer’s late husband’s family have a long standing connection with the properties now forming 106, 108 and 110 [ ] Road. The pursuer’s mother-in-law, Margaret MacDonald or Dougherty, was born at 108 [ ] Road in 1890. Margaret Dougherty’s father was Thomas MacDonald (Junior) and her grandfather was Thomas MacDonald (Senior). Thomas MacDonald (Senior) built the three properties. The properties

were originally known as "Rosefield", being 110 [ ] Road, and "Knockie Villa", consisting of two semi-detached houses now known as 106 and 108 [ ] Road.

(4) 108 and 110 [ ] Road are part and portion of the subjects described in Feu Charter by Colonel Hugh Inglis of Kingsmills in favour of Thomas MacDonald recorded in the said Division of the General Register of Sasines on 18 June 1872.

(5) In 1918 Thomas MacDonald (Senior) sold Rosefield to Donald MacKenzie and Christina MacLeod or MacKenzie. The Disposition was registered in the said Division of the General Register of Sasines on 16 May 1918. The 1918 Disposition was the first break-off disposition of the subjects referred to in the 1872 Feu Charter. The 1918 Disposition had a plan annexed and signed as relative to the Disposition. The conveyancing description of the subjects in the 1918 deed is in the following terms:

"All and Whole the subjects and others known as "Rosefield", Hilton in the Parish and County of Inverness, extending in measurement, including the road in front thereof, to One rood and eighteen poles or thereby imperial measure and bounded as follows. Viz. On the west by grounds attached to the Inverness District Poorhouse along which it extends eighty seven feet or thereby, On the South by the subjects formerly belonging to John Fraser sometime Baker in Inverness and now William A. Murray, Builder, Hilton, along which they extend, including the breadth of the said roadway, two hundred and twenty seven feet or thereby, On the East and across the said roadway, by the subjects formerly belonging to Mrs Catherine Junor or Gair, now to Henry MacDonald, Solicitor, Town Clerk of Inverness, along which it extends fifty eight feet six inches or thereby, And On the North by other subjects belonging to me known as "Knockie Villa", along which they extend, including the breadth of the said roadway, two hundred and twenty three feet four inches or thereby, All as the subjects and others are delineated and coloured pink on the sketch or plan annexed and signed as relative hereto...(being part and portion of the 1872 Feu Charter)"

(6) In 1950 108 [ ] Road was disposed by Frank Dougherty, who was the pursuer's father-in-law, as Trustee of the late Annie Gordon or MacDonald in favour of Edith Gordon MacDonald. The Disposition was recorded in the said Division of the General Register of Sasines on 9 November 1950. There is a plan attached to, and recorded with, the 1950 Disposition. Although the plan is not subscribed the signature of Frank Dougherty is

located near the top of the plan. The said plan has no docket identifying it as relative to the Disposition. The conveyancing description of the subjects in the 1950 deed is in the following terms:

“All and Whole the semi-detached dwelling house known as Number One Hundred and Eight [ ] Road, Inverness, in the Town Parish and County of Inverness together with the solum thereof ground attached and all buildings erected thereon bounded and measuring as follows, videlicet:- on the North-west by property belonging to the Inverness Burgh and County Joint Hospital Board along which it extends Twenty seven feet one and one-half inches or thereby; on the North-east by the semi-detached dwelling house known as Number One Hundred and Six [ ] Road aforesaid belonging to me the said Frank Dougherty as Trustee foresaid and conveyed or about to be conveyed by me to Mrs. Margaret MacDonald or Dougherty and me the said Frank Dougherty, along which it extends in a broken line Two hundred and Twenty two feet six inches or thereby; on the South-east by property belonging to Mrs Davidson along which it extends Thirty feet seven and one-half inches or thereby: and on the South-west by property belonging to H J V Chinn along which it extends Two hundred and Twenty three feet or thereby; all as the said subjects hereinbefore disposed extending to seven hundred and ten square yards or thereby Imperial Standard Measure are delineated and coloured pink on the sketch or plan thereof annexed and subscribed as relative hereto....(being part and portion of the 1872 Feu charter)”

(7) Neither the 1918 Disposition nor the 1950 Disposition state whether the plans referred to are to be treated as taxative or demonstrative.

(8) Along the west boundary of both 110 and 108 [ ] Road there is a continuous stone wall. The wall can be seen on the 1918 deed plan. The boundary is known as “the Poorhouse Wall”. The Poorhouse Wall also extends along the west boundary of 106 [ ] Road. Further walls are shown on the 1918 deed plan along that part of the feu bordering the roadway to the east and walls partially along the south and north boundaries for distances not shown on the said plan. None of these features are shown on the 1950 deed plan.

(9) There is a structure shown in the south west corner of the 1918 deed plan. The 1918 Disposition refers to “together with the Dwelling House and others erected thereon”.

There is currently an old byre constructed in limecrete and other materials in that general area. The Ordnance Survey map of 1932 suggests that a larger building in this area straddled the boundary between 110 [ ] Road and the neighbouring property at 112 [ ] Road at that point in time.

(10) The pursuer's Land Registered title contains the following description of the subjects in the Property Section of the Land Certificate:

"Subjects cadastral unit INV[ ] 110 [ ] ROAD, INVERNESS [ ] edged red on the cadastral map.

Note: Further information relating to the particular boundaries of the plot is narrated in the Disposition by Thomas MacDonald to Donald MacKenzie and Christina MacLeod or MacKenzie, recorded G.R.S. (Inverness) 16 May 1918."

(11) The plan forming part of the pursuer's Land Certificate under Title Number INV[ ] is shown on a scale of 1:1250. Part of the north boundary (hereinafter referred to as "the disputed boundary") is depicted by a dotted line from where it meets the Poorhouse Wall and the eastern end of the pursuer's current garage. This boundary is also shown as a dotted line across the breadth of [ ] Road. The said plan shows a structure in the south west corner of 110 [ ] Road where the limecrete byre is located.

(12) The proprietorship section of the pursuer's Land Certificate states in relation to Date of Entry – "Note: The Date of Entry field is intentionally blank".

(13) The Land Registration cadastral map is based on the Ordnance Survey Map which is not warranted to be more accurate than +/- 0.5m absolute and +/- 0.5m relative error. The tolerances of the Ordnance Survey Map can vary to a greater degree. At a scale of 1:1250, up to a distance of 60 metres, absolute accuracy with a 99% confidence level is 0.9m, 95% confidence level is 0.8m and the RMSE is 0.5m. On the same scale, up to the same distance,

relative accuracy 99% confidence is +/- 1.1m, 95% confidence is +/- 0.9m and the RMSE is +/- 0.5m.

(14) In the 1930's a garage was erected within the subjects of 110 [ ] Road with the north elevation very close to the disputed boundary.

(15) At some time between 1933 and 1955 the disputed boundary between 108 and 110 [ ] Road was fenced, made up of recycled timbers of irregular length, from the Poorhouse Wall to an undefined point along that boundary. Pursuer's production 5.4.2 of process is a photograph taken in the 1970's which shows part of the disputed boundary and the said fence meeting the Poorhouse Wall. By 1970 the recycled timber fence was dilapidated to an extent. In the 1970's the recycled timber fence was attached to a large sycamore tree close to the Poorhouse Wall.

(16) At the east end of the disputed boundary there is a red brick wall. This extends back from the front stone wall of 108 [ ] Road. The red brick wall has been in its current position since before 1970. The red brick wall is not built in a straight line and bends closer toward 108 [ ] Road at its western end.

(17) In 1970 a gateway was created between the back garden of 110 and 108 [ ] Road at or about the point at which the red brick wall ended. Pursuer's production 5.4.3 of process is a photograph showing the pursuer using the created gateway in 1970.

(18) In the 1980's the recycled timber fence was replaced with a larch panel fence.

Pursuer's production 5.4.4 of process is a photograph showing her son's friend standing in front of a motor car in the 1980's which is in turn parked in front of the 1930's garage. The photograph also shows the red brick wall between the properties, the gateway and part of the replacement larch panel fence. The photograph further shows a portion of what is now

the defender's shed which at that point in time was located close to the north side of the 1930's garage.

(19) By 1990 little of the larch panel fence remained. A line of shrubs or bushes had been established in the gardens of both 110 and 108 [ ] Road along much of the disputed boundary between the Poorhouse Wall and the west end of the 1930's garage.

(20) When the defender moved into her property in 1990 the wooden shed continued to be located close to the pursuer's old garage. In 1995 the shed was moved towards the west boundary and was located about 6.5 metres from the Poorhouse Wall. The shed was positioned with its back wall bordering where the defender had always understood the boundary to be. The shed remained in this location until 2015 when it was moved to its current location closer to the pursuer's new garage.

(21) Following the death of the pursuer's husband in 2002 the pursuer's son undertook gardening work to make the garden more easily maintained. The disputed boundary was found to be overgrown. It was obscured by a dense hedge on the pursuer's side between the Poorhouse Wall and the 1930's garage. The pursuer's son proceeded to clear the undergrowth and try to determine the original fence line of the disputed boundary. Original features of the disputed boundary had deteriorated and were not visible to any material degree.

(22) In 2007 wire netting was placed against the south side of the pursuer's hedge along the disputed boundary to prevent the pursuer's dogs straying into 108 [ ] Road. Pursuer's production number 5.5.3 is a photograph showing a red line marking the position of the wire netting in front of a mature and substantial section of hedging. The wire netting was erected within the pursuer's property. The wire netting was removed in 2010 or 2011.

(23) In 2007 the pursuer's son attempted to mark the disputed boundary with ropes. The pursuer's son found his chosen boundary line was interrupted by the defender's shed being partly over that chosen line. The pursuer's son attempted to move the defender's shed but managed to move it a minimal distance if at all.

(24) In 2010 the pursuer attempted to erect three fence panels to cover the fence of 108 [ ] Road at the east end of the disputed boundary between the red brick wall and the 1930's garage. Pursuer's production 5.4.5 is a photograph of a post clamp which the pursuer's son had concreted in to support the first panel. This post clamp is seen positioned close to the west end of the red brick wall. The pursuer had two further posts and one panel erected before the pursuer halted the work following a visit from police officers.

(25) In 2012 the 1930's garage was replaced with a new garage. Pursuer's production number 5.4.7 of process is a photograph of the replacement garage. The photograph has letters indicating the following features. Letter A delineates the north elevation of the new garage. Letter B delineates the north elevation of the 1930's garage. Letter C shows the remaining part of the now dilapidated 1980's section of larch panel fence closest to the garage. Letter D shows the position of the pursuer's fence at that part of the disputed boundary. Letter E shows the end of the red brick wall.

(26) In 2014 the defender instructed Gordon Noble of Cairntech Ltd to prepare a survey and report in order to establish the accurate boundaries on site at 108 [ ] Road. Defender's production number 6.2.1 of process is the report and plans prepared by Mr Noble. The report concluded that the boundary between 106 and 108 [ ] Road matched the original title. The boundary between 108 and 110 [ ] Road were not correctly located. Mr Noble further concluded that the most obvious features of the incorrectly located boundary were the brick wall to the south east and the fence panel to the north east of 108 [ ] Road. Mr Noble

considered that the eaves of the pursuer's new garage were over-hanging the boundary of 108 [ ] Road. Defender's production number 6.2.3 of process is the further report of Mr Noble dated March 2021. In terms of the later report Mr Noble concluded that replication of title dimensions for 106 and 108 [ ] Road fitted within the boundaries identified on site with only 2 out of 20 dimensions not fitting accurately to the surveyed site features.

