

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FORFAR

[2024] SC FOR 46

FFR-A124-23

JUDGMENT OF SHERIFF MUNGO BOVEY KC

in the cause

(FIRST) GRAHAM DAVID WHAMOND and (SECOND) SALLY MARIE WHAMOND

Pursuers

against

ELIASZ SZCZEPAN KLASA and ILONA MARIA KLASA

Defenders

**Pursuers: McColl, counsel; Thorntons Law LLP**  
**Defenders: Young, counsel; Harper MacLeod LLP**

FORFAR, 4 November 2024

The Sheriff, having resumed consideration of the case, finds and declares that the pursuers as heritable proprietors of the subjects at Spring Garth, Cauldcots, Arbroath registered in the Land Register of Scotland under title number ANG 16642 enjoy the benefit of a servitude of drainage over the defenders' property at Willow Cottage, Cauldcots, Arbroath registered in the Land Register of Scotland under title number ANG 12351 including a right to use the drainage system installed there comprising the pipes, tanks and valves which provide sewerage drainage to the cottage of Spring Garth; refuses the second and third craves for lack of insistence; reserves the expenses of the case to a hearing to be afterwards fixed.

Sheriff Mungo Bovey KC

## Introduction

[1] This case concerns a piece of land near Arbroath between the A92 and the main east coast rail line. Spring Garth is the current name of the railway master's cottage that dates from the 1860s. It occupies the part of the site nearest to the junction between the A92 where it is crossed by a road to Friockheim. Its waste originally drained to a tank a bit to the north and thence to a burn nearby. In 1966 British Railways Board owned the land. They sold Spring Garth cottage and a small bit of land off. However, they retained the land with the tank serving the cottage. In 1988 BR sold that land to Angus McMillan. In 2001 he sold it to Charles and Rosemary Manson.

[2] The pursuers also bought Spring Garth in 2001. In 2016 the Mansons discovered that the septic tank carrying waste from Spring Garth went through their field. The old tank needed replaced and the Mansons and the pursuers arranged for the construction of a new septic tank in a corner of the Mansons' field near to Spring Garth. There was nothing in writing. The defenders bought Willow Cottage from the Mansons in November 2021 and, but for the intervention of the court, would have removed the new tank from their land about 2 years later.

[3] The pursuers seek:

"1... declarator that the pursuers as heritable proprietors of the subjects at Spring Garth, Cauldcots, Arbroath registered in the Land Register of Scotland under title number ANG 16642 enjoy the benefit of a servitude of drainage over the defenders' property at Willow Cottage, Cauldcots, Arbroath registered in the Land Register of Scotland under title number ANG12351 including a right to use the drainage system installed there comprising the pipes, tanks and valves which provide sewerage drainage to the pursuers' home"

failing which

"... declarator that the pursuers as heritable proprietors of the subjects at Spring Garth, Cauldcots, Arbroath, registered in the Land Register of Scotland under title number ANG 16642 enjoy the benefit of a servitude of drainage over the defender's

property at Willow Cottage, Cauldcots, Arbroath registered in the Land Register of Scotland under title number ANG12351 over the route shown on the plan produced herewith leading from the subjects under the access road in green and from there along the blue line marked 'old drainage pipe' to the location marked 'old tank' including a right to install a drainage system and septic tank to provide sewerage drainage to the pursuer's home."

As an alternative, crave 3 seeks a similar right in relation to the old tank and its piping.

[4] In crave 2 the pursuers seek to interdict the defenders from interfering with the pursuers' drainage system located on the defender's property.

### **History of the action**

[5] On 1 December 2023 the Sheriff, having heard from parties' agents and the defenders having given an undertaking at the bar not to interfere with the septic tank or drainage system used by the pursuers' subjects currently in place on the defenders' subjects, refused interim interdict in respect of crave 2.

[6] On 23 February 2024 the Sheriff refused a motion by the defenders for summary decree of absolvitor. On 6 March 2024 I allowed parties, before answer, a proof of their respective averments. This case called before me for proof before answer on Friday 14 June 2024 when the parties lodged a substantial joint minute. Evidence was led that day and on 26 August 2024 and submissions made on 20 September 2024.

### **The evidence**

#### ***14 June 2024***

[7] **Charles William Manson** (67) is a retired Chartered Quantity Surveyor. He adopted his affidavit of 28 May 2024. He is married to Rosemary Manson who was the second witness.

[8] He and his wife are the former owners of Willow Cottage. They purchased the land from a developer in March 2001 and built the cottage there. They lived there for almost 20 years and concluded the contract for the sale of the property to the defenders on 16 November 2021. Mr Manson said that, in his time there, Willow Cottage drained to a septic tank with a treatment pump that satisfied SEPA as the ground was not suitable for a conventional tank.

[9] In April 2016, Mrs Manson was cutting the grass in the field where she kept her horses. The lawnmower started to sink and she found an old septic tank buried in the middle of the field which they later discovered served the pursuers' property. There was no visible sign of the tank above ground. The Mansons discussed this and remembered that they had been told that there was a second tank in the field in addition to their own. Before they purchased the land, they viewed Spring Garth, the original railway master's cottage dating from the eighteen-sixties. They found out from the then owner that the adjacent land was for sale, and considered buying both and putting them back into one property. Mrs Manson remembered that the lady who was selling Spring Garth had told her there was a septic tank for that property in the field, but that she did not know its location. The approximate location of the tank in the field is shown on the plan 5/1/3 of process. The tank once discovered was found to be very old and was deemed to be no longer in working order following its collapse.

