SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 7

EDI-A184-20

JUDGMENT OF SHERIFF JOHN K MUNDY

in the cause

ISABELLA PATON KERR LANGSKAILL

Pursuer

against

TRACY-ANNE BLACK

Defender

Pursuer: Middleton, Advocate; instructed by Lindsays, Edinburgh
Defender: Tosh, Advocate; instructed by Dentons UK & Middle East LLP

EDINBURGH, 21 October 2022

INTERLOCUTOR

The sheriff, having resumed consideration of the cause, before answer, allows parties' a proof of their respective averments; reserves all questions of expenses and appoints a hearing thereon and further procedure on a date to be afterwards fixed.

NOTE

[1] This is an action in which the pursuer seeks a declarator that a disposition in her favour by her late husband is, for the purposes of prescriptive possession, habile to include a lane forming the entrance drive to her house. The pursuer also seeks a declarator that any servitude right of access over the lane in favour of an adjoining property owned by the defender has negatively prescribed. In addition, the pursuer seeks interdict against the

defender' or others acting with the defender's permission from entering or encroaching onto the lane and interdict against such persons from removing any flower, shrub, plant or other flora from the lane.

[2] The defender has a counterclaim for declarator that the disposition founded upon by the pursuer is not habile to include the said lane and for declarator that the defender has a servitude right of access to the lane for pedestrian and vehicular traffic. In other-words, the defender seeks declarators to the opposite effect of those sought by the pursuer.

[3] Both the principal action and counterclaim contain preliminary pleas to the relevancy and specification of the other parties' averments. However, the matter was appointed to debate on the defender's motion and on the defender's pleas in law, the pursuer having offered a proof before answer.

[4] The case called before me for debate at which time counsel for the defender, Mr Tosh moved the court to sustain the first two pleas in law for the defender in the principal action, the first being that the pursuer having no title or interest to sue the action should be dismissed and the second being directed at the relevancy and specification of the pursuer's averments, warranting dismissal of the principal action. The motion was to appoint the cause to a hearing to determine further procedure in relation to the defender's counterclaim at which time matters of expenses could be dealt with. For his part counsel for the pursuer, in opening his submissions moved the court to appoint the cause to a proof before answer.

[5] Before dealing with the particular submissions on either side, it would be as well to set out the background to this matter as gleaned from the parties' averments. The pursuer avers that her late husband purchased the property of which she is now owner in St Ronan's Terrace, Edinburgh in 1962. She and her husband lived in the property from then until her husband's death in 2015. It would appear that the title was in her late husband's sole name.

Access to the pursuer's property, which is a cottage, and its garden grounds, is taken via a lane, which runs east to west from the public road known as St Ronan's Terrace to the cottage. The lane is bounded around its western end by the cottage and grounds. Otherwise, the lane is bounded to the south by another address in St Ronan's Terrace and on the north side going from east to west by the gardens of three properties on Morningside Drive including the property owned by the defender. The pursuer avers, in article 4 of condescendence:

> "Since 1962 and in any event for at least seven years prior to the present action, the pursuer and Mr Langskaill [the pursuer's late husband] have been in possession of the Lane. Throughout this time, they acted as if heritable proprietor. The Lane is described in neighbour's property sales particulars as the pursuer's 'drive'. The pursuer and Mr Langskaill alone have maintained and controlled the Lane. In or around the early 1970s, Mr Langskaill resurfaced the Lane to its present materials. Over the years, he maintained and repointed the walls to the Lane. Mr Langskaill granted consents for utilities companies to undertake works on the Lane. On 15 March 1990, Mr Langskaill entered into a wayleave agreement with BT. He agreed to the installation of a telephone pole, manhole and cables in the Lane. Mr Langskaill and the pursuer alone dealt with the local authority in respect of any issues relating to the Lane, in particular with respect to the lighting. Mr Langskaill and the pursuer hold the only key to an electrical supply box in the Lane. On or around 2011, the pursuer installed gates across part of the Lane towards its western end. She installed CCTV. Between 2008 and 2013, Mr Langskaill took out a 'water supply pipe cover' insurance policy with Scottish Water and Homeserve in relation to repair costs for the water supply pipes under the Lane. The pursuer and her family have planted, established and maintained numerous flowerbeds, plants, trees and shrubs along the length of the Lane from 1962 to the present day. Until redemption in 1975, Mr Langskaill paid Feu Duty, which he understood related to the Lane. Until around 2010, the pursuer and Mr Langskaill believed that he held title as owner over the Lane".