(27) In April 2015 the defender erected a new wooden fence from the Poorhouse Wall for approximately ninety feet along the disputed boundary. The new fence was erected between the Poorhouse Wall down to where the defender's shed was located being to the west of the pursuer's current garage. The new wooden fence was erected along the line which the Cairntech Ltd survey identified as the location of the boundary between the properties. In order to erect the new wooden fence bushes and shrubs located in the defender's garden had to be cut back. The wooden fence was erected between where the two lines of shrubs and hedging had been established in the gardens of 108 and 110 [ ] Road.

(28) In 2016 the defender erected a further piece of fencing between the red brick wall and the remaining portion of the 1930's garage. Pursuer's production number 5.4.8 of process is a photograph showing the position of this section of fencing. In erecting this section of fencing the defender utilised the three post clamps installed by the pursuer in 2010. These post clamps now sit on the north side of the 2016 fence and are located on ground now possessed by the defender.

(29) The pursuer instructed Mr McWilliam, Chartered Land Surveyor, to visit her property and prepare a GPS derived plan to show whether the ground occupied by the pursuer was consistent with that shown on the OS plan attached to the pursuer's Land

Certificate and to determine the position of the mutual boundary between 110 and 108 [ ] Road. Mr McWilliam visited on site on 18 December 2019. On 21 October 2020 Mr McWilliam surveyed the south-west and south-east corners of the Limecrete byre and the north side of the boundary wall between 102 and 106 [ ] Road. He did not have access to either 106 or 108 [ ] Road when he carried out his surveys. Pursuer's production number 5.2.1 of process is a copy of Mr McWilliam's report dated 12 January 2020. Pursuer's production number 5.5.1 of process is a copy of Mr McWilliam's revised report dated 16 March 2021.

(30) Mr Noble and Mr McWilliam have reached differing conclusions as to the correct positioning of the disputed boundary.

(31) The boundary fences erected by the defender in 2015 and 2016 continue to remain in place at this time.

(32) Between 1990 and 2007 there was no dispute between the parties in relation to the boundary separating 110 and 108 [ ] Road.

(33) Substantial sections of the pursuer's southern boundary do not conform to the original positioning of that boundary. The exact position of the original southern boundary of the pursuer's property cannot be determined with accuracy.

(34) The section of fence erected by the defender in 2015 was erected along the approximate line of the original boundary between the two properties or was at least erected along a line delineating the approximate area of land possessed by the defender since at least 1995.

(35) Between 1970 and 2015 the pursuer possessed as part of the subjects at 110 [ ] Road land up to the south face of the red brick wall and the north elevation of the 1930's garage.

The pursuer did not use or possess any ground beyond these points at that part of the disputed boundary.

### **Finds in fact and law**

1. The court has jurisdiction.
2. The plans annexed to the 1918 Disposition and the 1950 Disposition are demonstrative only.
3. The conveyancing description contained in the 1918 Disposition is not in terms sufficient by reference to a specified prior possession, or by a detail of the physical limits, by measurement or by any or all of these combined to be regarded as a bounding charter. It is a habile title.
4. The conveyancing description contained in the 1950 Disposition is not in terms sufficient by reference to a specified prior possession, or by a detail of the physical limits, by measurement or by any or all of these combined to be regarded as a bounding charter. It is a habile title.
5. The defender has not encroached on the pursuer's heritable property known as and forming 110 [ ] Road, Inverness [ ] between the Poorhouse Wall and along the north elevation of the pursuer's current garage.
6. In terms of section 1 of the Prescription and Limitation (Scotland) Act 1973 the defender has possessed the area of ground within 108 [ ] Road up to the position of the fence erected in 2015 openly, peaceably and without judicial interruption since at least 1995, being a continuous period in excess of ten years, and her possession is founded on a deed containing a description habile to include that interest in the land between the Poorhouse

Wall and to a point at or about the east end, or front elevation, of the pursuer's current garage. The real right so far as relating to that land is exempt from challenge by the pursuer.

7. The defender did not possess the area of ground she now possesses between the east end, or front elevation, of the pursuer's current garage and the west end of the red brick wall prior to erecting a fence between these points in 2016. In terms of section 1 of the Prescription and Limitation (Scotland) Act 1973 the defender's possession of this area of land has not been for a continuous period of ten years and is not exempt from challenge by the pursuer. The defender's possession is not founded on a deed containing a description habile to include that interest between the east end, or front elevation, of the pursuer's current garage and the west end of the red brick wall.

8. The defender has encroached on the pursuer's heritable property known as and forming 110 [ ] Road, Inverness [ ] between the east end, or front elevation, of the pursuer's current garage and the west end of the red brick wall.

Therefore: Repels the defender's pleas-in-law; Sustains the pursuer's first plea-in-law and in terms thereof Finds and Declares that the defender as owner of the heritable property known as and forming 108 [ ] Road, Inverness [ ] is legally obliged to refrain from encroaching on the pursuer's heritable property known as and forming 110 [ ] Road, Inverness [ ] and, specifically is legally obliged to refrain from encroaching into the pursuer's northern boundary between the east end, or front elevation, of the pursuer's current garage and the west end of the red brick wall otherwise being that length of the boundary fenced by the defender in 2016; Sustains the pursuer's second plea-in-law and in terms thereof Finds and Declares that the defender has encroached on the pursuer's said heritable property by the erection of a section of fence in 2016 between the east end, or front elevation, of the pursuer's current garage and the west end of the red brick wall; Sustains

the pursuer's fifth plea-in-law and Ordains the defender to remove the said section of fence within six weeks from the date hereof: Meantime reserves to pronounce further on the pursuer's fourth and sixth pleas-in-law; Assigns 20 October 2021 at 11.15am as a procedural hearing, said hearing to take place via conference call, Directs parties to furnish the sheriff clerk with a direct contact telephone number no later than forty-eight hours in advance of said hearing; Reserves the question of the expenses of the cause to date until 20 October 2021.

## **Note**

### **Introduction**

[1] This action relates to a boundary dispute. The dispute has been ongoing since 2007. The issue is whether the defender, as proprietor of 108 [ ] Road, has encroached into the pursuer's property at 110 [ ] Road.

[2] The pursuer seeks declarator, first that the defender is legally obliged to refrain from encroaching on the pursuer's heritable property in relation to which her title is now registered in the Land Register of Scotland, and secondly to find that the defender has encroached on the pursuer's heritable property by placing a shed, erecting fencing and a metal frame and depositing a motor cycle thereon. Various interdicts are sought. In the event that declarator is granted the pursuer seeks an order ordaining the defender to remove the items erected or deposited on the pursuer's property. In the event that these items are not removed within such period as the court orders the pursuer seeks an order authorising removal or demolition of the items and decree for payment of any expenses incurred in effecting removal or demolition.

[3] The defender denies there has been any encroachment. The defender argues that the area occupied by her is consistent with the dimensions of her subjects as described in the original split-off disposition. The defender further argues that she has possessed the area she occupies for a continuous period of at least 10 years and can rely on prescriptive possession in any event. Any conflict between the physical features of the boundary and the registered title of the pursuer falls within the accepted tolerances of Ordnance Survey map scaling.

[4] The matter in issue is further complicated by the fact that title to 110 [ ] Road is now recorded in the Land Register of Scotland. Title to 108 [ ] Road remains on the Sasine Register. The evidence of the parties as to how the boundary was physically marked, and precisely where it was located differs. The professional opinion of expert or skilled witnesses charged with plotting the boundary for each party also provides differing locations.

### **Procedural History**

[5] The action commenced in 2018. The action was sisted between late 2018 and November 2019. On defender's motion a debate was assigned for 21 February 2020. On joint motion the debate was discharged and the cause continued to 18 March 2020. Given the restrictions imposed by the Covid pandemic the Court continued matters *ex proprio motu* to 5 August 2020.

[6] In late 2020 the case was continued for the purposes of adjustment and, following sundry pre-proof procedure, proof was assigned for 25 and 26 March 2021. Evidence was led on these dates and the proof was continued to 6 May 2021 to allow evidence to be

concluded. The case was further continued to hear parties' submissions on 31 May 2021.

Having heard submissions I made *avizandum*.

### **The Evidence at Proof**

[7] The proof was conducted on the Cisco WebEx platform. I must congratulate both parties for the preparation which was put in place to allow the proof to be conducted in this manner. Furthermore, we are all indebted to the Sheriff Clerk for the necessary input and preparation to assist in the relatively straight forward, and efficient manner in which the proof proceeded by remote means.

[8] All witnesses other than the expert witnesses gave their evidence-in-chief by affidavit. I will summarise the evidence of each witness so far as relevant to my findings in fact. I will comment on issues of credibility and reliability as relevant to my assessment of each witness.

### ***Evidence for the Pursuer***

[9] The pursuer gave evidence. In addition evidence was led from Mr McWilliam, Chartered Land Surveyor and the pursuer's son, Steven Dougherty.

### ***The Pursuer***

[10] The pursuer, subject to the acknowledgement of one minor typing error, adopted her affidavit as her evidence-in-chief. This was supplemented by some additional oral questioning by Mr Logan.

[11] The pursuer provided her personal details. She provided her understanding of the history of the properties and her late husband's family connection to these. The defender

had been her neighbour since 1990. She contended that the defender's current fence was erected on her land. The defender's shed, originally situated on the ground of 108 [ ] Road, straddled the boundary. The defender had also stored a meal frame and a motor cycle on her land.

[12] The pursuer confirmed that she and her husband had lived at 108 [ ] Road before exchanging houses with the owner of 110 [ ] Road. It was the pursuer's belief that the correct boundary had been marked by a wooden fence erected between 1933 and 1955. The pursuer accepted that this fence was "a bit dilapidated" when she and her husband moved to 110 [ ] Road in 1970. This had been replaced with a lap larch fence in the same alignment in the 1980's.

[13] The pursuer produced and referred to a number of photographs taken between 1969 and 2015. Where relevant the evidence I accepted about these photographs is contained in my findings in fact. When describing the photograph which showed the remnants of the 1933/1955 fence she referred to the tree against which the fence was attached but stated that she had "no idea" which tree that was but she believed it was a tree which had been in her garden.

[14] The pursuer stated that the defender had encroached on her land for a number of years. There had been ongoing legal correspondence regarding this matter for many years.

[15] The pursuer stated that in 2007 she received a letter from the defender alleging the pursuer's son had moved the defender's shed. Given the pursuer's knowledge that her son was trying to identify the correct boundary she assumed her son had done so and she apologised to the defender for this. The pursuer later learned that her son had been unable to move the shed. The pursuer stated that after commencement of this court action the

defender had moved her shed northwards and, although the shed now encroached less onto the pursuer's land, it still encroached.

[16] When recalling the nature of the garden the pursuer accepted that things had changed over the years but believed she owned land to the north of where the defender had erected the current fence. There was a tree now in the defender's garden under which some of the pursuer's late husband's ashes had been placed. The pursuer also considered that the title plan in the deed for 108 [ ] Road was not accurate.