[10] Mrs Manson was not happy about having the tank serving the pursuers' property in their field. She contacted SEPA to ask if she had to allow this and SEPA advised that, as the previous septic tank was located in the Mansons' field, she could not deny the pursuers the right to have their septic tank in the Mansons' land.

[11] In April 2016, the Mansons met with the second pursuer and her drainage contractor, Mark Whitworth from Drain Dogs. It transpired that the pursuers needed a new septic tank and the Mansons asked whether this could be located on the pursuers' property, but the contractor confirmed that this would not be possible. The Mansons then agreed that the new tank should be positioned in a new location. The new location was still within the Mansons' field but closer to the pursuers' property and therefore easier to access for maintenance and emptying. It was also less inconvenient for Mrs Manson as she did not particularly want a tractor coming into the middle of her horse paddock to empty the tank.

[12] The Mansons did not have any issues with the new location of the tank. It was only to Mr Manson's recollection ever emptied twice or three times in the 6 years after it was installed, and it only took about 20 minutes. It is a very simple system with no moving parts. The old tank was never emptied. Between 2001 and 2016 there was no sign of it. The pursuers' contractor also installed a new soakaway pipe which ran from the location of the new septic tank down the perimeter of the field before connecting into the Mansons' drainage pipe, which ran a short distance thereafter to the bottom of the field and into the burn. The original tank and the pipe serving the old septic tank ran through the middle of the field to the burn and both remain in position.

[13] The work to install the new tank and soakaway system was disruptive. It took about a week to complete and involved a digger on site digging a large pit to accommodate the new septic tank and a trench for the soakaway pipe from the tank to the burn.

[14] When the Mansons decided to sell the property, the selling agent from Savills discovered that the Whamonds were occupying a section of land which was owned by the Mansons. As the Whamonds had always occupied this area of land as their garden, the

Mansons gifted the land to them, and the pursuers paid the conveyancing fees. The Mansons and the pursuers are still on friendly terms and keep in touch.

[15] Shortly after the defenders bought the property, their solicitor got in touch with the Mansons to advise that they had not been made aware of the existence of the pursuers' septic tank in the field. This was not correct. The defenders had viewed the property on at least three occasions. On one of their visits, Mr Manson had walked round the field with the first defender. He was asking a lot of questions about the Mansons' septic tank, the field and the stables. Mr Manson showed him the septic tank for Willow Cottage and when walking round the field, pointed out the pursuers' tank. There is a lid on the pursuers' new septic tank and an adjacent lid for the inspection chamber. Both lids are roughly the size of a bin lid.

[16] The witness denied that there was a contradiction between his claim always to have known about the Spring Garth septic tank and being sufficiently upset about it in 2016 to phone SEPA; he was told about it but did not think about it until the old tank re-appeared. The Mansons did not think to document their agreement with the pursuers about the septic tank because they were ignorant of servitudes. SEPA did not mention it. The witness made reference to a provision in title deeds that all drainage was the responsibility of the new land owners and the Railway Board was no longer responsible.

[17] At one stage Mr Manson suggested that his affidavit was wrong in stating that his wife remembered the conversation about a septic tank with the owner of Spring Garth in 2001 and that it should have said that he also remembered it. Apart from this statement, I found his evidence as I have recorded it acceptable. I have not found it necessary to resolve the conflict between this witness and the Klasas as to whether he told them of the pursuers' septic tank when selling Willow Cottage to them.

[18] **Rosemary Manson** (67) is a retired project officer with Angus Council. She adopted an affidavit of 28 May 2024 in substantially the same terms as her husband's evidence.

No-one ever came on to their land to deal with the old tank. Between 2001 and 2016 it was out of sight and out of mind. The location of the pursuers' new septic tank was suggested by Mark from Drain Dogs so that it could be emptied from the road and this is what happened. The existing location was less satisfactory because she would have had to get her horses out of the field and the trucks would churn up the field when it was wet.

[19] The witness did not think that the pursuers knew of the old septic tank in 2001 but the same woman who told the Mansons may have told them. Mrs Manson did not tell them. It was no bother until it collapsed. Mrs Manson was asked about paragraph 6 in the second pursuer's affidavit:

"I remember Mrs Manson asking whether the tank and pipework could be installed on our land but Mark said there was insufficient land. He said the tank could be positioned on our land but we would need a pump. As we experience a lot of power cuts which would cause the drainage system to fail we did not see this as a solution."

She said she did not recall the bit about the pump but agreed with the reasons: there are a hell of a lot of power cuts and if the pump failed, it would overflow onto the Mansons' land.

[20] I found Mrs Manson's evidence entirely acceptable.

#### ***26 August 2024***

[21] **Sally Whamond**. The second pursuer adopted her affidavit of 30 May 2024. She spoke to investigations which had concluded that the pursuers' land was too small for a Mound System for waste disposal and an email from the drainage services manager of a firm of civil engineering contractors of 16 November 2023 (9/3/15 of process).

