SHERIFF APPEAL COURT

[2025] SAC (Civ) 28
FFR-A124-23

Sheriff Principal A Y Anwar KC
Appeal Sheriff P A Hughes
Appeal Sheriff G K Murray

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the cause

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

Pursuers, Respondents and Cross-Appellants

against

(FIRST) ELIASZ SZCZEPAN KLASA and (SECOND) ILONA MARIA KLASA

Defenders, Appellants and Cross-Respondents

Pursuers, Respondents and Cross-Appellants: C. MacColl; Thorntons Law LLP
Defenders, Appellants and Cross-Respondents: T. Young; Harper Macleod LLP

29 August 2025

Introduction

[1] The parties are the proprietors of adjoining properties in Arbroath. The pursuers own Spring Garth. The defenders own Willow Cottage. Originally, both properties formed part of a single undivided property owned by the British Railways Board ("the Board") prior

to August 1966, lying between the A92 and the then main East Coast railway line near Cauldcots which included a railway master's cottage, named Spring Garth.

[2] The main issue which arises in this appeal is whether Spring Garth, benefits from a servitude of drainage to a septic tank located on the grounds of Willow Cottage.

Background

[3] On 10 August 1966, the Board granted a break-off disposition of Spring Garth. It was owned by several proprietors, including Mr and Mrs Hainsworth, before being purchased by the pursuers in June 2001.

[4] In 1989, the Board granted a break-off disposition of Willow Cottage. It was derelict land at the time. In 2001, it was purchased by Mr and Mrs Manson who built a dwelling house on it.

[5] At no stage has either Spring Garth or Willow Cottage been connected to the mains sewer system. The disposition granted by the Board in 1966 upon the transfer of title to Spring Garth did not contain an express servitude of drainage.

[6] In 2016, while Mrs Manson was cutting the grass in a field at Willow Cottage, her lawnmower began to sink. She discovered a tank buried in the middle of the field ("the original septic tank"). Although Mrs Manson had been aware that a septic tank lay somewhere within her property and served Spring Garth, the matter had slipped her mind. It had not been visible to the naked eye and had not been emptied for many years.

[7] In April 2016, the pursuers and the Mansons consulted Mark Whitworth, a drainage contractor. He advised them that the original septic tank needed to be replaced as it had begun to collapse and was no longer in working order. The Mansons' preference was for the pursuers to construct a new septic tank on the grounds of Spring Garth. Mr Whitworth

advised that that was not possible. The pursuers and the Mansons then reached an oral agreement that the original septic tank would be infilled and a replacement tank, soakaway and inspection chamber would be constructed at a different location within the grounds of Willow Cottage, closer to Spring Garth and closer to Willow Cottage's boundary with the A92. The new location would minimise the disruption caused to the Mansons when contractors required to empty the septic tank. That work was subsequently carried out.

[8] The appendix to this opinion contains an excerpt of the title plans for Spring Cottage and Willow Cottage, together with a copy of production 5/1/3 showing the route of the original and new drainage systems as well as the location of the original and new septic tanks serving Spring Garth.

[9] The defenders purchased Willow Cottage from the Mansons in November 2021. The defenders maintain that the Mansons failed to disclose the existence of a servitude right of drainage in favour of Spring Garth. Proceedings have been raised by the defenders against the Mansons alleging a breach of missives and of warrandice. Those proceedings are presently sisted.

[10] In November 2023, the defenders wrote to the pursuers requesting that they remove the new septic tank. In response, the pursuers raised these proceedings, in which they seek declarator that Spring Garth enjoys the benefit of: (a) a servitude right of drainage across Willow Cottage to the new septic tank, whether by implied grant or by the operation of positive prescription; or, alternatively, (b) a prescriptive servitude right of drainage to the location of the original septic tank and a right to replace it. The defenders maintain that neither form of servitude to the new septic tank exists and that any servitude of drainage to the original septic tank was abandoned in 2016 when the new septic tank was installed.