[17] In cross-examination the pursuer did not detract in her evidence to any material degree. She did accept that no encroachment had been identified until 2007 although she recalled there may have been a suspicion of such in 1994 when the defender had built an extension. That said the pursuer recalled that her late husband had erected a panel of fencing at the Poorhouse Wall in the 1990's close to where there was now a yellow mark on the wall. At that time the pursuer recalled there was a hedge of Leylandii, bushes and shrubs. When the defender had erected her new fence this had not originally been seen by the pursuer given the thick hedge still there at that time. Indeed, the pursuer conceded the boundary had become overgrown. She recalled the Leylandii had been planted by her husband and the original fences had become lost in the bushes. The fencing had deteriorated and it was then that her late husband had erected the single panel of larch lap fencing to fill a gap. The pursuer could not explain why her husband had only erected one fence panel. The pursuer conceded she did not exactly know what was left marking the boundary between her garage and the Poorhouse Wall given the overgrown nature of the hedges and shrubbery at that point. She accepted that matters relating to the garden had been left to her husband. She stated that she had often been away filming.

[18] In cross-examination the pursuer accepted that she had not used land to the north of her garage. The pursuer conceded that the defender had probably used this area given there was no existing fence there.

[19] Whereas I found the pursuer to be a credible witness in most respects I had some hesitation as to the reliability of her recollection of the exact nature of the disputed boundary over the period from 1970 to the current date. That is hardly surprising given the length of time over which the pursuer was asked to recall matters. I did form the impression that matters relating to the garden had been something dealt with primarily by the pursuer's late husband. Indeed, in cross-examination I noted the pursuer as stating when 108 [ ] Road was owned by Miss MacDonald, following the death of her brothers, she did not want a fence between the properties. I had no hesitation in accepting the pursuer's evidence as to the approximate positioning of the disputed boundary between the west end of the red brick wall and the position of both the old and new garage. The pursuer left me with a less than clear picture of the positioning or physical formation of the disputed boundary from the Poorhouse Wall to the western edge of the 1930's garage. Over that section, on the pursuer's side of the boundary there had been thick hedging and shrubbery which obscured the exact position of the boundary.

[20] The pursuer was less than precise as to the extent of land she had possessed. For example she accepted that she had never used the land behind the 1930's garage. Given evidence I accepted from the defender I found the pursuer's evidence about the single fence panel at the Poorhouse Wall, and the significance of the tree within the defender's boundary, to be less than entirely reliable. Furthermore, it seemed clear that the pursuer accepted the positioning of the defender's shed over the years. This supported the defender's evidence that the shed had been in a position close to the Poorhouse Wall between 1995 and 2007

when the dispute arose. This, in turn, supported the defender's evidence as to the approximate extent of the ground she had occupied and possessed in that section of the boundary for fully 20 years before the shed was relocated to its present position.

[21] Finally, in relation to the pursuer's evidence, I would observe that whilst her affidavit confirmed that she had "lived" at 110 [ ] Road since 1970 there was no further clarification as to the nature of the pursuer's proprietary interest in the subjects before voluntary registration in the Land Register in 2015. Other than by admission in the pleadings that the pursuer's title is registered in the Land Register effective as from 25 February 2015, it may be that the pursuer obtained a real right by the recording of title in her favour since 1970 but that is mere speculation on my part. For reasons hereafter stated, whilst making this observation, it has had no ultimate bearing on the decision I have reached.

***Michael McWilliam***

[22] Mr McWilliam was called by the pursuer as an expert or skilled witness. He had 40 years' experience as a Chartered Land Surveyor and had completed many boundary surveys. Various versions of his report were lodged in process and Mr McWilliam adopted the terms of these reports in his evidence. I took the main version of Mr McWilliam's report to be dated 12 January 2020 and lodged as pursuer's production number 5.2.1 of process (hereinafter "revised report"). A further version of Mr McWilliam's report dated 16 March 2021, pursuer's production number 5.5.1 of process, commented on the updated report of Mr Noble dated March 2021 (hereinafter "supplementary report"). I will summarise the contents of Mr McWilliam's reports and his evidence generally. Where accepted, and of relevance, Mr McWilliam's evidence is incorporated in my findings in fact.

[23] Mr McWilliam confirmed he had been instructed to visit and prepare a GPS derived plan to show whether the ground occupied by the pursuer was consistent with that shown on the OS plan attached to the pursuer's Land Certificate and to determine the position of the disputed boundary between 110 and 108 [ ] Road. He had visited on site on 18 December 2019. In his revised report he confirmed that he had carried out a further survey on 21 October 2020 when he had surveyed the south-west and south-east corners of the limecrete byre and the north side of the boundary wall between 102 and 106 [ ] Road. He confirmed he had not had access to either 106 or 108 [ ] Road when he carried out his survey.

[24] Mr McWilliam explained the methodology and technical systems used to produce his calculations and the plan prepared. Much of Mr McWilliam's evidence was focussed on explaining his conclusions as set out in what was referred to at proof as the "A3 plan", being pursuer's production 5.6.1 of process. On that plan Mr McWilliam had drawn up the Land Certificate boundaries for 106,110 and 112 [ ] Road. 114 [ ] Road was not yet on the Land Register. He stated that the cadastral map was like a jigsaw puzzle with registered titles having to fit together within OS tolerances. It was prudent not to examine Land Certificate plans in isolation. Adjoining pieces of the jigsaw should be checked where these were accessible. Accordingly, within the accuracy of the OS Map, Mr McWilliam's main report concluded that 110 [ ] Road's Title Registration boundary was "a good match" although the 1918 Disposition plotted boundary was "in even better agreement" with his ground survey. Mr McWilliam stated this to be so apart from a shortfall of 2'2" along the "south boundary which runs east – west and is unlikely to affect north – south measurements".

[25] Mr McWilliam stated that it was important when determining any boundary to establish any evidence which still existed of any feature described in a Sasine Deed or a Registered Title.

[26] In his main report Mr McWilliam described the southern boundary as comprising a concrete block wall for part of its length which did not follow a straight line as shown in the 1918 Disposition or as shown on the current Land Certificate Title Plan. He had been advised by Steven Dougherty that there had been old sheds on what was now 112's garden and when they had rotted away a concrete wall had been erected. Mr McWilliam commented that this should "probably not be regarded as the legal boundary".

[27] The main report stated that the aggregate west boundary of 106 and 108 was 16.154m or 53' whereas the distance between the Land Registered Titles of 106 and 110 was 15.08m or 49'6". Mr McWilliam considered this to be a significant difference. He further examined all dimensions on the 1950 plan and found the north – south aggregate dimension to be 17.23m or 56' 6" which was at odds with the Land Registered aggregate dimension of 15.75m or 51.8". Mr McWilliam stated that the errors in the 1950 plan were between two to three times the root mean square error and greater than 99% probability. He had only witnessed a 99% error probability on OS maps twice in his career.

[28] From the above observations Mr McWilliam stated in his main report that the likelihood of the 1950 Disposition dimensions being correct was extremely unlikely. He noted the 1950 plan's scale bar was not to scale. Neither that plan, nor the declared dimensions, could be relied upon to determine the 108/110 boundary measuring these 1950 dimensions from the 102/106 boundary.

[29] In his main report Mr McWilliam criticised the initial report of Mr Noble and its failure to mention the discrepancy of between 1.07m and 1.48m north – south across the rear

gardens of 106/108 between Mr Noble's survey and that of the OS Map. The conclusion

Mr McWilliam's main report was as follows:

"There appears to be an unwritten rule that the Keeper of the Land Register will not be moved to alter the status quo of boundaries where the changes are less than +/- 0.4 m and I suspect that this is down to the perceived precision that a skilled cartographer could scale off a 1:1,250 scale map. The status quo on the ground here for 108/110 mutual boundary was and has been for a hundred years the Old Brick Wall at the east end and the Old Fence at the west end for at least 25 years and in my opinion at the very least this is the position that this boundary should be returned to and at the most a full proper implementation of the full 1918 Disposition Plan".

[30] In his supplementary report Mr McWilliam stated that the 1918 Disposition dimension of 87' between the south-west corner of the limecrete byre and the position of the old fence panel now within the garden of 108 which he considered as an excellent match with the 1918 plan. He did not accept Mr Noble's assertion that the southern boundary of 110 could not be determined and did not fit well with historical features. He remained of the opinion that the 1918 dimensions fitted remarkably well within the almost completely intact corner features on the ground. Mr McWilliam criticised Mr Noble for replicating the Title Plan for 106 as, when Cairntech's survey was carried out, a Land Certificate Title plan was available for that property.

[31] Mr McWilliam did not accept Mr Noble's contention that the limecrete byre was not in the original position as depicted on the 1918 plan. There was a limecrete wall on that part of the south boundary. In relation to Mr Noble's conclusion that the new fence of 108 was consistent with the 1950 deed description Mr McWilliam stated that this was not supportable. The 1950 plan showed all boundary turning points were 90 degrees but in reality they were not. Mr McWilliam stated that the 1950 plan was off scale and geometrically incorrect. He further observed that why there were so many errors was open to conjecture but the errors may well have initiated and inflamed the boundary dispute.

[32] Mr McWilliam confirmed many of these points in oral questioning during examination-in-chief. He was at pains to state that the comparison of the 1918 plan with features on the ground was remarkable. He went so far as to observe that the 1918 deed plan was the best he had ever seen. By comparison the 1950 plan was simply, as it stated, a sketch. It was not a scale plan albeit it was not the worst plan or sketch he had ever seen. With further reference to the limecrete byre Mr McWilliam did concede in his evidence-in-chief that this was an old method of making houses but the byre in question did have a more modern wet cast finish on its south elevation.

[33] In cross-examination Mr McWilliam was referred to the Land Certificate Title Plan for 110 [ ] Road and explained that where, as here, part of the north boundary was represented by a dotted line this meant there was not necessarily a defined feature. Mr McWilliam accepted there may be cases where it was necessary to go behind a registered title and consider Sasine deeds and their descriptions and plans. This was just such a case where that was necessary. Mr McWilliam accepted that there was no reference to the Poorhouse Wall. There was no reference in the 1918 Disposition or plan to any feature or building on the south boundary. The north boundary, and reference to 223', was split in two. The 199' measurement from the Poorhouse Wall to the stone pillar was a straight line albeit there was a kink in the red brick wall. With that observed it was fairly close to a straight line but Mr McWilliam had not measured the angle at which the boundary line ran.

[34] In cross-examination Mr McWilliam was referred to his A3 plan and to his plotting of the Land Register Title going through the limecrete byre. He accepted that this was an inaccuracy in the registered title. Mr McWilliam further accepted that on the south boundary, the pursuer was occupying more land than she owned. There was at one point a

difference between the pursuer's registered title and the concrete wall being a difference of 0.8m. He accepted this was an encroachment compared to the 1918 plan.

[35] Overall, Mr McWilliam did not detract to any material degree in his evidence. He was firmly of the opinion that there was a close correlation between the 1918 plan and the OS mapping used to create the pursuer's Land Certificate Title Plan.