Cross-examined as to whether this meant it was impossible, she said it was not advised and

the gravity system was always the best option. She was concerned that trees would have to be removed and at interference with the embankment referred to.

[22] In cross-examination, Mrs Whamond said that when she and her husband bought their land in 2001 they had no prior knowledge of the land they now own or the defenders' land. In 2016, when the septic tank collapsed, they had no knowledge of when it had been established or how it came to be in the defenders' field. They had used the water in their cottage without any issue up to then. They knew the septic tank was in the field somewhere. Between 2001 and 2016 they never inspected, emptied, maintained or upgraded it. No-one had identified the tank during the Mansons' work to construct Willow Cottage in 2001 and 2002. Mrs Manson kept horses in the field and sheep at one end. Because there were horses, the Mansons put an electric fence round the field.

[23] Under reference to photograph 5/3/9, dating from April 2016, the time of the collapse, Mrs Whamond agreed that the area where the digger was operating could be the position of the collapsed tank.

[24] It was put to Mrs Whamond that there were passages in her affidavit identical to her husbands but she denied collaboration; the same events were happening to them both. They had written their own affidavits. They discussed the whole situation but the affidavits were not a product of talking together.

[25] Mrs Whamond was asked about a brief affidavit by her dated 12 May 2022 in which she said:

“2.1 Throughout the period of my ownership I have used the Drainage System, and have taken pedestrian and vehicular access to and from the Drainage System for the purposes of its inspection, maintenance, repair, upgrade and replacement over the areas shown coloured green on the Plan.”



[26] It was put to her that this was not true as she had not taken access. She thought it must refer to the new area by which I understood her to refer to the new tank. She added "We had to access the system to repair it."

[27] The Whamonds and the Mansons had been friends as neighbours; they did not socialise but chatted over the fence many times in 20 years. They have remained friends and discussed the Klasas' actions against them though not the evidence the Mansons were to give.

[28] When the old tank collapsed, it was, as far as she knew, filled in and back-filled. She had asked Mr Whitworth why new drainage should be put in and thought it was because of the age of the tank and it was in the middle of the field. She spoke to him and involved the Mansons because she was by herself and thought it was best to do so.

[29] She did not know why a new tank was necessary and it was not possible to rebuild where it was; this was the advice she received. As regards the move to the corner, the pipe left the house and went under the road and entered the field at the same point and took a branch off earlier, thereafter joining the Mansons' soakaway. The work had cost £5,603.25 plus VAT (5/3/8) in 2016.

[30] They had been told they could put in a pump but this was not preferred because of the power cuts. There were various discussions as to where it could go including the pursuers' land; Mark Whitworth was asked this question but because of the power cuts, it was not the best option. The mechanism of the pump would have been more prone to failure than a gravity flow. It was not advised. The Whamonds have a wood burning stove and a supply of candles and torches to cope with the unpredictable power cuts they experience.

[31] Under reference to a SEPA registration notification which took effect on 18 October 2022 (5/3/12), Mrs Whamond said that they had applied for authority after the new septic tank was built but accepted that there was no record of it with SEPA before 2022 by which time the dispute with the defenders had emerged.

[32] The Whamonds had nothing in writing or registered about their agreement with the Mansons because it continued to go from their house except in a manner more convenient to the Mansons.

[33] Shown a photograph 6/50/21 said to date from December 2021, Mrs Whamond agreed that it showed the digger used by Drain Dogs when they were dealing with an issue with the access road and that the current tank is roughly where the digger is. Shown 6/24/5 of process as the brochure for the sale of Willow Cottage, she said that she could see the road from which they take access in the top-right photograph. Asked if it was unlikely that someone visiting the field for the first time would see the plates covering the septic tank, she replied that the Klasas had visited many times but that on the first visit one would just see the house.

[34] I prefer Mark Whitworth's evidence on the route of the new arrangements but otherwise found Mrs Whamond's evidence entirely acceptable.

[35] **Mark Whitworth** adopted his affidavit of 30 May 2024. He has 16 years' experience of working with septic tanks. He was contacted by Mrs Whamond in about April 2016. He traced problems with her drains to an old septic tank covered by old railway sleepers. These sleepers were all rotten. Although it was hard to say, Mr Whitworth thought the tank was at least 60, more likely 80 years old. The bricks forming the tank were old and the mortar had completely deteriorated and worn away. The pipes were old clay pipes. He thought it was

probably the original tank though there was nothing else that spoke to it being part of the railway enterprise.

[36] Mr Whitworth said the plan 5/1/3 is pretty much exact as to what's on site. He was of the view that the blue hatched square marked as the approximate position of the old tank is a fair reflection of its location. It is beside the telegraph pole but more towards Willow Cottage, off to the left of photograph 5/3/9. The orange box reflects the location of the new tank, the green line the pipe into it and the red line its soakaway pipe. The pipe discharging from the old tank crosses the red line diagonally and the two pipes reach the burn independently.

[37] In discussions with Mr and Mrs Manson and Mrs Whamond in 2016 he told them that a pump would not be ideal if there was a power cut. A gravity system was the best solution rather than a pump or anything like that.