[11] The pursuers sought to establish that an implied grant of a servitude of drainage was created when the Board granted a break-off disposition transferring title to Spring Garth in 1966. In the absence of any witness who could speak to the position as at 1966, the pursuers sought to lead evidence from Mr Whitworth about the age of the original septic tank. At proof, the defenders objected to what they anticipated would be inadmissible opinion evidence by Mr Whitworth about the age and condition of the original tank. His evidence, which was to the effect that the original tank had been in place since at least 1966, was heard under reservation.

The sheriff's judgment

[12] The sheriff repelled the objection to Mr Whitworth's opinion evidence. He regarded Mr Whitworth as "a specialist worker" who spoke within the scope of that specialism; he had 16 years' experience working in septic tanks and made appropriate concessions in cross-examination. Separately, the sheriff noted that the defenders had refused to allow an architect instructed by the pursuers to inspect and excavate the original tank in advance of the proof. The sheriff accepted Mr Whitworth's evidence that the original septic tank was, likely, 80 years old. He accepted Spring Garth used the drainage to the original septic tank as at the date of severance of the title to Willow Cottage in 1966.

[13] The sheriff held that an implied servitude of drainage existed over Willow Cottage for the benefit of Spring Garth. The presence of a septic tank at Willow Cottage contributed to the convenient and comfortable enjoyment of Spring Garth. The original tank had been used for many years prior to 2016, albeit in a manner which was not physically open or obvious. He held that the defenders were put on notice that a potential servitude existed by virtue of the 1989 disposition for the sale of Willow Cottage which included the following:

> "…the subjects hereby disponed are so disponed 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 disponee 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;"

[14] As the servitude was implied and not express, the sheriff found that the subsequent variation of its route was effective to retain the right. He granted declarator as sought by the pursuers that there was a servitude to the new septic tank installed in 2016.

[15] The sheriff also held that the servitude was constituted by positive prescription of 20 years by virtue of section 3(2) of the Prescription and Limitation (Scotland) Act 1973. The sheriff held that the servitude had existed until 2016. Had the sheriff held that the servitude was not created by implied grant, but, rather, by positive prescription, he explained that he would have held that the servitude to the original septic tank had been abandoned through non-use since 2016. He considered the facts to be indistinguishable from those in *Magistrates of Rutherglen* v *Bainbridge* (1886) 13 R 745.

[16] The defenders appeal the sheriff's decision that an implied servitude existed or that such a right had been created by the operation of prescription. The pursuers cross-appeal against his decision that the prescriptive right was abandoned in 2016.

Submissions for the appellants and cross-respondents (the defenders)

Implied grant

[17] There were two essential requirements for a servitude to be created by implied grant. These were, firstly, that the right concerned was in use prior to the separation of the dominant and servient tenements, and secondly that exercise of the right was necessary for

the comfortable enjoyment of the dominant tenement. Emphasis was placed on the first requirement; for the implied servitude at issue to exist, the pursuers required to prove that the original tank was in use before the title to Spring Garth was created in 1966 *(ASA International Ltd* v *Kashmiri Properties (Ireland) Ltd* [2016] CSIH 70 [19]; 2017 SC 107 [19]).

[18] Only Mr Whitworth gave evidence on the date of the original septic tank. The sheriff erred by repelling the defenders' objection to its admissibility. Mr Whitworth was not presented as a skilled witness. His evidence failed to comply with the relevant principles for leading skilled witnesses (*Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59). He gave no evidence about the extent or nature of his relevant knowledge or experience. As he had worked for the pursuers in 2016, he was neither an impartial nor an independent witness. As he produced no materials that he used to reach his opinions or conclusions, paragraph [3] of his affidavit was *ipse dixit*.

[19] The defenders' refusal to allow the pursuers' expert to inspect the original septic tank was irrelevant to the admissibility of Mr Whitworth's evidence. The sheriff's reliance on the point effectively inverted the onus of proof.

[20] In any event, the sheriff also erred by concluding any implied right was necessary for the comfortable enjoyment of the dominant tenement (*Ewart* v *Cochranes* (1861) 23 D (HL) 3 at p 4; *ASA International* [19]). His statement that the ability of a potential purchaser to identify the existence of servitudes from physical factors was not "necessarily a key element in a claim for implied servitude" was inconsistent with *ASA International* ([18] to [21]). There, the Inner House had emphasised the importance of the discoverability of real rights, given that they were permanent and would bind any future purchaser of a servient tenement. There were sound policy reasons why the law should be slow to recognise real rights that arose by implication; and a right that was "necessary for comfortable enjoyment"

was more likely to be obvious, being based on the configuration of the property rather than any particular practice of an individual occupier.