[36] In assessing Mr McWilliam's evidence I had no difficulty accepting him as a credible witness in most respects but I did find his observation that the 1918 plan was the best he had seen as being more than a little surprising. If Mr McWilliam had correctly plotted the 1918 plan, the 1950 plan and the various Registered Titles then there were a large number of discrepancies. With reference to the A3 plan, these discrepancies could be seen as follows:

1. The 1918 deed narrated, and showed a measurement on the plan, that the east boundary was 58'6". The Land Certificate Plan measured 54' 11". The north end of the east boundary, being the boundary line between 108 and 110, suggested the difference between the 1918 plan and Land Certificate Title Plan more or less coincided but the registered title was 0.26m less than the 1918 plan.
2. On the disputed boundary, between the gate post and the end of the red brick wall the pursuer's registered title fell short of the wall by between 0.26m and 0.46m.
3. Setting aside whether the defender had encroached on the pursuer's land, at the point where the defender had erected the new section of fence in 2016 the starting point of the new fence coincided with the pursuer's registered title which was 0.57m, or 2'2", south of the end of the red brick wall.
4. Between the pursuer's garage and the Poorhouse Wall the 1918 boundary and the Land Certificate boundary largely coincided but showed a potential encroachment into the pursuer's registered title by up to 0.93m.

5. The pursuer's registered title aligned with the outer face of the Poorhouse Wall to the west but the pursuer's title as plotted by the 1918 deed followed the inner face of the Poorhouse Wall.

6. On the south the 1918 deed coincided with the outer elevation of the limecrete byre but, along the entire length of the south boundary, the pursuer's land registered title fell within the occupied extent of the subjects at 110 [ ] Road by between 0.49m and 0.87m. Indeed, according to the A3 plan, at the point where the pursuer's registered title fell short of the occupied southern boundary by 0.87m at or about the same point on the disputed boundary it appeared that the claimed extent of the defender's encroachment was 0.86m.

[37] Ultimately, given the competing evidence of Mr Noble, I found Mr McWilliam's A3 plan to be very confusing. If the A3 plan accurately plotted the 1918 Disposition boundaries, the 1950 Disposition boundaries and the Land Certificate boundaries one thing was clear – what was on the ground by way of current boundaries, setting aside the disputed boundary itself, was an incredible mismatch between recorded, registered and occupied extents of not only 108 [ ] Road but also 110 [ ] Road not to mention the mismatch in the registered titles of 106 and 112 [ ] Road. Given this, and the competing testimony of Mr Noble, I am not prepared to accept that Mr McWilliam's A3 plan can be sufficiently relied upon to correctly identify the extent of the pursuer's land registered title.

*Steven Dougherty*

[38] Mr Dougherty, the pursuer's son adopted his affidavit as his evidence-in-chief. There was further supplementary oral questioning by Mr Logan.

[39] In his affidavit Mr Dougherty confirmed his personal details and his understanding of the history of the disputed properties. Between the date of his birth on 23 April 1966 and 1970 he lived with his parents at 106 [ ] Road. From 1970 until 1990 he lived at 110 [ ] Road. From 2008 until the present he had resided at 102 [ ] Road.

[40] Mr Dougherty stated he remembered clearly how the north boundary was formed when he was between 8 or 12 years of age as he described the garden as his “playground”. He described the boundary as comprising the red brick wall and then a dark black fence up to the garage. There was an access between the properties. Beyond the garage there had been a post and wire fence running 15 to 20 feet followed by the remains of a tree. Beyond the garage the posts were rotten. There was then a gap followed by what he described as the main fence starting after that. There had also been a stick shed or Nissan hut belonging to 108 [ ] Road and then there was the picket fence, described by Mr Dougherty as a “2 up, 2 down fence” which ran back to the Poorhouse Wall. According to Mr Dougherty’s recollection the old “2 up, 2 down fence” ran to just north of the point where his late father had erected the fence panel in the 1990’s.

[41] With reference to a plan produced as part of the report by Mr Noble, Mr Dougherty stated that the current position of the defender’s fence was not where the fence he described had been located. The original fence had been positioned north of the current fence. It had been where his father had blocked a gap with a fence panel in 1990.

[42] In his affidavit Mr Dougherty stated that, following his father’s death in 2002, he had helped his mother to make the garden of 110 [ ] Road more easily maintained. At that time the disputed boundary was overgrown and there was an issue with the pursuer’s dogs getting into the neighbouring garden. Mr Dougherty began to clear the undergrowth and tried to determine the fence line by joining up the existing ends. He tried to mark the

boundary by laying lengths of rope. He could not do so as the rope was deflected by the position of the defender's shed. There was some initial help given to Mr Dougherty by the defender's partner.

[43] Mr Dougherty was referred to various photographs. He spoke to the photograph taken in the 1980's and the then new lap larch fence. He identified the defender's shed in the position it was in when the defender purchased in 1990. According to Mr Dougherty the shed remained in that position until 1994 or 1995 and, at that time, it formed part of the boundary between the properties. Mr Dougherty identified the post clamp he had installed in 2010 when he had attempted to replace the deteriorating lap larch fence. Mr Dougherty had been prevented from completing the new fence when the police had been called.

Mr Dougherty also spoke to the photograph showing the post clamps installed by him having been utilised by the defender to support her new fence. Another photograph, according to Mr Dougherty, showed the extent of this by showing how much the new fence intruded under the eaves of the new garage. Mr Dougherty spoke to a photograph which he stated showed the tree planted by his late father under which some of his ashes had been placed. His mother had scattered the ashes there which she did by herself. The yellow mark on the wall had been placed there by a surveyor and verified by Mr McWilliam as denoting the boundary line. Mr Dougherty had chiselled a mark in the wall at that point. A photograph showing holes in the Poorhouse Wall would, in Mr Dougherty's opinion, have been for pegs to secure the end of the fence for 108 [ ] Road which was slightly north of where Mr Dougherty's late father had understood the boundary to be.

[44] Mr Dougherty admitted in his affidavit that he had tried to move the defender's shed but he had been unable to move it given its weight. He stated that the shed was undamaged, not moved from its base and was still in use today. In supplementary

examination-in-chief Mr Dougherty conceded that if he had managed to move the shed it had been a minimal distance of 6 inches at the most.

[45] In his affidavit Mr Dougherty confirmed that wire netting as a dog barrier had been erected on the pursuer's side of the boundary in 2007 and removed in 2009. It was about twelve feet short of the boundary line at one end and about eight feet short at the other. He identified the positioning of the wire netting on a photograph showing it had followed the line of hedge. He did not believe it would have been visible from the defender's side of the boundary. He further stated that all attempts made on behalf of the pursuer to erect a fence at the eastern end had been removed by the defender and the new fence was built further south than the original line.

[46] Mr Dougherty denied any responsibility for erecting the fence panel at the western end of the boundary. He stated this had been erected by his late father in the 1990's and was slightly south of where the previous fence had terminated.

[47] Mr Dougherty did not detract from his evidence to any material degree in cross-examination. He stated that, in 1990, the fence would have been "nearly complete". He presumed his father had only erected one fence panel because the rest of the fence would still have been there. Mr Dougherty accepted that when he started to try and establish the position of the boundary there were 2 defined lines of trees and bushes with one each side of where he tried to set up the rope line.

[48] In cross-examination Mr Dougherty accepted there had never been a fence running across the back of the garage. When the defender's shed had been in that location originally the south elevation of the shed had been in line with the boundary. Mr Dougherty stated that the north boundary west of the garage had been "a bit ambiguous". Whereas the

pursuer or Mr Dougherty had not used the ground to the north of the garage as part of their garden he considered there was access for repair.

[49] I found Mr Dougherty to be generally credible but I had some hesitation as to Mr Dougherty's reliability about whether his father had erected the fence panel at the Poorhouse Wall and when that had been done. I could not reconcile this piece of evidence with Mr Dougherty's evidence where he stated in his affidavit that in 2002, when clearing the overgrown boundary, he discovered that there was about twenty feet of fence at either end of the boundary and a gap of about 100 feet between these features, thirty feet of which was hidden by a garage and the remainder by a dense hedge. If that were so this did not make sense. If there was about twenty feet of existing fence at the Poorhouse Wall why was there a separate and solitary fence panel erected against the Poor House Wall by Mr Dougherty's father?

[50] I found Mr Dougherty's evidence about the positioning of the disputed boundary between the red brick wall and the old and new garage to be both credible and reliable. In relation to Mr Dougherty's recollection of the precise location and nature of the disputed boundary to the west of the garage I considered this to be less reliable. By his own admission, in 2002 Mr Dougherty had commenced to clear thick hedges and bushes from that area and it was only then that he made attempts to calculate the positioning of the boundary between the garage and the Poorhouse Wall. As with the pursuer, Mr Docherty's evidence clearly supported the defender's evidence about the positioning of her shed between 1995 and 2015 and, in turn, assisted in supporting the defender's evidence as to the extent of the ground occupied and possessed by her over that period.

*Evidence for the Defender*

[51] The defender gave evidence and called as witnesses the defender's former partner, John Steven, her current partner, David Anthony and Gordon Noble, Engineer and Surveyor.

*The Defender*

[52] At the outset of her evidence, the defender sought to correct one part of her affidavit. She confirmed, with reference to paragraph 11, that the 3 panel fence nearest the red brick wall had been erected for her in 2016 and was "not quite" in the original position. The new section of fence had been erected to stop Steven Dougherty coming into the defender's garden. The defender had moved this section of fence to where she considered the correct boundary to be. She stated that the distance between her house and the replaced fence was now 9 feet 10 inches, the distance per the 1950 deed plan, whereas the original position had been measured at 9 feet 5 inches. With that correction the defender adopted her affidavit as her evidence-in-chief. In addition there were supplementary questions put to the defender during her evidence-in-chief by her solicitor, Mr Thomson.

[53] The defender confirmed her personal details including the history of her ownership of 108 [ ] Road. Between 1990 and 2007 there had been no issue regarding the boundary. She considered issues regarding the boundary were largely driven by Steven Dougherty. It was as a result of these issues that the defender had erected a new fence in 2015.

[54] The defender recalled that when she moved to 108 [ ] Road there may have been parts of a fence along the boundary but there had never been a fence along the whole boundary. She stated there may have been a fence panel at the Poorhouse Wall but not the one claimed to be installed by the pursuer's husband in 1990. So far as the disputed area

was concerned she stated that the pursuer had never made use of that area but she and her family had.

[55] With reference to photographs produced by the pursuer, the defender stated that the fence shown was further south than where the pursuer now claimed it had been. The defender stated that whereas there was some evidence of an old fence when she moved in the positioning of this was further south than her current fence.

[56] The defender spoke to a number of photographs lodged by her which she stated helped to illustrate the nature of what separated the properties. In describing various parts of the boundary the defender referred to the pursuer's garage as it was in 1990. She described the position of that garage as the effective boundary and she had always occupied the land on her side of the garage. The defender commented on the red brick wall ran at an unusual angle. The wall did not follow a straight line. If, as the pursuer claimed, the boundary ran in a straight line from the wall this would cut off a large part of the defender's garden.

[57] In 1990 the defender's shed had been located close to the pursuer's garage. Around 1995 the defender built an extension to her property and the shed was moved to a location nearer to the western boundary, about 6.5 metres back from the Poorhouse Wall. The back elevation of the shed had been placed on what the defender understood the boundary line to be and the shed remained in that position until moved to its present location in 2015.