[38] The Mansons' outflow connected to the old clay pipework that led from the old tank. In about 2018 or 19 the witness did work for the Mansons and connected their outflow to the pipe they had installed for the pursuers. What is shown in 6/39/1 is not what is on site.

[39] Mr Whitworth was cross-examined as to his experience; he agreed that he is not a qualified engineer but had experience working with the biggest installer of septic tanks in the UK and had been dating pipes since 2008 - 09. He had done a five-day course on inspecting mains sewers. He accepted that this had been a repair job 9 years ago and that he had been asked about age later. But he had discussed age at the time. There was no way of telling when it had been installed. He did not think it could have been as little as 50 years old though it was a possibility as was 100. It was definitely 60 to 80 years old.

[40] The old tank was beyond repair; the cost of removing the brickwork would be astronomical and a huge hole would be required to make it safe.

[41] In re-examination Mr Whitworth thought it would be difficult to find the old tank again as they back-filled it with material from the hole they dug for the new tank.

Mrs Manson asked them to level it off; it would still be there but would require excavation.

[42] I found Mr Whitworth an impressive witness and accepted his evidence.

[43] **Joan Hainsworth** adopted her affidavit of 28 May 2024. She owned Spring Garth from 1977 to 1997. During that time her waste went through a septic tank located in the field opposite. Its approximate location is shown in plan 5/1/3. She had no problems with drainage. In those days you did not empty such tanks so, although she knew where it was, she did not have reason to access it at all.

[44] In cross-examination she accepted that she had no particular knowledge of these matters before 1977. Nor did she know about the improvement grant of £384 apparently paid to the then owners in 1967 (6/23/1).

[45] Ms Hainsworth made a limited but unchallenged contribution.

### *The defenders' witnesses*

[46] **The second defender** adopted her affidavit of 3 June 2024. The Klasas were not told by the Mansons and did not know about the pursuers' septic tank being on their land when they bought Willow Cottage and its adjoining lands. They never went into that corner and did not think the Mansons would hide something from them. They were first aware of it in mid-December 2021 when Mr Whamond came to seek permission to dig under the shared driveway which was given. It then turned out they needed access to the defenders' premises because they had a soakaway and a septic tank. Next day they saw a digger in their garden. They did not understand what was going on. They were asking why it was

never revealed, never in the documents. Mr and Mrs Whamond said they thought the Mansons told you and the Klasas said no.

[47] The existence of the septic tank complicates everything for their future. They have five children and they want the right space for them. Her child could be sunk in and she would like to avoid this. They plan another building, for her husband's tools. In November 2023 the pursuers did not put the lid on the tank properly, leaving the soakaway open. She had a child playing in a sandpit in the field.

[48] When they bought the property they checked all the documents and thought they showed what they were buying; that should be enough to understand their position.

[49] Cross-examined, Mrs Klasa accepted that the email lodged as 5/3/15 from W M Donald Ltd contradicted what she said in paragraph 24 of her affidavit. She maintained that the contractor had told her that the pursuers' septic tank could easily be moved to their land; but it needs willingness and the contractors would not take the job if the pursuers did not want it. It can be done but they do not have the willingness. She had read the report by Geo Smart (6/47) but when challenged as to whether it showed that it would be possible to put a tank on the pursuers' land replied that she "can't recall" at which point counsel for the defenders intervened to say that the report was "not key" and examination passed on to another matter. The witness accepted that the author of the letter 6/48/1 had not been able to see the old septic tank.

[50] At paragraph 29 of her affidavit Mrs Klasa thought worth mentioning the situation in which Mr and Mrs Whamond decided to go on holiday. The Klasas were left with a full septic tank and soak-away at a time when Angus was on a red flooding warning. She and her husband had no choice but to call in a local company to empty the septic tank immediately as it was overflowing in their garden. "Having little children is a priority to us

and we had to call the professionals to eliminate the risk of contaminated land by the neighbours' sewage." It was at this point that the pursuers raised the action in November 2023.

[51] It was put to Mrs Klasa that part of the reason they were emptying the tank was because they were intending to remove it: "Not intending to remove it. Two years' negotiations."

[52] It was put to her that on 23 November 2023 her agents wrote to the pursuers setting a deadline of 5.00pm on Thursday 30 November failing compliance the defenders would remove and cap the drainage system. She replied that before that, there had been lots of negotiations before that.

[53] The key terms of the letter of 23 November 2023 are admitted in answer 5. Having regard to the interlocutor of 1 December 2023 in which the Sheriff, having heard from parties' agents and the defenders having given an undertaking at the bar not to interfere with the septic tank or drainage system used by the pursuers' subjects currently in place on the defenders' subjects, refused interim interdict in respect of crave 2, I felt unable to accept the version of events given by the second defender in paragraph 29 of her affidavit and consider that this chapter seriously limited any weight I could attach to her evidence.

[54] **Eliasz Klasa** adopted his affidavit of 3 June 2024. He first learned of the existence of the pursuers' septic tank when his wife called him to say the neighbours' septic tank had burst. It was a big shock. He does not like having the septic tank on their property; you cannot use within five metres of it. This was not their plan when they bought the house.