[21] The obviousness of a right – the ability of a purchaser to identify its use – was a key element in considering whether the second requirement, necessity for comfortable enjoyment, had been met. The sheriff had erred in finding otherwise. In the present case neither the use of the original tank nor the existence of the replacement tank was obvious or visible. Any drainage taking place would readily have been overlooked.

[22] Finally, the sheriff was not entitled to rely on the 1989 disposition. The evidential test for implied grant was the position as at 10 August 1966, when the properties were severed. The 1989 disposition was irrelevant to that test.

Prescription

[23] The sheriff erred by holding that a prescriptive right to the original septic tank existed until 2016. No evidence was led to show when the original septic tank was installed. He erred by finding that the drainage arrangements were obvious and open.

[24] There were no findings in fact about the date on which the original septic tank was installed nor about knowledge of its existence on the part of any owner of Willow Cottage before 2016. While a slight change to an existing servitude might be permissible, that did not extend to deviation of its route (*Buchan* v *Hunter*, 12 February 1993, unreported but narrated in Cusine and Paisley, *Unreported Property Cases from the Sheriff Courts,* (2000)).

Variation and abandonment

[25] The pursuers did not plead that the informal agreement in 2016 amounted to acquiescence on the part of the Mansons to variation of any existing servitude through the

grounds of Willow Cottage. Even had they done so, it was doubtful whether informal actings could create a real right that bound successors in title.

[26] Variation was only possible if there had been "very considerable" irreversible expense (*Moncrieff* v *Jamieson* [2005] CSIH 14; (2005) 1 SC 281 [27] – [29] and *AC & IC Fraser & Son Ltd* v *Munro* [2024] SAC (Civ) 41 [15] – [16]). Prior authorities that suggested otherwise appeared to have been overruled (*Hozier* v *Hawthorne* (1884) 11 R 766; *Davidson* v *Thomson* (1890) 17 R 287 at 290; *Millar* v *Christie* 1961 SC 1 at 8 and 11 and *Robertson* v *Hossack* 1995 SLT 291 at 294D – F).

[27] At best, minor changes to the subject of a servitude amounted to the exercise of necessary ancillary rights to make the right effective. However, that did not permit the constitution of something entirely new and different (*Kerr* v *Brown* 1939 SC 140 at 147 – 148).

[28] Against that background, the sheriff was correct to hold that any prescriptive servitude was extinguished after 2016. Intentional and physical destruction by the dominant proprietor of a right of way or other form of servitude operated to renounce or abandon it (*Scottish Land Law* (3rd ed), 25-90 – 25-94; *Hill* v *Ramsay* (1810) 5 Paton's App 299; *Magistrates of Rutherglen* v *Bainbridge* at 747 – 748). The defenders' evidence to that effect was supported by averment.

[29] The sheriff's distinction between the abandonment of servitudes created by implied grant and those created by positive prescription was without merit. Either the servitude was abandoned or it was not. The manner of its creation was irrelevant.

Submissions for the respondents and cross-appellants (the pursuers)

Implied grant

[30] For an implied servitude to be recognised, the dominant and servient tenements must have been owned by a common owner and then severed; the servitude required to relate to something used for the comfortable enjoyment of the dominant tenement and the disposition severing the tenements could not include terms which might exclude the possibility of such a grant being implied (*Ewart* at 4).

[31] It was not essential that a potential purchaser of the land be able to identify such a servitude from the configuration of the properties (*ASA International* [21] restating *Ewart*).

[32] The sheriff correctly repelled the objection to the admissibility of Mr Whitworth's evidence. Mr Whitworth explained his experience and training. That explanation entitled the sheriff to be satisfied that Mr Whitworth's evidence assisted him to determine the issue, which was the only relevant consideration. The defender's submission that Mr Whitworth should not have been "presented to the court as a skilled witness" had no foundation.