[58] The defender stated there had been two lines of bushes and shrubs running either side of where the defender believed the correct boundary to be. Her then partner had tended to the bushes on her side when required. In order to erect the fence in 2015 the bushes and shrubs on the defender's side were cut away but those on the pursuer's side were left.

[59] The defender stated that Steven Dougherty had moved her shed but it was moved back to the original position. The defender believed the pursuer had apologised for her son's behaviour in letters. Between 2007 and 2010 Steven Dougherty had placed ropes at different positions. The defender had removed these as she believed they were encroaching on her property. Further, the defender believed that Steven Dougherty had been responsible for attaching a fence panel to the Poorhouse Wall. She had left it there as evidence of his aggressive behaviour. Further, in 2010/2011 Steven Dougherty had cut down a mature tree which had been in the defender's property to remove a fence panel and post near to her side door and the police had been involved.

[60] Because the boundary issue remained unresolved the defender instructed Mr Noble of Cairntech Ltd to prepare a survey to advise the defender what she owned per her deeds. The defender stated that Mr Noble's conclusions were in line with what she had understood the position to be. Based on this confirmation the defender erected her new fence in 2015.

[61] With reference to the claims of the pursuer, the defender stated that her new fence and current location of her shed were located consistent with land she had occupied since 1990. The defender did not accept that the pursuer's late husband had replaced a fence panel in the 1990's at the Poorhouse Wall. The defender did not accept that the pursuer's late husband had planted any trees located to the north of where her fence was now located during the period of her ownership. The defender had no knowledge of the pursuer or her family digging land to the rear of her garden to bury human ashes which in any event conflicted with Steven Dougherty's previous contention that there had been pet bones buried in that location.

[62] The defender's affidavit concluded by stating that whereas she did not accept there to be an encroachment she would remove her fence or other items of property if ordered to

do so but her current fence had been built in good faith based on a genuine understanding of what she owned.

[63] In cross-examination the defender did not detract her evidence to any material degree. She accepted that the part of fencing erected in 2016 did not follow the same line as the fence which was replaced. The defender confirmed she had “corrected that”. She further stated that the measurements taken by Mr Noble confirmed that the brick wall was “well within” her property. The wall was not at the angle shown on the 1918 deed plan. She did not accept that the yellow mark made on the Poorhouse Wall was in line with the pursuer’s Land Certificate title. She confirmed that Steven Dougherty had twice moved her shed. She now accepted that there had been trees where her son had played when he was young which were in fact in the pursuer’s garden but at that time there had been no fence delineating the boundary between the properties.

[64] I assessed the defender as a credible and reliable witness. She readily accepted that much of the boundary had been overgrown for a number of years. I accepted the defender’s evidence that she had been in possession of ground up to the pursuer’s old garage. I found the defender to have a credible and reliable recollection of there being two rows of shrubs and hedges and I accepted that she had cleared the row on her side and established the 2015 fence in the gap in the middle of those two rows. The defender had in good faith accepted the line proposed by Mr Noble as the true boundary but she had, in any event, been in possession of the ground including the mid line between the shrubs and hedges since at least 1995, being the point in time when her shed had been relocated. The defender was also credible and reliable when she accepted that the 2016 fence was established on ground she had not possessed previously albeit that she considered this to be the correct boundary line as identified by Mr Noble. In so doing the defender effectively accepted an encroachment

on the basis that she had not possessed the ground up to the point where the 2016 section of fence was now located.

*John Steven*

[65] Mr Steven adopted his affidavit as his evidence-in-chief. He confirmed personal details. He and the defender jointly purchased 108 [ ] Road in 1990 and he resided there until mid-2007.

[66] Mr Steven did not recall much interaction with the neighbours at 110 [ ] Road but did not recall any problems or issues. There was no boundary dispute whilst he resided at the property. In the mid-1990's Mr Steven and the defender constructed an extension to the rear of the property. Whilst he conceded he did not have a strong memory of the circumstances he recalled that there was a shed in the back garden near to the house and near to the pursuer's boundary. The shed was moved to five or six metres from the back wall of the garden and the back of the shed was on what was considered to be the boundary. There was no suggestion that the shed was encroaching into the pursuer's property.

[67] At some point the shed was moved by Steven Dougherty and Mr Steven was fairly confident this was after Mr Dougherty senior's death. Mr Steven had no recollection of discussions about this with the pursuer's son. He denied that he had ever accepted the shed had encroached. He believed the shed was then moved back to the original position.

[68] Mr Steven's recollection was that the north wall of the pursuer's garage was the boundary between the properties. Beyond the garage there had been a line of bushes which Mr Steven would prune on his side when needed. He believed there were bushes and shrubs on the pursuer's side but conceded he had only been in the pursuer's garden three or

four times. He did recall at one point there being a chicken wire fence put up by the pursuer's son, from the end of the garage to the rear wall.

[69] Mr Steven recalled the bushes or hedge reached the shed and then there were trees and other growth which separated the gardens before reaching the shed and then there were trees which created a barrier up to the rear wall. There had been a treehouse built by the defender's son which may have been partly in the pursuer's garden but this had never been an issue. He did not recall Mr Dougherty Senior erecting any fence at the back of the garden and had no recollection of him having planted any trees. Mr Steven recalled that the boundary had been slightly irregular with the pursuer's garage, hedges and bushes, shed and trees but it was relatively clear on the ground that it was a straight line parallel to the boundary on the other side.

[70] Mr Steven was briefly cross-examined. He accepted that he had not been in the garden of 108 [ ] Road since 2007. He stated the dispute had arisen after he had left. He had not been involved in the dispute. With reference to paragraph 9 of his affidavit, Mr Steven confirmed that the shed had been moved on only one occasion.

[71] I considered that Mr Steven was an honest witness trying his best to recollect what he remembered about the boundary whilst he was at the property. Whilst it is understandable, given the significant passage of time, Mr Steven conceded he did not have a great recollection of all matters I did not consider his reliability was affected materially. In supporting the defender's recollection of the physical features of the boundary, Mr Steven's testimony supported the fact that, between the Poorhouse Wall and the pursuer's old garage it was more likely than not that the boundary between the properties was undefined but lay somewhere between two mature rows of bushes and trees. The other part of the boundary was the red brick wall and the trellis fencing up to the pursuer's old garage.

*David Anthony*

[72] Mr Anthony adopted his affidavit as his evidence-in-chief. He confirmed that he had been in a relationship with the defender since April 2012 and had regularly visited and stayed at 108 [ ] Road since then.

[73] Mr Anthony was aware of the ongoing boundary dispute. His first direct involvement had been in May 2012 when he had a conversation with the pursuer who stated she was going to have the matter resolved once and for all. Thereafter two posts were placed at either side of the defender's shed, at approximately the shed's mid-point. Three further posts were installed by Steven Dougherty and Mr Anthony understood this was to assert a claim to the position of what Mr Dougherty considered to be the correct boundary. Mr Anthony had first seen the shed in this location in 2012.

[74] Mr Anthony had assisted the defender's contractor in erecting the new fence in 2015. He recalled that the pursuer had confirmed there were pet bones under the tree by the Poorhouse Wall and had made no reference of her husband's ashes being there at that time. Similarly, when shouted at by Mr Dougherty during construction of the new fence, there had been no reference to his father's ashes.

[75] Mr Anthony referred to photographs which he stated showed where various bushes and shrubs had been cut back when the defender's shed had been moved. He was of the opinion that the current fence line was entirely consistent with the occupational extent of the defender's garden since he had started visiting the property.

[76] Mr Anthony was briefly cross-examined. He confirmed that the defender's shed was moved at the time the new fence was erected in 2015. In relation to his view that the new location of the shed had its south elevation in line with what had been part of the

defender's garden before the shed was moved, Mr Anthony conceded that was what he had been told. He accepted that the panel, marked D on pursuer's production 5.4.10 of process, had been there in 2012.

[77] Mr Anthony's evidence was limited in nature. It provided confirmation of the physical features of the defender's garden and the nature of the disputed boundary since 2012. I found Mr Anthony to be a credible and reliable witness albeit that his evidence was of limited assistance.

### *Gordon Noble*

[78] Mr Noble confirmed he was an Engineer and Surveyor. He had been employed by Cairntech Ltd for 8 years. He had 17 years' experience of being involved in investigating boundary disputes. Mr Noble had produced two reports. These were dated 27 July 2014 and March 2021. Mr Noble adopted both reports as part of his evidence-in-chief.

[79] I will summarise the contents of Mr Noble's reports. Where accepted, and of relevance, the terms of Mr Noble's reports are incorporated in my findings in fact.

[80] Following a survey of the defender's property in 2014, using survey software and the latest OS map, Mr Noble produced a plan which he stated allowed him to replicate the original title plans for 106, 108 and 110 [ ] Road. His 2014 report explained how this was achieved. Mr Noble's conclusion was that 106 and 108 [ ] Road followed the historic walls to the east and north boundaries and that their locations were accurate on both the historic and survey plans. The boundaries of 110 [ ] Road had been replicated using the original title plan which showed that the west boundary did not match the physical boundary. Mr Noble went onto state that the boundary had not been surveyed and the line shown on the plan had been plotted from the OS map. He concluded that the boundary or site

features representing the boundary between 108 and 110 [ ] Road were not in the correct location. The most obvious feature was the red brick wall to the south east and the fence panel to the north east of 108 [ ] Road. The new garage eaves were over-hanging the boundary of 108 [ ] Road,

[81] Mr Noble's 2021 report followed further instruction in 2019. The instruction was to investigate the respective titles of the properties. At that time Mr Smith, surveyor, was instructed on behalf of the owners of 110 [ ] Road. Mr Noble and Mr Smith met on site and walked the boundaries of all three properties at 106, 108 and 110. Mr Noble prepared a survey plan for both parties to work from.

[82] In the 2021 report Mr Noble and Mr Smith agreed that the west (Poorhouse) wall was consistent with that shown on the 1918 deed plan. The wall separated by a shared access road to the east appeared to be shown on the 1918 and 1950 plans. The wall to the north of 106 appeared to be the same wall shown on both the 1918 and 1950 plans. The southern boundary of 110 was of mixed construction with part being the original wall in dressed stone and part of block work construction. The block work section was not built in a straight line.

[83] Mr Noble further commented on the building constructed on the southern boundary of 110. This was not shown on the 1918 title plan and only half of the building in the south west corner appeared to be shown. A historic comparison could be made with a map from 1932.

[84] Following agreement with Mr Smith various points of interest, marked 1 to 9a on a plan forming part of the report, were identified. Having downloaded the latest digital OS survey map, with agreement, Mr Noble started the title replication of 110 using point of

interest 8 being the north east corner of 110. Mr Noble also checked his previous replication of the titles of 106 and 108 [ ] Road.

[85] In his second report, Mr Noble concluded that the 1918 title proved difficult to replicate and fit within the surveyed boundaries. The property did not fit within the surveyed features. Whereas the 1918 plan scaled reasonably well, 2 out of 4 stated dimensions did not match the scaled dimensions and when replicating the angles the property did not fit with the surveyed physical features. The east and west dimensions stated on the plan did not reach the walls.