[55] In cross-examination Mr Klasa denied that Mr Manson had told him of the septic tank. He denied having been in the field because of the sheep. He never walked on the field, not because of the sheep but because he could see it. His cottage has a septic tank.

Both that an oil heating are new to him. They have no animals because they have five children. They said the sheep had to go. He wants to build a garage on the field. The current tank is not in the corner – it is 12 metres off the driveway and 5 metres off the road. He accepted that it could be drained without coming into the field.

[56] I find it very unlikely that Mr Klasa bought Spring Valley without entering the field that is a substantial part of the purchase and said to be key to the defenders' enjoyment of their home. The fact that he gave two different reasons in quick succession did not assist his evidence in this regard.

### **Findings in fact**

- a) The pursuers are the heritable proprietors of the area of land known as Spring Garth, Cauldcots, by Arbroath, Angus, DD11 5RJ ("Spring Garth").
- b) The defenders are the heritable proprietors of Willow Cottage, Cauldcots, by Arbroath, Angus, DD11 5RJ and the area of land in which it stands ("the Willow Cottage land").
- c) The parties' properties are adjacent lands between the A92 and the main east coast rail line. Spring Garth is the current name of the station house that dates from the 1860s.
- d) Before 31 May 1966 the parties' properties formed undivided parts of a larger area of ground owned by the British Railways Board ("BR") which included the nearby railway line.
- e) By disposition dated 10 August 1966 BR disposed Spring Garth to Catherine Stather with entry on 31 May 1966. At that stage, the Willow Cottage land remained part of the larger area of ground owned by BR.

- f) The land included in that sale of Spring Garth did not include the location of the old tank which remained in the ownership of BR. The “parts, privileges and pertinents” were disposed but there was no explicit reference to drainage arrangements.
- g) Successors to Ms Stather sold Spring Garth to the pursuers with entry on 1 June 2001.
- h) By disposition dated 31 August 1988 BR disposed the Willow Cottage land to Angus McMillan with entry on 14 September 1988. That disposition included the following:
- “...the subjects hereby disposed are so disposed ALWAYS WITH AND UNDER the following burdens, conditions and others videlicet:- (First) The said subjects are sold under burden of any servitudes and rights of wayleave for laying and maintaining sewers, drains, pipes, cables, telegraph and telephone poles, that may be laid in, through or across the said subjects; declaring that our said disponent shall satisfy himself as to the existence of the foregoing and shall free and relieve us of all claims and liability of every kind in respect of any future interference with the said sewers and others due to his operations in erecting buildings on the said subjects or otherwise;”  
 (“the burden”)
- i) Mr McMillan sold the Willow Cottage land to Charles and Rosemary Manson with entry on 9 March 2001. It was at that stage that Willow Cottage was constructed there and the Mansons took up residence.
- j) At no stage has either Spring Garth or Willow Cottage been connected to the mains sewer system.
- k) When Spring Garth was constructed, its waste drained to a tank a bit to the north (“the old tank”) and thence to a burn nearby.
- l) Between 31 May 1966 and 2016 the occupants of Spring Garth continued to use the old tank for their sewage with piping down to the burn. Latterly at least, this use



was unobserved by the owners of Willow Cottage. Between 2001 and 2016 there was no sign of the old tank which was never emptied.

- m) In April 2016, Mrs Manson was cutting the grass in the field at Willow Cottage where she kept her horses. The lawnmower started to sink and she discovered the old tank buried in the middle of the field which the Mansons later discovered served the pursuers' property at Spring Garth. There was no visible sign of the tank above ground. The Mansons discussed this and remembered that they had been told that there was a second tank in the field in addition to the one serving their home. The approximate location of the tank in the field is shown on the plan 5/1/3 of process. The tank, once discovered, was found to be very old and was deemed to be no longer in working order following its collapse.
- n) Mrs Manson was not happy about having the tank serving the pursuers' property in their field. She contacted SEPA to ask if she had to allow this and SEPA advised that, as the previous septic tank was located in the Mansons' field, she could not deny the pursuers the right to have their septic tank in the Mansons' land.
- o) In April 2016, the Mansons met with the second pursuer and her drainage contractor, Mark Whitworth from Drain Dogs. It was apparent that the pursuers needed a new septic tank and the Mansons asked whether this could be located on the pursuers' property, but the contractor said that this would not be possible. The Mansons then agreed that the new tank should be positioned in a new location. The new location was still within the Mansons' field but closer to the pursuers' property and therefore easier to access for maintenance and emptying. It was also less inconvenient for Mrs Manson as she did not want a tractor coming into the middle of her horse paddock to empty the tank.