[6] The defender, in answer 4, denies that the pursuer and Mr Langskaill alone have controlled the Lane.

[7] It appears from the averments in articles 2 and 5 of condescendence that in or around 2010, the pursuer's late husband discovered that his titles did not include the Lane. To resolve the position, he granted a disposition in favour of the pursuer in 2011 (the "2011

disposition") which included an a *non domino* title to the lane. A further disposition by the pursuer in favour of Mr Langskaill recorded in 2012, re-conveyed a one-half *pro indiviso* share of the property (including the lane) to Mr Langskaill. His share reverted to the pursuer upon his death by virtue of confirmation in favour of the pursuer as executor nominate of her late husband.

[8] In article 6 of condescendence it is explained that the property conveyed in the 2011 disposition is described *inter alia* by reference to an attached plan which includes the lane and it is averred that for the purposes of a position prescription, the 2011 disposition is habile to include the lane hence the pursuer's first crave for declarator. In answer 6, the defender avers:

> "Explained and averred that the subjects conveyed by the 2011 Disposition are also described in a verbal description contained in the dispositive clause of the 2011 disposition. That description incorporates by reference the description of the subjects conveyed by the disposition by Mrs Elizabeth Austin in favour of Mrs Elizabeth Hardie dated 11 May 1922 and recorded in the Division of General Register of Sasines for the County of Edinburgh on 12 May 1922 (the '1922 Disposition'). The subjects conveyed by the 1922 Disposition are described as being partly bounded to the east and partly bounded to the west by the lane. The lane does not form part of the subjects described in the 1922 Disposition. The lane does not form part of the subjects described in the verbal description in the dispositive clause of the 2011 Disposition. The verbal description of the subjects in the 2011 Disposition prevails over the description of the subjects in the plan. Accordingly, the description of the subjects conveyed by the 2011 Disposition is not habile to include the lane. The pursuer is not entitled to the declarator first craved".

[9] The defender is the current proprietor of the property in Morningside Drive having acquired it in 2017 or thereabouts. It is clear from the averments that the defender asserts that she holds a servitude right of access over the lane deriving from a Feu Contract between the Scottish Heritages Company Ltd and Robert Foggo in 1880. The pursuer avers in Art. 7 of condescendence that such servitude has negatively prescribed. That contention is refuted

on the part of the defender. This issue forms the basis of the declarators sought on either side in relation to the servitude.

[10] There are then averments in articles 8 and 13 of condescendence and the answers thereto relating to apprehended encroachment on the lane by the defender on the basis of proposed works to the defender's property and planning applications, a building warrant and related activities.

Submissions

[11] Mr Tosh for the defender, in submitting that the principal action ought to be dismissed, put forward two opening propositions. Firstly, the 2011 Disposition was not habile to include the lane. While the plan attached to the disposition included the lane, the verbal description did not. There was an irreconcilable discrepancy between the plan and the verbal description. Secondly, as a result, the pursuer had no title or interest to seek declarator as second craved that any servitude right of access over the lane held in favour of the defender's property had negatively prescribed.

[12] The terms of the disposition were referred to and the fact that it incorporated a description by reference to the 1922 Disposition. This was a bounding description, which described the lane as bounding the subjects. Counsel briefly referred to section 1 of the Prescription and Limitation (Scotland) Act 1973, the relevant provision being section 1(1)(a). This provides if land has been possessed by any person for a continuous period of 10 years openly, peaceably and without any judicial interruption and a possession was founded on and followed the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in that land or 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.