[33] While the 1989 disposition was not central to whether there was an implied grant in 1966, its terms put potential purchasers of Willow Cottage on notice of the potential for a servitude to exist.

Prescription

[34] The sheriff correctly held that a prescriptive right existed. While he erred by calculating the period of positive prescription in reverse, he also found in fact that the prescriptive period ran from both 1996 to 2016 and from 2003 to 2023. Those findings were not challenged. The pursuers' pleadings afforded scope for any positive prescriptive period from 1966 to 2016. Mrs Hainsworth spoke to a 20-year period of use between 1977 and 1997.

[35] The use of the original tank was open, peaceable and constant, was not clandestine and was of right, not tolerance. The defenders did not suggest it was not peaceable.

Variation and abandonment

[36] Variation of the route of a servitude of drainage neither altered its character and purpose, nor necessarily increased the burden it created. The defenders' assertion that the pursuers somehow lost their right to enforce the servitude by moving the septic tank with the knowledge and concurrence of the Mansons would be inconvenient to both parties and unconducive to neighbourly relations.

[37] If a dominant tenement varied the route of an existing or potential servitude over a servient tenement and the proprietors of the servient tenement accepted the variation, the existing right was not extinguished, nor did a new prescriptive period commence (*Hozier* at 774 – 775). A dominant tenement did not lose the benefit of extensive suitable possession (*Harper* v *Stuart* (1907) 15 SLT 550).

[38] Neither express nor implied variation of the route of a servitude amounted to renunciation of the right to use it. Renunciation entailed the taking of steps which were inconsistent with the exercise of the servitude. The construction of another route for the exercise of a drainage right was consistent with the servitude continuing.

[39] The sheriff ought to have distinguished *Magistrates of Rutherglen*. In that case, the dominant tenement ceased using any part of the servient tenement after it became possible for access to the former to be taken without recourse to the latter. It appeared from the sheriff's reasoning that he erroneously decided that the effect of a change of route of a servitude differed according to the manner in which it was created.

Decision

Was a servitude right of drainage created by implied grant?

[40] The test to be applied in determining whether a servitude right has been created by implied grant was set out by the Inner House in *ASA International;* the right must have been used by the proprietor of the property which is said to have become the dominant tenement at the time of severance and the servitude claimed must be reasonably necessary for the convenient and comfortable enjoyment of the dominant tenement. To succeed at proof, therefore, the pursuers required to establish both use and necessity at the time of severance. In relation to the latter, we note that no evidence was led as to the whether the servitude claimed was reasonably necessary for the convenient and comfortable enjoyment of Spring Garth in 1966. In relation to the former, the pursuers relied upon Mr Whitworth's evidence to establish that the septic tank was used by the proprietors of Spring Garth when the break-off disposition was granted by the Board in 1966.

[41] In *Kennedy*, the Supreme Court made a number of helpful observations regarding the use and instruction of skilled witnesses:

> "[40] Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue…There are no special rules governing the admissibility of such factual evidence from a skilled witness.
>
> [41] Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject-matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact…
>
> [44]…As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her

> presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence…The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent…
>
> [48] An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or 'bare ipse dixit ' carries little weight, as the Lord President (Cooper) famously stated in *Davie* v *Magistrates of Edinburgh* (p 40). If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless…
>
> [50] The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence…
>
> [51]…the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence…
>
> [54] What amounts to a reliable body of knowledge or experience depends on the subject-matter of the proposed skilled evidence…"

[42] The pursuers' pleadings contained the following averment: "Inspection of the septic tank, in 2016 when it failed, showed it to be between 80 and 100 years old". On 1 May 2024, the defenders lodged a motion seeking commission and diligence for the recovery of all documents held by the pursuers and their predecessors in title, the Mansons, which contained entries that supported that averment. That motion was granted on 9 May 2024.