- p) The Mansons did not have any issues with the new location of the tank. It was only emptied twice or three times in the 6 years after it was installed, and that only took about 20 minutes. It is a very simple system with no moving parts. The pursuers' contractor also installed a new soakaway pipe which ran from the new septic tank down the perimeter of the field and into the burn. The original tank and the pipe serving the old septic tank ran through the middle of the field to the burn and both remain in position. However, the old tank was filled with the earth excavated in the course of constructing the new one.
- q) The work to install the new tank and soakaway system was disruptive. It took about a week to complete and involved a digger on site digging a large pit to accommodate the new septic tank and a trench for the soakaway pipe from the tank to the burn. The work of installing the new tank and filling in the old one cost £5,603.25 plus VAT in 2016.
- r) When the Mansons decided to sell the property, their selling agent discovered that the pursuers were occupying a section of land which was owned by the Mansons. As the pursuers had always occupied this area of land as their garden, the Mansons gifted the land to them, and the pursuers paid the conveyancing fees whereby by disposition dated 23 November 2021 the Mansons transferred a piece of garden ground beside Spring Garth to the pursuers.
- s) By disposition also dated 23 November 2021 the Mansons transferred the balance of the Willow Cottage title to the defenders. The defenders' title deed repeats the burden in full.
- t) The old septic tank was covered by old railway sleepers. These sleepers were all rotten when seen in 2016. The tank was at least 60, more likely 80 years old. The

bricks forming the tank were old and the mortar had completely deteriorated and worn away. The pipes were old clay pipes. It was very likely the original tank.

- u) The pipe serving the new septic tank leaves Spring Garth, goes under the road and enters the defenders' field at the same point as the pipe that served the old tank. It branches off earlier. Since about 2018 or 2019 the soakaway from Willow Cottage now joins the pipe installed to carry waste from the new tank to the nearby burn. The new arrangement for Spring Garth sewage is materially physically different from the old one.
- v) The new arrangements are not obvious; there is a lid on the pursuers' new septic tank and an adjacent lid for the inspection chamber. Both lids are roughly the size of a dustbin lid. The pursuers have made constant use of the new tank since it was installed.
- w) The pursuers' septic tank on the defenders' land very much contributes to the convenient and comfortable enjoyment of the dominant tenement. Restricting the sewage outflow to the pursuers' property would be very much to the detriment of such enjoyment. It would need a pump which would be prone to back up during power cuts.

### **Submissions and discussion**

[57] Both counsel lodged very full and useful written submissions in good time for the hearing on 20 September 2024.

*Implied servitude*

[58] The defenders submitted that the pursuers' evidence falls significantly short of the high bar required to be met for establishing that the 1966 Disposition contained an implied servitude, first because there was no witness evidence at all about drainage at Spring Garth before the division of land in 1967.

[59] I do not attach much importance to this given that it was 60 years before the collapse of the old tank brought it to attention in 2016.

[60] The pursuers placed weight on Mr Whitworth's assessment of the age of the septic tank. The defenders argued:

“(a) Mr. Whitworth was not presented to the court as a skilled witness, and the age of septic tanks is not a matter of common experience;

(b) Mr. Whitworth was giving evidence about events that occurred 8 years ago and, at the time of his work, assessing the precise age of the septic tank was irrelevant to his task; and

(c) in cross - examination, he accepted that different ranges could be given from those he had given. When the potential for even wider ranges, from 40 – 100 years was put to him, his evidence was that these were possible because it was ‘very difficult to tell’ the age of a septic tank.

In short, his opinion evidence is both inadmissible and, in any event, cannot bear the weight the pursuers seek to put on it.”

[61] Contrary to this submission, I accept Mark Whitworth's evidence as to the likely age of the old tank namely that it was probably then 80 years old. He found it covered by old railway sleepers. These sleepers were all rotten. The bricks forming the tank were old and the mortar had completely deteriorated and worn away. The pipes were old clay pipes. He thought it was probably the original tank.

[62] In accepting this evidence, I reject the submission for the defenders that this is illegitimate opinion evidence; the tank is on the defenders' property. It has been filled in.

The defenders have neither employed someone to look at it nor allowed the pursuers to do so. The tank is therefore unavailable for further inspection. Mr Whitworth has 16 years of experience working in septic tanks. He has worked for the owners of both properties albeit not for the defenders. His assessment of age is based on detailed observation. He discussed the age of the old tank when dealing with it in 2016. The fact that he accepted that it was difficult to estimate and that a wide range was possible though not his view adds to his acceptability as a specialist worker speaking within the scope of his specialism.

[63] Mr Whitworth's evidence contains sufficient detail from which I am myself prepared to draw the conclusion that when seen in 2016 it had served the dominant tenement for many years and was, indeed, the original arrangement.

[64] The defenders' second argument against the implied creation are that the express terms of the 1966 Disposition are inconsistent with an implied servitude; in particular, Condition (TWO) of the 1966 Disposition is in the following terms:

“the said disponee [i.e. Ms. Stather, the first owner of Spring Garth] and her foresaids shall before carrying out any operation or commencing the erection of any building on the said subjects obtain the prior written consent of our [i.e., British Railways Board's] Estate Surveyor to the plans including sections and detailed drawings shewing inter alia the water supply and drainage arrangements connected therewith and shall give effect to any reasonable suggestion made by the Board's Estate Surveyor in regard to said plans for the protection of the remaining property of British Railways Board”

[65] This was said to be:

- a) inconsistent with drainage arrangements involving a septic tank already being in existence in 1967 – otherwise it is difficult to give the clause any content whatsoever; and
- b) in any event, inconsistent with the proposition that parties must be taken to have intended Spring Garth would have an absolute, implied servitude right to a

particular drainage arrangement immediately upon grant of the 1966 Disposition - otherwise BR would have had no protection for its remaining property as envisaged in this clause.