[13] Counsel then advanced six separate propositions. The first was that a habile title had to be capable of being construed as conveying the property in dispute. Reference was made to the *dicta* of Lord President Hope in *Suttie* v *Baird* 1992 SLT 133 at 136A. It was submitted that the 2011 Disposition was not capable of being construed so that the property encompassed the lane. There was no doubt or uncertainty about it. The second proposition was that where boundaries are defined there is no scope for relying on prescriptive possession to give title to an interest in land beyond the boundaries and in this respect reference was made to D Johnston, *Prescription and Limitation (2nd Edition)* at paragraph 17.40 to 17.45, *North British Railway Company* v *Hutton* (1896) 23R 522 per Lord McLaren at pages 525/6, and *Compugraphics International Ltd* v *Nikolic* 2011 SC 744 at paragraph [40]. Counsel's third proposition was that the extent of the subjects conveyed is a question of a proper construction of the dispositive clause and he made reference to the case of *Luss Estates Co* v *BP Oil Grangemouth Refinery Ltd* 1987 SLT 201, per Lord President Emslie at page 205B. The fourth proposition was that the 2011 Disposition incorporated the description of the 1922 Disposition. By virtue of section 61 of the Conveyancing (Scotland) Act 1874, this had the effect of incorporating the particular description in the 1922 Disposition into the 2011 Disposition. Counsel's fifth proposition was that where property was bounded by a road or lane, the road or lane was excluded. In support of this, he referred to Gretton & Reid, *Conveyancing (5th Edition)* at paragraph 12.21; *Gordon on Scottish Land Law (2nd Edition)* at paragraph 12-34 and 12-35; and Halliday, *Conveyancing Law & Practice (2nd Edition)* Vol 2 at paragraph 33-11 and authorities referred to therein including *Houston* v *Barr* 1911 SC 134 and *Argyllshire Commissioners of Supply* v

Campbell (1885) 12R 1255. The sixth proposition was that where there was a reconcilable inconsistency between a verbal description and a plan then the former prevails. In support of this counsel referred to Gretton & Reid, *sup cit* at paragraph 12.22 and Halliday *sup cit* at paragraph 32-13 and some authorities referred to therein including *Drumalbyn Development Trust* v *Page* 1987 SC 128.

[14] It was anticipated that counsel for the pursuer would found on a passage in Gratton & Reid *sup cit* and in particular paragraph 8-29. That relates to the statutory requirement in section 1 of the 1973 Act that a foundation writ must be "sufficient in respect of its terms". In relation to that the following passage occurs:

> "Where a description contains contradictory elements, so that the land possessed is included by one element (for example a plan) but excluded by another (for example a verbal account of a boundary) it may still be capable of founding prescription, although the authorities on the point are mixed".

[15] In the footnote to that passage four authorities are mentioned including *Nisbet* v *Hogg* 1950 SLT 289; *Trustees of Calthorpe's 1959 Discretionary Settlement* v *G Hamilton (Tullochgribban Mains) Ltd* [2012] CSOH 138; *Rivendale* v *Clark* [2015] SC 588 and *Munro* v *Keeper of the Registers of Scotland*, unreported, Lands Tribunal for Scotland 30 March 2017. Counsel sought to distinguish the authorities. In the instance case, there were irreconcilable difference between the bounding description and the plan and the pursuer's title was simply not habile to include the lane. Therefore, the pursuer was not entitled to declarator as first craved.

[16] Counsel submitted that it followed from the foregoing that the pursuer had no title or interest to seek a declarator in relation to any servitude of access over the lane and in particular, a declarator that any such right negatively prescribed. In support of that proposition, Mr Tosh referred to various authorities including DM Walker, *The Law of Civil*

Remedies in Scotland at page 106, *Drennan* v *Associated Ironmoulders of Scotland* 1921 SC 151 and *Salt International Ltd* v *Scottish Ministers* 2016 SLT 82. The pursuer required to have a "patrimonial interest". She did not. The pursuer was not the owner of the lane and even taking her case at its highest, did not have a relevant interest.

[17] In relation to the interdict sought, mere possession did not confer title and interest. Reference was made to *Watson* v *Shields* 1996 SCLR 81. On that authority, the pursuer would only have title if he is able to establish that the challenger has no right to possession. That was not the position here.

[18] For the defender Mr Middleton invited the court to refuse the pursuer's motion in its entirety and to appoint the case to a proof before answer. The debate involved two key questions: firstly, where a disposition contains a description which is internally inconsistent, can it nonetheless form a foundation writ for the purposes of prescriptive possession? If the answer is yes, then the next question is what is the area of land over which ownership can be acquired? It was accepted that here the description in the 2011 Disposition is internally inconsistent in respect that the plan includes the lane and that the description also incorporates the verbal description from the 1922 Disposition which does not include the lane. In that situation, and in answer to the questions he first posed, it was submitted that where there was an internal inconsistency, the disposition could nonetheless constitute a foundation writ for the purposes of positive prescription and further, ownership could be acquired where the land is capable of fitting in with either interpretation of the description. Counsel referred to the statute, section 1 of the 1973 Act and in particular what was required was a deed "which is sufficient in respect of its terms" to constitute the real right and "habile" to include the land. He submitted that the leading authority in relation to these criteria was *Auld* v *Hay* (1880) 7 R 663 and referred to the opinions of the Lord Justice Clerk