[43] There appears to have been a belated realisation on the part of the pursuers that, in the absence of any witness who could speak to the installation or use of the original septic tank in 1966, they required to lead opinion evidence from a skilled witness about its age. The proceedings were raised in December 2023. A proof was assigned for 14 June 2024. In May 2024, around two weeks prior to the proof, the pursuers sought an order from the court compelling the defenders to allow access to the original septic tank in order that their architect "may inspect and photograph it with a view to expressing an opinion as to the approximate date of installation". According to Mr Whitworth's evidence that would have

required excavation works; in his affidavit, he explained that the inspection of the original septic tank in 2016 had involved the user of a digger and the excavation of 3 feet of earth. Had that motion been granted, the defenders would have had fair notice of any opinion expressed by the architect, the basis upon which any opinion was expressed and would have had an opportunity to instruct their own expert, if they so wished. However, the pursuers' motion was refused. Leave to appeal was not sought. The interlocutor refusing that motion is not challenged in this appeal. Instead, the pursuers chose to rely upon Mr Whitworth's evidence at proof.

[44] Mr Whitworth's evidence regarding the location of the original septic tank raised no issue of admissibility; it was evidence of fact (*Kennedy* at [40]). However, his evidence about the age of the tank, the bricks which surrounded it and the railway sleepers which lay over it purported to be based on his knowledge and experience. The extended notes of evidence have not been lodged. We are thus confined to considering the summary of Mr Whitworth's evidence, provided by the sheriff, which was not disputed by the parties. The sheriff noted:

> "[Mr Whitworth] has 16 years' experience of working with septic tanks… Although it was hard to say, Mr Whitworth thought the tank was at least sixty, more likely eighty 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 . . . 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 nine 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 didn't think it could have been as little as fifty years old though it was a possibility as was 100. It was definitely 60 to 80 years old."

[45] Mr Whitworth's affidavit has been lodged as part of the Appendix to the Appeal Print (and was adopted by him at proof). His affidavit contains the following passage relating to the age of the original tank:

> "The septic tank was in very bad condition. I would estimate that the tank had been there for about 80 years. The railway sleepers were completely rotten. The bricks which had been used to form the tank were old and the mortar had completely deteriorated and had worn away. The pipes in the tank were old clay pipes. In my view anyone looking at the tank would say that it was about 80 years old."

[46] In rejecting the defenders' submission that this evidence was inadmissible expert evidence, the sheriff made the following observations:

> "The defenders have neither employed someone to look at [the tank] nor allowed the pursuers to do so. The tank is therefore unavailable for further inspection. Mr Whitworth has sixteen 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…the fact that he accepted that it was difficult to estimate and that 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. 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."

[47] The question of whether the defenders had employed anyone to examine the original septic tank or refused to allow the pursuers to do so was irrelevant to an assessment of Mr Whitworth's opinion evidence. For that opinion evidence to be admissible, the sheriff required to take account of the four considerations set out in *Kennedy* at [44]. The first, whether it assisted the sheriff to determine the age of the original septic tank, was considered. However, the other three were not. In relation to considerations two and four, Mr Whitworth possessed no apparent skill or relevant experience which might assist the court to determine the ages of the bricks, the rate of deterioration of the mortar, the age of the pipes or the railway sleepers. His experience of working in septic tanks did not necessarily suggest he could express an opinion on their ages. He stated simply that he had

been "dating pipes since 2008-2009" without any evidence as to the basis upon which he did so or the methodology he employed; without any evidence as to how often he did so, the reference to experience in dating pipes since 2008-2009 was meaningless. He referred in his evidence simply to "old" bricks and pipes without explaining what allowed him to form that conclusion, whether by reference to the types of bricks or pipes manufactured and installed in the 1960s or otherwise. He offered none of the analysis that would ordinarily be expected of an expert, nor did he refer to any reliable body of knowledge or experience to underpin his assessment such as by references to the rate of deterioration of any of these materials based upon, for example, environmental factors. Indeed, he offered the view that "anyone" looking at the original tank would conclude that it was 80 years old, implying that no particular skill, experience or expertise was, in fact, necessary. We agree that based on Mr Whitworth's factual evidence as to the condition of the tank, "anyone" might conclude that it was "old"; however, we do not agree that such a specific expression of opinion as to the age of a septic tank is a matter of ordinary life or experience. In relation to the third consideration identified in *Kennedy*, as Mr Whitworth was originally employed by the pursuers and the Mansons (who remain in dispute with the defenders), a legitimate question might have arisen in relation to the impartiality of his opinions but that does not appear to have been explored in evidence.