[66] I do not agree with either of these points; the quoted provision is directed at future development on the land being sold. It is silent on the existing state of the retained territory.

[67] A further argument for the defenders was that, whilst doubtless the stationmaster's cottage located on Spring Garth existed before the division, it would be fallacious for the court to assume that that means the drainage arrangements remained unaltered pre - division:

“There is no evidence to support a finding one way or another. The court has no evidence about what the drainage arrangements were prior to 1967. The court has no evidence about the extent to which the stationmaster resided at the cottage before it was sold into private ownership. It is at least equally possible that significant alterations were made to reflect the fact that Spring Garth was being converted from a building next to a working railway line into a private residential dwelling for the first time in 1967. There is no room for such imprecision in the evidence when one is dealing with a right that does not appear anywhere on the registered title.

As far as the court is left trying to analyse the meagre evidence that does exist ... it tends to suggest the drainage was installed after 1967 because that would make sense of the condition in the 1967 Disposition itself, it would make sense of the erection of a fence that later collapsed and it would explain the fact that in 1967 Ms Stather was paid an improvement grant by the County Council of Angus.”

[68] None of these points persuades me. The submission seems highly speculative and each of the points neutral.

[69] In reliance on *Cochrane v Ewart* (1861) 23 D HL 3 Ms McColl submitted for the pursuers that the requirements for creation of such a servitude are that (i) the dominant and servient tenements have been owned by a common author and then severed; (ii) the servitude claimed is of something used for the comfortable enjoyment of the dominant

tenement and (iii) the disposition does not include terms which might exclude the possibility of such a grant being implied.

[70] She maintained that all three requirements were met.

[71] In reply, Mr Young argued that no servitude of drainage was created by implication in the 1966 Disposition. The legal principles for this type of servitude were authoritatively analysed by the Inner House in *ASA International v Kashmiri Properties (Ireland) Ltd* 2017 SC 107 from which he made four submissions:

a) The courts should be slow to recognise the creation of servitudes by implication.

There are strong legal policy reasons for this approach. As the Court said: "...if an expansive approach is taken to the creation of such rights there is a risk that a substantial number of dubious or even extravagant claims may be made.":

paras [17] – [18] (Lord Drummond Young).

b) Recognition of such rights should be restricted to cases where their existence is apparent from the surrounding circumstances. This will most often be the case where the existence of a right (for example of access) is obvious from the physical configuration of the land or properties because such a configuration will likely be obvious to purchasers coming to the property: paras [18] – [21].

c) Whilst prior use of the servient tenement before division may be important, it is with the above policy considerations firmly in mind that the court should approach the critical test of whether or not the claimed servitude is "necessary for [the dominant property's] convenient and comfortable enjoyment as it existed at the time of the grant": paras [20] – [21].

d) Care requires to be taken in taking guidance from cases decided before *ASA International* because each case is: (a) fact specific; and (b) in several of the decided

cases the Inner House observed that the underlying policy reasons in this area have not been kept as clearly in mind as they should have been: paras [22] - [23].

[72] In reply, Ms McColl denied that hers was a dubious or extravagant claim. It is not the use that establishes the implied grant but reasonable necessity (*ASA* para [21]).

[73] The two properties have been severed from common ownership. The dispositions do not include terms which might exclude the possibility of such a grant being implied.

Proceeding on the basis that I should be relatively slow to recognize real rights that arise by implication, I turn to the issues of necessity and use.

[74] The critical question that arises in the present case is the relationship between the two elements of use and necessity, the latter word being understood in the sense of reasonable necessity for convenient and comfortable enjoyment. The elements of use and necessity are intended as cumulative requirements. If anything it is necessity that is more important, because in some cases, where the two parts of the property that is divided were occupied together, there might be no actual use of the route claimed because another route through the servient part of the property was in fact used. Nevertheless, in such a case there might be a good argument that a route of some sort was necessary for comfortable enjoyment, in a practical common sense manner, and that the most suitable route was one that had not in fact been used but was still necessary. The use of a property may not be obvious to a purchaser when he acquires the property, especially if the use is not constant. The critical point is that the element of necessity is essential.

[75] The Inner House considered the element of necessity for convenient and comfortable enjoyment a matter that is more obvious than use, as it is likely to be based on the configuration of the property rather than any particular practice of the occupiers for the time being. Awkwardly for the present case, neither use nor necessity is particularly obvious



from visual observation of the lands here. Although I do not feel able to find that the Klasas were in fact unaware of the existence of the pursuers' septic tank, I accept that purchasers might readily overlook it.

[76] However, I accept the evidence of Mrs Whamond and Mr Whitworth and conclude that the septic tank on the defenders' land very much contributes to the convenient and comfortable enjoyment of the dominant tenement and that restricting the sewage outflow to the Whamonds' property would be very much to the detriment of such enjoyment. I accept the evidence that this would need a pump which would be prone to back up during power cuts.

[77] As regards use, it is clear that for many years prior to 2016 the owners of Spring Garth put their sewage through the old tank and down to the burn albeit, latterly at least, unobserved by the owners. Similarly, the pursuers have made constant use of the new tank since it was installed even if it was initially unobserved by the defenders.