[86] Mr Noble also expressed doubts as to whether the limecrete byre in the south west corner of 110 was the same building shown on the 1918 plan. It was a mix of modern materials fixed over time. He considered it was formed with the remains of whatever earlier building had been there. In Mr Noble's opinion the 1932 map looked to go through the centre of a building between 110 and the neighbouring property.

[87] By comparison, Mr Noble concluded that the title for 106 and 108 [ ] Road fitted within the boundaries identified on site with only 2 out of 20 dimensions not matching. He considered the 1950 plan had been based on accurate survey information with all stated dimensions scaling very well. The defender's current fence was in a position consistent with the location of her southern boundary per the 1950 plan and consistent with the extent of the deed subjects including the shape of the plot and the area occupied.

[88] In his evidence-in-chief Mr Noble stated that he did not believe the wall shown in the 1918 deed plan was the red brick wall on site. The red brick wall did not follow any of the boundary lines referred to in the Disposition. If it was the wall then this reinforced the fact that the 1918 plan was not accurate. When it came to the west boundary the dimension shown on the plan fell short of the Poorhouse Wall by 867mm.

[89] Mr Noble considered that the defender's shed in its current position was situated over the boundary by only 24 mm. Mr Noble confirmed that he had set out where the defender's current fence should be situated. In his opinion, the current location of the fence was consistent with the position of the boundary in the 1950 plan. Mr Noble acknowledged that in 2014, at the time of the first survey, 110 did not have a registered title.

[90] In cross-examination Mr Noble was referred to photographs lodged as productions by the pursuer. He confirmed he had not seen these photographs before. He could not say whether the red brick wall was the same one now as seen in the photograph taken in 1970. Whereas 110 did not have a registered title in 2014, Mr Noble accepted that 106 was registered but he had not looked at the registered title. In 2019, when 110 was registered, Mr Noble stated he had not used the Title Plan. He would not do this. He further conceded that, having set out the position of the boundary as he believed it to be he advised the defender to seek legal advice before commencing construction. He remained of the opinion that he had correctly set out the boundary per the 1950 plan.

[91] In cross-examination Mr Noble was asked whether he accepted any of the criticisms levelled at his conclusions by Mr McWilliam. He did not accept any of these criticisms. He further disagreed entirely with Mr McWilliam's A3 plan. He did not accept that Mr McWilliam had correctly plotted any of the boundaries and stated that Mr McWilliam had been "picking and choosing" what best suited his conclusions.

[92] I found Mr Noble to be a credible and reliable witness. The reasoning he provided was relatively clear and straight forward. In contrast to Mr McWilliam it appeared that Mr Noble, using historic features, had carried out his measurements from the north boundary of 106 [ ] Road. By doing so, and working towards the south boundary of 108 [ ] Road Mr Noble had determined what he considered to be the correct measurements.

Furthermore, Mr Noble gave a reasoned and convincing explanation which cast doubt on whether the pursuer's current southern boundary was in its original 1918 positioning. I preferred Mr Noble's evidence to that of Mr McWilliam when it came to their respective opinions on the accuracy of the plans attached to the 1918 and 1950 Dispositions. Given the survey carried out by Mr Noble I accepted that the 1950 plan was extremely accurate and that the survey he completed had identified the correct positioning of the disputed boundary per the deeds and the descriptions each provided.

[93] Clearly, Mr Noble's conclusions were of assistance and confirmed the correct positioning of the disputed boundary which placed it at the position which would have been between the two lines of trees and shrubs. Whilst secondary to the evidence I accepted about the ground occupied and possessed by the defender prior to challenge, Mr Noble's professional opinion further supported, and gave a legitimate basis to the defender's contention regarding the positioning of the dilapidated boundary she recalled when taking ownership in 1990. Mr Noble's conclusions as to the positioning of the true disputed boundary between the Poorhouse Wall and the west elevation of the garage were consistent with the evidence I accepted about possession of that area between 1995 and 2015. Mr Noble's calculations about the boundary between the end of the red brick wall and the new garage did not take into consideration the respective possession of the parties of ground at that point up to the defender's new section of fence being erected in 2016.

### **Parties Submissions**

[94] In advance of the hearing assigned for submissions on 31 May 2021 the parties drafted, exchanged and lodged written submissions. I am indebted to agents for the full and considered submissions lodged on behalf of both the pursuer and defender.

*Submissions for the pursuer*

[95] Mr Logan, Counsel for the pursuer, adopted both his principal and supplementary written submissions. He was largely content to rest on these with brief oral submissions in addition.

[96] Mr Logan invited me to sustain the pursuer's first and fifth pleas-in-law; repel the defender's pleas-in-law and to grant decree in terms of pursuer's first and sixth craves.

Thereafter Mr Logan invited me to continue consideration of the case for a period of 4 weeks to ascertain whether the defender had obtempered the order sought ordaining demolition of the shed, metal frame and fencing, and removal of the motor cycle so that consideration could then be given as to whether further orders were necessary. I was further invited to find the defender liable in expenses and to certify Mr McWilliam as a skilled witness. I was reminded that a motion certifying the cause as suitable for the employment of junior counsel had previously been granted.

[97] First, Mr Logan submitted that in terms of section 38(2)(e) of the Courts Reform (Scotland) Act 2014 a Sheriff had jurisdiction to determine questions of heritable right or title, including declarator of irritancy and removing. The 2014 Act did not give the court power to challenge or change the terms of a Land Certificate as that power was vested in the Lands Tribunal for Scotland in terms of the Land Registration etc. (Scotland) Act 2012. No application had been made in this case but there was no basis for such an application. As a result, in the absence of such an application, the Keeper's warranty resulted and the pursuer benefited from that. The Keeper's warranty had not been qualified or modified in relation to the pursuer's Land Certificate.

[98] Secondly, it was submitted that if I was satisfied that Mr McWilliam had accurately reflected the terms of the pursuer's Land Certificate in the A3 plan which was referred to during the proof then the court must respect the delineation of the Land Certificate as showing the extent of the pursuer's title and any order or decision of the court must respect the rights flowing from that. Mr Logan submitted that it was clear the defender had encroached upon the pursuer's land when erecting the fence in 2015. Mr Logan argued that there was no basis for reaching any other conclusion.

[99] In advancing the second point Mr Logan submitted that there had been no challenge to the accuracy of the A3 plan. He accepted that Mr McWilliam had explained the scale of the OS map could involve an element of uncertainty because there were recognised tolerances. In certain cases, when dealing with very small areas of land, this potential inaccuracy could create a space in which the court could make declarators or determine that the right was within the tolerances allowed by the cadastral map used by the Keeper. The Keeper would not generally allow variation of a Land Certificate for a distance of less than 0.4m to account for this tolerance or potential inaccuracy. In this case, the defender could not claim that the fence erected by her in 2015 would fall within the RMSE of the recognised mapping tolerances and there was accordingly an intrusion onto the pursuer's property.

[100] Mr Logan referred to the defender's concession on the third day of proof regarding the 2016 fence. Any question of prescriptive possession founded on a title habile to include that land fell away. As such, what was left was two competing and overlapping Sasine titles before registration. Where prescriptive possession could not be shown the older title prevailed. This meant the defender's title was inferior to that of the pursuer even before registration in the Land Register. Had the defender conceded this earlier then matters might

well have been capable of being determined at debate and the late concession would have a bearing on the question of expenses regardless of the outcome of the case.

[101] Mr Logan submitted that the evidence of Mr Noble did not assist the defender. He had relied on the sketch attached to the 1950 Disposition. For other reasons stated his evidence was irrelevant but if Mr Logan was wrong in that conclusion there were various reasons why Mr Noble's evidence should be rejected. First, Mr McWilliams explanation of registration of title working as a jigsaw what was left, between the registered titles of 106 and 110 was available to the defender. Secondly, Mr Noble disregarded evidence which did not suit his position. There was no proper basis to ignore the significance of the limecrete byre which gave a correct starting point for the measurement along the west boundary. He had speculated, with no evidential foundation, that the wall was in a different position to that seen in the 1918 Disposition. Mr Noble had ignored a discrepancy of 2 feet 8 inches in the combined width of 106 and 108. His contention that the 1950 deed was a "good fit" was not credible. By contrast Mr McWilliam's evidence should be preferred

[102] In supplementary submissions, which addressed certain parts of the defender's submissions, Mr Logan repeated that it was not open to the court to find any error in the registered title but if he was wrong in that then the 1918 title was habile to include the land contained in the Land Certificate. Criticisms levelled at Mr McWilliam's conclusions were not accepted.

[103] With reference to the title plan in the pursuer's Land Certificate, the fact the boundary line was undefined was immaterial. The title was what it was and was binding on the court. Whilst it was accepted that there were minor discrepancies between the registered title and the 1918 deed these were not material and would provide no basis for rectification.

[104] It was submitted that the pursuer did not require to aver possession because she had a registered title. Even although the evidence which I should accept supported the fact that the pursuer had possession of the disputed strip prescriptive possession was only relevant to make a good title but that is what the pursuer had the defender's position regarding possession was irrelevant. The defender had not counterclaimed to establish prescriptive possession and no plea-in-law to that effect.

[105] In summary Mr Logan submitted:

1. The Land Certificate rules in the absence of rectification.
2. The pursuer's 1918 deed was superior to the 1950 deed.
3. The boundary was consistent with the 1918 deed and with the Land Certificate until 2016 when the defender erected her fence.
4. That fence and everything behind it was an encroachment on the pursuer's registered title.
5. The defender had neither pled nor given evidence that would allow rectification of the pursuer's title even if that was within the power of the court.
6. The orders sought in the pursuer's primary submissions should be granted.

*Submissions for the defender*

[106] Mr Thomson, solicitor for the defender, adopted his written submissions and amplified these with further oral submissions. He submitted that the defender denied any encroachment. The orders sought by the pursuer relied on a finding that there been an encroachment. Further the pursuer required to prove the precise location of the disputed boundary to her title.

[107] Mr Thomson did not accept that the act of registering the pursuer's property in the Land Register was determinative of identifying the disputed boundary. He did not accept that the plotting of the registered title against the physical survey of the property on the ground determined the precise extent of what the pursuer owned. The pursuer's claim was based on the assessment of Mr McWilliam and his conclusions. Those conclusions were that the encroachment was to a differing extent at various points along the boundary and was less than one metre at the widest extent. In places it was significantly less than one metre. The pursuer had failed to establish she owned the area claimed but in any event the defender's title was exempt from challenge given the area she had occupied since 1990.

[108] Mr Thomson highlighted the fact that the boundary on the registered title was undefined. The OS scale used was accepted by both Mr McWilliam and Mr Noble was inherently inaccurate and therefore unreliable to determine the precise location of an undefined boundary. The area in dispute fell within the tolerance of relative accuracy. The OS mapping did not match accurately with the physical survey. For the pursuer to rely solely upon the OS mapping of the registered title was insufficient to establish the extent of her ownership of the undefined boundary.

[109] Mr Thomson submitted that prior to the change in the land registration system under the 2012 Act the law recognised that it could be necessary to examine prior titles where there was a dispute which could not be resolved by reference to the Land registered title alone, particularly where the amount of land was small and there were no historic features on the ground indicating the position of the boundary. He referred to various unreported cases, *North Atlantic Salmon Conservation Organisation v Au Bar Pub Limited* (Edinburgh Sheriff Court 18 July 2008), *Clydesdale Homes Ltd v Quay* (OH 10 September 2009) and *Welsh v The*

*Keeper of the Registers of Scotland* (Land Tribunal 22 April 2010) as examples where Sasine titles had been referred to.