[48] For these reasons, Mr Whitworth's opinion evidence was inadmissible. It was mere assertion or 'bare *ipse dixit*'. Without it, there was insufficient evidence before the sheriff to allow him to conclude that the original septic tank was in use in 1966 and therefore that an implied servitude right of drainage existed. Accordingly, we shall allow ground of appeal 2(a)(i). It is not necessary for us to consider grounds of appeal 2(a)(ii) or (iii). We shall delete finding in fact (K). We shall amend finding in fact (T) by deleting the words "The

tank was at least sixty, more likely eighty years old" and "It was very likely the original tank."

Was a servitude right of drainage created by the operation of prescription?

[49] The pursuers' position that a servitude right was created by prescription was an *esto* one; their primary position was that such a right had arisen through implied grant. However, notwithstanding his findings on implied grant, the sheriff explained his reasoning fully in respect of prescription.

[50] We consider that the sheriff was entitled to find, as he did, that by 2016 a servitude right to the original septic tank had arisen by the operation of positive prescription. For a right to arise in this way there required to be open peaceable possession, without judicial interruption, for a period of twenty years (section 3(2) of the Prescription and Limitation (Scotland) Act 1973). Neither party contends that there has been any judicial interruption of the prescriptive period; nor does any issue arise as to its characterisation as 'peaceable'. Instead, the issue is whether the acts of possession or use were overt in the sense that they were of such a character or done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right was being asserted, and the nature of the right. That remains the classical statement of the law on "open possession" as set out by Lord Watson in *McInroy* v *Duke of Athole* at (1891) 18 R (HL) 46 at p.48.

[51] Self-evidently, the nature of the right asserted will dictate the character of the acts of possession or circumstances upon which the dominant proprietor may rely to establish a servitude by the operation of prescription. In the present case, the original septic tank and associated pipes were buried from sight. The existence of underground drainage systems do not tend to be obvious. Their usage does not tend to be overt. How then might the

purported dominant tenement establish "open" possession? Is usage which is not obvious or overt necessarily clandestine (Erskine, *An Institute of the Law of Scotland*, (1773), II, I, 23)? There is little Scottish authority which deals directly with this issue.

[52] The answer in our view lies in Lord Watson's speech in which, having explained the need for "overt" possession, he went on to explain at p 48:

> "The proprietor who seeks to establish the right cannot, in my opinion, avail himself of any acts of possession *in alieno solo*, unless he is able to shew that they either were known, or ought to have been known, to its owner…"

[53] Overt possession allows the proprietors of the purported servient tenement an opportunity to challenge the right asserted. Where the nature of the right asserted is one which cannot easily be observed, however, such as a right of drainage by the use of apparatus which is underground, the extent of the works required to install that apparatus may allow the court to infer that such works are inherently unlikely to be capable of being carried out in a clandestine manner and accordingly, a servient proprietor or his predecessor in title either knew or ought to have known that a right was being asserted. Thereafter, the court requires to examine the facts and circumstances and in particular, the actings during the purported prescriptive period which either support or contradict the assertion of a right. We agree, in part, with the comments of Professors Cusine and Paisley, *Servitudes and Rights of Way*, (1998) at paragraph 10.16 in this regard:

> "…in cases of underground drains the requirement that possession is "open" will take account of the nature of the right and the geographical and physical make-up of the servient and dominant tenements. In our view it seems sufficient in such cases that the installation of the drains or pipes was done in an open manner and that the dominant proprietor, if asked, has not since then sought materially to misinform the servient proprietor as to the existence and location of the drains or pipes."

[54] However, where we digress from the learned authors is that we regard it as necessary to examine all the relevant facts and circumstances since the installation of

underground drains, rather than confine such an examination to the statements made by the dominant proprietor.

[55] The authors also identified one relevant unreported sheriff court decision in their subsequent work, *Unreported Property Cases from the Sheriff Courts,* (2000), namely *Buchan* v *Hunter.* In that case, there was limited evidence as to the nature of discussions which led to the installation of an underground sewerage system; however, the description of the works carried out allowed the sheriff to conclude that the installation was "not only overt but obvious". The system was used for a period of 40 years during which it operated with "silent, unseen (bar one piece of minor maintenance) efficacy". We agree with the sheriff's observations in *Buchan* that "the fact that use is unobserved does not mean that it was clandestine".