[78] The defenders relied on the fact that the arrangement was not an open and obvious feature of the properties. While I accept that the ability of a potential purchaser to identify the existence of such servitudes from physical factors such as configuration of the properties featured in the Division's reasoning in *ASA*. I would not accept that it is necessarily a key element in a claim for an implied servitude as the defenders argued. I certainly do not accept that the court specified how the existence of the servitude comes to the attention of the servient tenement.

[79] In that regard, I attach importance to the terms of the disposition dated 31 August 1988 in which BR divested itself of the servient tenement which they disposed to Angus McMillan. That disposition included the following:

“...the subjects hereby disposed are so disposed ALWAYS WITH AND UNDER the following burdens, conditions and others videlicet:- (First) The said subjects are sold under burden of any servitudes and rights of wayleave for laying and maintaining sewers, drains, pipes, cables, telegraph and telephone poles, that may be laid in, through or across the said subjects; declaring that our said dispo shall satisfy himself as to the existence of the foregoing and shall free and relieve us of all claims and liability of every kind in respect of any future interference with the said sewers and others due to his operations in erecting buildings on the said subjects or otherwise;”

[80] So the old tank was not legally unobserved; the burden I have quoted from the 1988 Disposition is incorporated in the disposition in the defenders' favour. It imposes a burden of any servitudes and rights of wayleave for laying and maintaining sewers, drains, pipes that may be laid in, through or across the defenders' property. The purchaser is to satisfy himself as to the existence of such servitudes or wayleaves. The owners of the servient tenement were in my view very much put on notice as to the likely existence of exactly the kind of arrangement which existed and continues to exist.

[81] I am accordingly of opinion that, a servitude created by grant implied from circumstances exists, necessary for the convenient and comfortable enjoyment of the dominant tenement.

[82] The issue then arises of the location of the septic tank and the new route of the associated pipework serving the new tank. Both counsel dealt with this as a single issue in relation to the two bases on which the pursuers seek to establish the existence of a servitude right. However, I consider it appropriate to deal with them separately.

[83] For the avoidance of doubt, I agree with counsel for the defenders that the new arrangement is materially physically different from the old one. Neither the old nor the new arrangement is readily obvious.

[84] Cusine and Paisley in *Servitudes and Rights of Way* (paragraph 17.16 at page 682) express the view that in addition to servitudes constituted by express grant and prescription,

servitudes constituted by implication can be lost by abandonment. While this may be so, it seems here important to recall that necessity is the key to creation by implication whereas use is the essential foundation of a prescriptive right. Use is secondary to constitution by implication.

[85] Moreover, the dominant tenement has continuously put its waste through the servient tenement since the properties were separated. They need to do so in the required sense. In my view the essence of the need and use of sewage disposal remain the same. In the circumstances, I hold that by relocating the means by which they exercise this practice they did not abandon the right by implication.

[86] For these reasons, I grant the declarator first sought by the pursuers.

### *Servitude by prescription*

[87] Ms McColl founded on section 3(2) of the Prescription and Limitation (Scotland)

Act 1973:

“If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge.”

[88] On 1 December 2023 the Sheriff, having heard from parties' agents and the defenders having given an undertaking at the bar not to interfere with the septic tank or drainage system used by the pursuers' subjects currently in place on the defenders' subjects, refused interim interdict in respect of crave 2. It seems to me that, but for this intervention by the court, the defenders would have removed the pursuers' septic tank and that this would be the date of interruption for the purposes of the provision.

[89] Twenty years earlier is 1 December 2003 at which time, the old tank was still in use.

[90] Informed by the discussion at paragraph 10.16 in *Servitudes and Rights of Way* (Cusine and Paisley 1998 W Green) I have no doubt that both the old and new tanks and their associated pipeworks meet the requirements of openness and peaceableness.

[91] As there was no challenge by the Mansons in 2016, I hold that by that date the pursuers and their predecessors had possessed a positive servitude over land for a continuous period of 20 years openly, peaceably and without judicial interruption.

[92] Either way, then, the issue that stands in the way of success on the part of the pursuers is the relocation of the septic tank and consequent rerouting in 2016.

[93] In that regard, the decision of the Division in *Magistrates of Rutherglen v Bainbridge* (1886) 13 R. 745 seems to me indistinguishable from the present one: A servitude right of access having apparently been established by prescriptive use, the dominant proprietor abandoned and shut up that access, and went to the expense of opening another access on to the public road.

[94] In an action by the proprietor of the old road for interdict to prevent the successor to the dominant tenement using it, the Division held that any right of access by the old road which his predecessor had had had been lost by abandonment; the shutting up of the old entrance, making the fence between the road and the field continuous, and the opening up a new access, operated an abandonment of the original burden on the property.

[95] Here, the old tank was filled with the earth excavated in the course of constructing the new one. There has thus not only been non-use since 2016 but a physical obstruction to resumption. I hold that the prescriptive right established by 2016 was abandoned by the pursuers as owners of the dominant tenement.

[96] In the result, I would not be prepared to find for the pursuers on the basis of servitude by prescription.

**Other matters**

[97] In light of my decision to grant the declarator first sought, the pursuers will no longer want the alternative third craved. The interdict is not insisted in either. Parties were agreed that a hearing on expenses should be set and I will do this.