[110] The difficulty for the pursuer, it was submitted, was that the 1918 Sasine title did not assist in determining the precise location of the undefined disputed boundary. The pursuer could not claim title to land she did not have good title to before registering her property. The 2012 Act provided more protection to the unregistered owner of a neighbouring property than had the 1979 Act. The 2012 Act gave the Lands Tribunal a broad remit to determine claims relating to accuracy of the register and the Keeper had his own power to rectify a manifest error. What constituted an inaccuracy was also defined by section 65 of the 2012 Act. Significantly for this case the definition stated that the cadastral map would not be considered inaccurate by reason of an inexactness in the base map within published accuracy tolerances relative to scale. If the court concluded that the pursuer's registered title included the area in dispute but that this conflicted with the defender's competing possession then the Land Register was not inaccurate because the extent of the disputed area was within the published accuracy tolerances to be applied.

[111] Mr Thomson submitted that the 1918 title was habile so as to include the area in dispute. Mr McWilliam had argued the pursuer's 1918 title was a bounding charter. Mr McWilliam's assertion that the 1918 plan was one of the most accurate he had seen was remarkable. The plan and verbal description contained an error in relation to the southern boundary to the points that both expert witnesses had agreed were the likely intended boundaries. The north-west or south-west corner could not be precisely plotted based on either the verbal description or the plan attached to the 1918 Disposition which meant the remaining boundaries could not be accurately plotted by triangulation. Mr Thomson referred to conveyancing texts and case law, in particular relying on *Cosh v Potts* 1950 SLT 10

and *Suttie v Baird* 1992 SLT 133 as to whether a description is a bounding description. It was accepted that if a bounding description is suitably precise an individual can never possess land beyond the extent of the boundary. The 1918 title was habile to include the disputed area. Equally the 1950 title was habile to include the same area.

[112] Mr Thomson explored the law relating to prescriptive possession. Although the pursuer had not averred prescriptive possession it was necessary for her to prove such possession to show good title. The defender's evidence of possession was unchallenged. Some elements of possession were expressly admitted by the pursuer and her son. This included the location of the defender's shed between 1995 and 2015.

[113] Mr Thomson conceded the defender had accepted in evidence that the 2016 fence was nearer to the pursuer's property than earlier fences but the pursuer had failed to establish the extent of her title. Mr McWilliam's plan showed the encroachment as being minimal at this location.

## **The Applicable Law**

### *The jurisdiction of the Court and remedies sought*

[114] The pursuer seeks declarator with ancillary orders flowing from that. Principally, the pursuer seeks decree of declarator that the defender has encroached on the pursuer's heritable property. This is with specific reference to the pursuer's heritable property as now registered in the Land Register of Scotland.

[115] The current jurisdiction and competence of a sheriff is contained in section 38 of the Courts Reform (Scotland) Act 2014. This confirms that a sheriff continues to have the jurisdiction and competence attached to the office of sheriff in relation to civil proceedings immediately before the section came into force. Without limiting that generality the section

proceeds to state that a sheriff has competence as respects proceedings in relation to, amongst other powers, questions of heritable right or title, including declarator of irritancy and removing (section 38 (2)(f)).

[116] The Sheriff Court does not have power to challenge the accuracy of a Land Certificate. Beyond the Keeper's duty to rectify a manifest inaccuracy in a title sheet or in the cadastral map, that power is vested in the Lands Tribunal for Scotland to which a person with an interest may refer a question relating to the accuracy of the register or what is needed to rectify an inaccuracy in the register (section 82 of the Land Registration etc. (Scotland) Act 2012).

[117] In this case the court is not being asked to grant a remedy in relation to the accuracy of the Land Certificate which now forms the title of 110 [ ] Road. That said, the matter as to whether a Land Registered Title overrides or "trumps" a Sasine Registered Title, and whether this court can look behind this particular Land Certificate, are issues which feature here and require some exploration. To that end it is worth considering the differing systems of registration and what flows from each when determining land ownership.

### ***Sasine and Land Registered Titles***

[118] The Register of Sasines was instituted in 1617 as a register of deeds constituting or transferring rights in land. The Land Registration (Scotland) Act 1979 introduced a new system of registration with the intention of superseding the recording of deeds in the Register of Sasines. This was on a phase-in process on a county by county basis completed in 2003. The 1979 Act was replaced by the Land Registration etc. (Scotland) Act 2012 (hereinafter "the 2012 Act") with the goal of having all titles on a map-based system by 2024.

[119] It has been commented that The General Register of Sasines (“GRS”) is a warehouse of deeds and little more than that apart from being a superb system of indexes. By contrast, map-based precision is vital in the Land Register (*Gretton and Reid, Conveyancing*, 5<sup>th</sup> Edition, paragraph 12-17).

### ***Priority of Sasine and Land Registered title***

[120] The relevant Sasine title descriptions in this case were recorded in 1918 and 1950. Since 1693 priority of right was made dependent on priority of the date of registration of competing instruments of sasine (Real Rights Act 1693 c.13). . This principle was reflected in section 7(3) of the Land Registration (Scotland) Act 1979 which stated that title to a registered interest and a title governed by a deed recorded in the Register of Sasines shall rank according to the respective dates of registration and recording. It should be noted that section 7(3) of the 1979 Act was repealed by the 2012 Act. Where there are two overlapping Sasine titles the older registered title prevails unless prescriptive possession can be shown. Does that still hold where there are competing or overlapping Sasine and Land Registered titles? I see no reason why that basic principle would not continue to be observed and applied. There still requires determination of the implications of prescriptive possession where a dispute arises between Sasine and Land Registered title if that remains pertinent to resolution of the dispute.

### ***Prescription and Limitation (Scotland) Act 1973***

[121] The 2012 Act introduced amendments to section 1 of the Prescription and Limitation (Scotland) Act 1973. That section, so far as relevant to this case, now reads as follows:

**“1 Validity of right**

(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

(b) the registration 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,

then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge....”

[122] The 1973 Act has been amended by the 2012 Act to reflect the fact that prescriptive possession can create a real right in land ownership by either a Sasine recorded or Land registered deed provided the deed is sufficient in its terms to constitute the right sought in the land described or that the land is of a description habile to include that land. That is so, so far as I can determine, whether competing Sasine titles are involved, whether competing Land Registered titles are involved or whether the competition is between a Sasine and Land Registered title.

[123] The main requirement for prescriptive possession to operate is that a title to the land must be of a description habile to include that land. The description in the registered or recorded deed is the starting point to determine that.

*Descriptions in deeds and resolution of disputed boundaries.*

[124] A bounding Charter is one which, wholly or partially, proceeds by reference to a specified prior possession, or by a detail of the physical limits, by measurement or by any or all of these combined (*Rankine, The Law of Landownership in Scotland*, Chapter 4 at page 101). In the case of a bounding charter, no amount of possession beyond its limits can enable the possessor to vindicate ownership beyond the area described. Where the bounding charter is so precise and intelligible in its terms to allow the court to fix the boundaries no proof of possession will be allowed. Where the terms are ambiguous and unintelligible without extrinsic evidence proof will be necessary and prescriptive possession will be of importance (*Rankine*, page 102). Erskine observed that differences can seldom arise concerning the extent of land conveyed where a charter points out "obvious and indubitable boundaries" (*Erskine*, II, vi, 2).

[125] A particular description can be done verbally, by reference to a plan only or a combination of both. A GRS deed with both a verbal description and a plan are to be read together. In the event of their being a discrepancy between the two the plan prevails if the deed declares the plan to be "taxative" and the verbal description prevails if the deed declares the plan to be "demonstrative". If the deed is silent on this point then the verbal description will usually prevail (*Gretton and Reid*, paragraph 12.22).

[126] Where subjects are described both by physical boundaries and measurements discrepancies may appear. If that is so physical boundaries, if clearly set forth, govern. Any bounding description must make it clear what is included. Where a person's property is described as bounded by the property of another there is no definite boundary line and proof will be necessary unless there is a clear demarcation on the ground ( see *Cosh v Potts* (1950) 66 Sh Ct Rep 93; *Suttie v Baird* 1992 SLT 133).`

[127] Where it is determined that there is an accurate and sufficiently precise description so as to exclude variation no amount of possession beyond the defined points give any possessory right. If this is not the case then ownership may be claimed by positive prescription. The necessary period is one of 10 years. Such possession must have been exercised openly, peaceably and without judicial interruption and founded on a deed containing a description habile to include that interest in land.

[128] In order to establish such ownership the individual must show (a) an appropriate title duly completed and (b) prescriptive possession of that title. The requirements of positive prescription require that there should be a habile title. This means that the title should be an adequate foundation for the right which is alleged to have been acquired by prescription (*Gordon and Wortley, Scottish Land Law, Third Edition, paragraph 12.26*). The question is whether the title, upon any reasonable construction, covers the land in dispute. In *Suttie v Baird* the verbal description in the disputed title referred to an aerial measurement and to a scale plan which showed linear measurements along all boundaries. Inclusion of the relatively narrow strip of land in dispute even produced an area of a different shape to that shown on the plan. Having reviewed a number of earlier authorities, Lord President Hope summarised matters as follows:

“The question in the end of the day becomes one of degree, and this emphasises the essential ambiguity of the pursuer’s title at this point. On the one hand, if the measurements and the plan had been sufficiently precise, the pursuers’ claim might have been capable of being answered by means of simple arithmetic. That evidently has not proved to be possible. On the other hand, the strip of ground is sufficiently narrow in relation to the area and length of plot no.40 as shown on the plan for us to be able to say that the strip fits the description and thus falls within the title on which the pursuers rely. Possession is, in this case, the best guide to the position of the western boundary, and for that reason, I think that the pursuers are entitled to the declarator which they seek.” (page 137 F to H)

### *Rectification of Land Registered Title*

[129] The 2012 Act makes provision for the functions of the Keeper of the Registers of Scotland. Sections 3 to 10 state what must be incorporated into a Title Sheet. The Keeper must enter in the property section of the title sheet a description of the plot of land being a reference to the cadastral map (section 6(1)(a)). Each registered plot is given a cadastral unit. The cadastral map may, but need not, show the boundaries of cadastral units on the vertical plane (section 11 (3)) and must be based upon the base map which is currently the Ordnance Map (sections 6(5) and 6(6)(a)).

[130] Section 65 of the 2012 Act defines the meaning of “inaccuracy” in a title sheet. A title sheet is inaccurate in so far as it misstates what the position is in law or in fact (section 65(1)(a)). The cadastral map is inaccurate in so far as it wrongly depicts or shows what the position is in law or in fact or omits anything required, by or under an enactment, to be depicted or shown on it (section 65 (2) (a) and (b)). But the cadastral map is not inaccurate in so far as it does not depict something correctly by reason only of an inexactness in the base map which is within the published accuracy tolerances relevant to the scale of map involved (section 65 (3)).