[56] In the present case, the sheriff did not hear direct evidence as to the installation of the original septic tank or associated pipes. It was clear that the original septic tank was installed some time prior to 1977. The sheriff made no finding on the issue, however, it can reasonably be inferred, in our judgment, that disruptive works (similar to those described by Mr Whitworth) involving significant excavation of the ground, the installation of pipes leading from Spring Garth to the middle of a field within the grounds of Willow Cottage and the construction of the original septic tank would have been, or ought to have been, obvious to any observer present. It is inherently unlikely that such works were capable of being carried out in a surreptitious or clandestine manner.

[57] The facts and circumstances thereafter support the assertion of a right by the dominant proprietor. Again we do not have the benefit of the extended notes of evidence, however, we understand that there was no dispute that the sheriff was correct to describe the unchallenged evidence of Joan Hainsworth in the following terms:

> "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 on plan 5/1/3. She had no problems with drainage. In those days you didn't empty such tanks so, although she knew where it was, she did not have reason to access it at all".

[58] It is not disputed that plan 5/1/3 shows the location of the original septic tank. Mrs Hainsworth adopted the terms of her affidavit in which she explained that the tank was initially fenced, that a farmer used to work the land, and that the fence later collapsed. From at least 1977 until sometime before 1997 therefore, the location of the septic tank was visibly demarcated by a fence.

[59] The sheriff accepted Mr Manson's evidence that when the old septic tank was rediscovered in 2016, he and his wife remembered that in 2001, when they were considering the purchase of Willow Cottage, they had spoken to the then owner of Spring Garth who had advised them that there was a septic tank serving Spring Garth in the field which formed part of Willow Cottage. Thus, in 2001 the actings of the proprietor of the dominant tenement were consistent with the assertion of a right. As Professors Cusine and Paisley put it, the dominant proprietor was asked, and did not seek materially to misinform the prospective purchasers of the servient tenement as to the existence and location of the drains, pipes or tank on the servient tenement.

[60] The pursuers correctly conceded that the sheriff erred in the manner in which he calculated the prescriptive period. The evidence established that the original septic tank was in use from at least 1977. There was direct evidence (from Mrs Hainsworth) that it was continuously used until 1997. Having regard to the sheriff's unchallenged finding in fact (J) that neither property has ever been connected to the mains sewer system and that by 2016 the original septic tank required to be replaced (indicating it was still in use), the logical inference to be drawn is that it was used continuously until the installation of the new septic

tank in 2016. At the earliest stage of this 39-year period its existence was visibly demarcated by a fence. In 2001, its existence was declared by the owners of the dominant tenement, to the prospective purchasers of the servient tenement, the Mansons, a declaration which was indicative of an assertion of a right; that position was unchallenged by the Mansons throughout their period of ownership (from 2001 to 2021). In 2016, when the existence of the servitude was again brought to the attention of the Mansons, they saw it as undesirable but unchallengeable. They did not regard themselves as tolerating or permitting the use of their land to drain waste from Spring Garth. They explored the possibility of a tank within the grounds of Spring Garth but did not insist upon its relocation outwith the grounds of Willow Cottage. They understood that the proprietors of Spring Garth were exercising a right with which the proprietors of Willow Cottage were unable to interfere without consent. They understood that they required agreement for the installation of a new septic tank in a different location, within the grounds of Willow Cottage, more convenient to them.

[61] We accept that the continuous use of the servitude right of drainage was not capable of being readily observed. The system operated effectively without the need for the septic tank to be emptied, replaced or maintained until 2016. However, the acts of possession and the circumstances in this case were sufficient to establish the nature of the right asserted; a prescriptive right was established by 1997 and its usage continued until 2016.

[62] Accordingly, we shall allow the first ground of the cross-appeal. However, as the sheriff erred in the manner in which he calculated the prescriptive period, we shall amend finding in fact (AX) by: (i) deleting the words and figure "31 May 1966" and by substituting therefore the figures "1977"; (ii) by deleting the words "continued to use the old tank for their sewage" and by substituting therefore the words "used a tank situated approximately as shown by the hatched blue box on plan 5/1/3 ("the old tank") to drain waste".