(Moncrieff) at 668, Lord Deas at 672, Lord Ormidale at 677 and Lord Mure at 679. All agreed on three key propositions. Firstly, the question whether the description is habile to include the land depends entirely on the terms of the disposition. Secondly, for the purposes of prescription the court was not concerned with establishing the true construction of the disposition. The question is whether it is capable of being construed in a certain way. Thirdly, if the description is capable of more than one meaning, possession resolves ambiguity and possession determines the extent of the right. It was acknowledged that this case was decided under the Prescription Act of 1617 but the principle remained the same and was applied in *Suttie* v *Baird sup cit* per Lord President Hope at 136B. It was also clear from the passage at 136D that a bounding description could be a verbal description or a plan or both. In the present case there were bounding descriptions in both the 2011 Disposition and the 1922 Disposition. The question was whether the boundaries could be identified with sufficient precision. In the case of *Suttie* they could not be so identified and so the possession measured the extent of the right. In the instant case there were two inconsistent descriptions and the boundaries could not be identified with precision. The result was that the possession determined the extent of the right and not the description in the title. Reference was also made to *Nisbet* v *Hogg sup cit*, which bore similarities to the present case where the description in the title was internally inconsistent. The description in the dispositive clause required to be read as a whole. Where there was an internally inconsistent description the authorities showed that the real question was whether the description was capable of being construed in the way contended for.

[19] In response to the submissions made on behalf of the defender, counsel submitted that there was no rule that a verbal description would prevail over a plan and in this respect reference was made to *Rankine on Land Ownership (4th Edition)* at page 104/5. It depended on

the circumstances in each case whether the plan would prevail over the description or be held to be superseded and there might be a necessity for extrinsic evidence. Reference was also made to *Compugraphics International* v *Nikolic sup cit* at paragraph [40]. In that case, the plan, while not taxative, was nonetheless treated as being accurate. Reference was also made to Halliday *sup cit* at paragraph 33-13, which set out some general rules but not irrebuttable presumptions, recognising that in certain cases extrinsic evidence may be necessary. In other words, absolute rules could not be formulated.

[20] In relation to title and interest counsel submitted that possession of the lane was sufficient. He referred to the averments in article 4 of condescendence. In support of his argument he referred to Reid, *The Law of Property in Scotland* at paragraph 115 in relation to the rights arising from possession and *Watson* v *Shields sup cit* at page 83D. It was clear that possession of the lane constituted sufficient title and interest.

Discussion

[21] The first question is a simple one. Is the description in the 2011 Disposition in favour of the pursuer capable of being construed as encompassing the lane, which is in dispute? The authority of *Auld* v *Hay* demonstrates that the question whether the description of the land is habile to include the lane depends entirely on the terms of the disposition. It is also clear from that authority that the court is not concerned with establishing the true construction of the dispositive clause. The question is whether it is capable of being construed as including the land in question. Thirdly, the authority tells us that where there is more than one meaning to be obtained then possession is capable of resolving the ambiguity and the extent of the right. While that authority was decided under the Act of 1617, the principles still apply as is evident from the decision in *Suttie* v *Baird sup cit*.

[22] It is accepted that there an internal inconsistency in the description in the 2011 Disposition. I agree with counsel for the pursuer that there is no absolute rule that where there is an irreconcilable inconsistency between a verbal description and a plan that the verbal description will prevail. That is evident from the authorities cited on both sides and in particular Halliday *sup cit* at paragraph 33-13; *Rankine sup cit* at page 104/5; *Compugraphics sup cit* at paragraph [40]; Gretton & Reid *sup cit* at paragraph 8.29 and the authorities referred to therein. It seems to me to be clear from those authorities that whether a plan (whether taxative or not) or a verbal prescription prevails is a matter of circumstances and habile for enquiry.

[23] In relation to title and interest it is quite clear from the authorities that possession can constitute sufficient title and interest depending on the circumstances. The authority of *Watson* v *Shields sup cit* vouches for that as also Reid, *The Law of Property in Scotland, sup cit* at paragraph 115. There is little doubt that in order to properly determine the question of title and interest evidence requires to be heard.

[24] In conclusion, therefore I am of the view that a proof before answer is appropriate. I have pronounced an interlocutor accordingly and have reserved expenses meantime. A hearing will be appointed in due course dealing with expenses and further procedure, which I anticipate will set out a timetable for a proof.