[131] The published accuracy tolerances relevant to the scale of the map involved can be found published online by the Ordnance Survey itself. The width of a line on a 1:1250 OS map roughly represents 0.3 metres on the ground. The OS publishes expected confidence levels in the accuracy of their maps in terms of relative and absolute accuracy. Relative accuracy compares the scaled distance between features from the map data with distances measured between the same features on the ground. Absolute accuracy is the measure which indicates how closely the coordinates of a point in the OS map data agree with the “true” National Grid coordinates of the same point on the ground. The root mean square

error (“RMSE”) is the square root of the mean of the sum of the squares of the errors between the observations. At a scale of 1:1250, up to a distance of 60 metres, absolute accuracy with a 99% confidence level is 0.9m, 95% confidence level is 0.8m and the RMSE is 0.5m. On the same scale, up to the same distance, relative accuracy 99% confidence is +/- 1.1m, 95% confidence is +/- 0.9m and the RMSE is +/-0.5m.

[132] The following information can also be found on the Registers of Scotland Website:

#### **“Competing titles**

The same area of land cannot be represented by more than one unit on the cadastral map. We will reject any first registration applications for plots that overlap with existing registered titles....

... Competing titles registered before the 2012 Act’s powers took effect can continue to exist in the land register. If this overlap is brought to our attention, we will note it in the register. We can only rectify if the action we must take is obvious.

#### **Competition with subjects recorded in the sasine register**

It is for the granters of deeds to avoid overlaps between plots of land registered in the land register and subjects in the sasine register although, in most cases, this will consist of a decision as to the extent of their ownership based on what a title is habile to include. Clearly it would be unacceptable for the Keeper to reject a first registration application based on the possibility of a competing title at a later date. Instead, the subjects will be registered as shown in the deed and warranty will be restricted over any area where the Keeper is aware of a potential competition with subjects remaining in the sasine register. Should the subjects currently remaining in the sasine register be presented to the Keeper for registration in the land register at a later date, the rules against overlapping cadastral unit would apply unless already resolved by the parties.”

[133] Rectification of the Land Register is governed by section 80 of the 2012 Act and applies where the Keeper becomes aware of a manifest inaccuracy in a title sheet or in the cadastral map. The Keeper must rectify the inaccuracy if what is needed to do so is manifest. The term “manifest inaccuracy” is not defined in the 2012 Act. The Registers of Scotland Website states:

“The Keeper's duty to rectify is engaged when she becomes aware of a manifest inaccuracy in a title sheet or the cadastral map. In order to be manifest, the perceived inaccuracy must be clear and not reasonably disputable. For those seeking to demonstrate that a manifest inaccuracy exists, this is a high evidential standard. As is the position under the 1979 Act, the Keeper will not arbitrate in disputes: disputed matters will continue to require judicial determination.

By way of illustration, a manifest inaccuracy would exist where:

- a void deed is given effect to;
- the Keeper has incorrectly delineated a plot on the cadastral map;
- rights or burdens have been omitted; or
- the existence of an inaccuracy has been judicially determined;
- an off-register event results in a title sheet incorrectly disclosing the registered proprietors.
- 

Examples where a perceived inaccuracy may not be considered manifest would include:

- the existence or extinction of prescriptive rights;
- habile competing titles with disputed claims of possession; or
- anomalies between a description and plan within a deed.”

[134] I further observe from the explanatory notes to the 2012 Act that section 80(1) is described as an important provision that sets a high evidential standard for rectification.

The explanatory note goes on to state that “the position must be beyond dispute, in effect that it is more than simply probable that there is an inaccuracy” (explanatory note 191).

[135] An important matter flows from a Land Certificate where no manifest inaccuracy has been sought to be rectified or where no referral has been made to the Lands Tribunal. That is the Keeper’s warranty in terms of section 73 of the 2012 Act. In particular the Keeper in accepting an application for registration, warrants to the applicant that, as at the time of registration, the title sheet is accurate (section 73(1)(a)). Should that prove not to be the case the Keeper may become liable in compensation to the applicant in terms of the warranty which has been given. Dependent on the information provided to the Keeper, or on what the Keeper determines during the registration process, warranty may be modified or

restricted. As noted above, this would be the case if, in the course of registration, the Keeper was aware of a boundary dispute.

### *Challenge of Land Registered Title*

[136] From all of the above, I do not think it is possible to state that a Land registered title is superior to a competing Sasine registered title when the issue, as here, includes consideration of whether there are habile competing titles with disputed claims of prescriptive possession. The Keeper's warranty is in respect of the accuracy of the title sheet and provides, in effect, for compensation being obtained from the Keeper should a title be successfully challenged. Short of this there are avenues to have a title rectified if a manifest inaccuracy has been identified. It seems clear that where there is a dispute as to the extent of neighbouring lands, or the correct positioning of boundaries, even where there is a Land Certificate it may not only be appropriate but necessary to go behind that Land Certificate and consider Sasine registered deeds. It seems to me that in a case such as the present, where the issue of prescriptive possession is to be considered, it is essential to do so in order for the dispute to be judicially determined.

[137] In relation to the circumstances of this dispute it is the case that the Keeper's warranty is not modified or restricted in relation to the pursuer's Land Certificate. That does not assist me because no evidence was adduced about the voluntary registration process either in evidence-in-chief or in cross-examination. I do not know what was disclosed to the Keeper about the ongoing boundary dispute as part of that process and it is not for me to speculate on that matter.

**Decision**

[138] Between 1990 and 2007 the parties lived as neighbouring proprietors without any concern about their shared boundary. It is unfortunate that there has been an ongoing dispute since 2007 with this action having been raised in 2018. It is even more unfortunate that the parties have been unable to reach a sensible and pragmatic solution to their dispute. Given that they have been unable to do so I require to determine this matter based on the evidence I have heard, the facts that I find proved and the law which must be applied.

[139] Put simply, identification of the mutual boundary between 108 and 110 [ ] Road should not be so difficult or complex. The fact that it is apparently so difficult to identify the precise position of the boundary on the ground based on historic physical features speaks volumes. As was conceded by both parties' agents in their submissions the titles to both 108 and 110 [ ] Road are habile in nature. I agree with that concession. Neither property can claim to have a bounding description.

[140] This is a case in which it is appropriate to look behind the pursuer's Land Certificate. The reasons for this are clear. Given the tolerances in the Ordnance Survey map the area in dispute is so small as to be, partially if not exclusively, covered by those tolerances as I understand them to apply to the cadastral map given its scaling. It was again conceded that there would be no manifest error in terms of the 2012 Act and no basis upon which this dispute could be resolved by either seeking the Keeper to rectify or by posing a question on the point to the Lands Tribunal for Scotland. Again, I agree with that concession.

[141] The precise location of parts of the pursuer's northern boundary as plotted on the Land Certificate is also less than clear given the use of a dotted line between the Poorhouse Wall and the west elevation of a building, likely to be the pursuer's current garage, shown on the Land Certificate title plan. As was suggested, and as far as I am aware, a dotted line

is used in circumstances where the boundary is undefined. An undefined boundary can include circumstances where the boundary is obscured by trees and bushes or other features or otherwise has no defined structure to mark its location.

[142] I am of the opinion that the historic placement of the pursuer's southern boundary is unclear. It simply cannot be established by anything near pinpoint accuracy. In these circumstances, it is at least probable that there has, at some time in the past, been encroachment into the neighbouring property. This conclusion is supported by the opinion of Mr Noble. It helps explain in my mind why Mr McWilliam's plotting of the cadastral map used to produce the pursuer's title plan lies 0.49m into the confines of the pursuer's boundaries and appears to cut through the limecrete byre as it currently presents. No evidence was led to confirm how long the southern boundary area had been possessed by the pursuer or previous owners conform to its current location. There is evidence which suggests that in 1932 it is more probable than not that the byre was part of a larger building which straddled the boundary between neighbouring properties at that point.

[143] The red brick wall is a curious feature. It is not built in a straight line. There are differing views as to whether the current red brick wall is the same wall that was included in the 1918 deed plan. It is for that reason that, as a matter of fact, all I can establish is that the said wall has been in place since at least 1970 and possibly for an undefined period prior to that. What has also been established as a fact is that as from 1970 until 2016 the pursuer, whatever her proprietary interest was prior to Land registration in 2015, possessed and occupied that area of land up to the south face of the red brick wall. More importantly, the evidence establishes that the defender never possessed this area of land prior to erecting that section of fence which she did in 2016.

[144] It is for all of the reasons as above stated, and based on the conclusions I have reached that I have found it is more likely than not that the defender has possessed the area of ground within 108 [ ] Road up to the position of the fence erected in 2015 openly, peaceably and without judicial interruption since at least 1995, being a continuous period in excess of ten years. Her possession is founded on a deed containing a description habile to include that interest in the land between the Poorhouse Wall and to a point at or about the east end, or front elevation, of the pursuer's current garage. The real right created so far as relating to that land is concerned is exempt from challenge by the pursuer. On that basis the pursuer's case fails.

[145] For the same reasons, based on the same conclusions, and by admission on the part of the defender, she did not possess the area of ground she now possesses between the east end, or front elevation, of the pursuer's current garage and the west end of the red brick wall prior to erecting a fence between these points in 2016. She cannot rely on prescriptive possession. On that basis it is immaterial whether the defender's title is habile to include that interest in the land now claimed by the defender at that section of the disputed boundary. On that basis the pursuer's case succeeds.

#### **Orders to be made and further procedure**

[146] I have sustained the pursuer's first plea-in-law in terms which identify the extent of the defender's encroachment I have found proved. I have specifically stated the encroachment as being into the pursuer's heritable property known as and forming 110 [ ] Road. I consider that to be a sufficient and appropriate description of the subjects. I have not stated that this encroachment is in relation to the pursuer's registered title with reference to the pursuer's Land Certificate as the pursuer's crave invited me to do. That is because I

have not concluded that Mr McWilliam's A3 plan can be taken as an accurate depiction of the various sasine titles and cadastral map. Furthermore, had I accepted the said A3 plan as being accurate then the area involving the encroachment shows that the encroachment is, at least partially, in line with the plotted extent of the Land Certificate boundary and not within the plotted extent.

[147] Having found and declared the defender has encroached to the extent identified, by my understanding of the evidence, the only item which has so encroached is the defender's 2016 fence. I have therefore ordained the defender to remove this piece of fencing. I consider that a period of 6 weeks should be sufficient to complete the required removal. On that basis I have continued consideration of the pursuer's remaining pleas-in-law relating to interdict and orders for demolition and decree for payment of any expenses occasioned by demolition to ascertain whether any such further orders are sought or considered necessary. In this respect I have continued the matter to a procedural hearing to determine any further procedure which may be required.

### **Expenses**

[148] Finally I have determined it is appropriate to continue the matter of expenses occasioned to date to the same procedural hearing. The usual rule is that expenses should follow success. In this case there has been mixed success. Whereas, on one view, it could be argued that the defender was more successful than the pursuer and therefore should be awarded a percentage of her expenses, equally the pursuer's point raised in submissions is a good one. The pursuer submitted that the defender's late concession about the positioning of the 2016 fence was important in relation to the question of expenses regardless of the final outcome. Balancing all relevant factors, in my preliminary view, this would lead to the

question of expenses to date being dealt with on a no expenses due to or by basis but I am content to hear further argument on this in the event the parties fail to reach agreement.