[63] We note that the sheriff has failed to make findings in fact and law. Accordingly, we shall insert the following finding in fact and law at the end of finding in fact (W):

> **"Findings in fact and law**
>
> 1. The proprietors of Spring Garth used a septic tank the location of which is illustrated by a blue hatched box on the plan lodged as production 5/1/3 together with the pipes the location of which is illustrated by a green line to the point at which it intersects with and continues as a blue line on the same plan, openly, peaceably and without judicial interruption from 1977 to 2016 to drain sewage from Spring Garth through the grounds of Willow Cottage. A servitude right of drainage has thereby been created by the operation of prescription in terms of section 3(2) of the 1973 Act."

Was the servitude right of drainage to the original septic tank varied?

[64] The sheriff appears to have approached the change of route as one of abandonment rather than variation reflecting the pleadings and the submissions made before him. We agree with the defenders' submission that the legal principle upon which the pursuers relied for the proposition that the servitude to the original septic tank could be varied to the new septic tank is unclear. We note that neither the pursuers' averments nor their pleas-in-law set out the legal basis upon which their first crave (seeking declarator that Spring Garth enjoys a servitude right of drainage to the new septic tank) is sought. Neither section 3(2) of the Prescription and Limitation (Scotland) Act 1973 nor acquiescence is pled to establish a variation of the route of the servitude to the new septic tank.

[65] Had section 3(2) been pled, it would not have assisted the pursuers. The new septic tank and the pipes leading to it had been in use for only 7 years before this action was raised. Moreover, servitudes created by positive prescription are governed by the principle of *tantum praescriptum quantum possessum*; the extent of the use is the extent of the right.

[66] Had acquiescence been pled, we agree with the defenders that the authorities as to whether the acquiescence of a predecessor in title can bar successors in title of the servient

tenement from taking objection are not at one (see *Hozier; Davidson; Millar; Robertson*; cf. Bell, *Principles of the Law of Scotland* (4th ed); *Moncrieff*; and *AC & IC Fraser & Son Ltd*). As acquiescence was not pled, these proceedings are not the appropriate vehicle for resolving conflicting authorities or academic discussion on the issue (Cusine and Paisley, *Servitudes and Rights of Way* (1998) paragraph 11.37; Rankine, *The Law of Landownership* (4th ed, 1909, pages 50 – 51). The submissions made at appeal on the issue of acquiescence did not reflect the pleadings or the manner in which this action has been litigated to date.

[67] Other cases to which we were referred by the pursuers (*Pollock v Drogo* [2017] CSOH 64 and *Thomson's Trustees* v *Findlay* 1898 25 R 407*)* involved attempts to unilaterally alter the route of a servitude and, again, are not relevant. It is unsurprising that the parties were unable to refer us to any authorities dealing with the effect of a change of route in circumstances where that change came about by mutual agreement and was less burdensome to the servient proprietor. Disputes in such circumstances must be very rare.

Was the servitude right of drainage to the old septic tank abandoned in 2016?

[68] Professors Cusine and Paisley state in *Servitudes and Rights of Way*, (1998) at paragraph 17.15:

> "…There is a distinction between extinction by non-use constituting abandonment and extinction by non-exercise for the period of the negative prescription. If that were not so, mere non-use would result in the period of negative prescription being reduced. There must therefore be something more than non-use, if the period is shorter than 20 years, to constitute abandonment… In our view, extinction of servitudes by abandonment requires two elements, a cessation of use by the dominant proprietor and an intention on the part of the dominant proprietor to relinquish the servitude. The latter is to be inferred from additional acts on the part of the dominant proprietor which are consonant with no servitude existing or, possibly also, his inaction in the face of acts by the servient proprietor to similar effect."

[69] As an example of extinction of a servitude through non-use, the Professors refer to *Magistrates of Rutherglen*. In *Magistrates of Rutherglen*, prior to 1856 the only means of access to the defender's land was by means of a private road over land belonging to the pursuer. In 1856, the defender's predecessor in title created a new access from a public road, fenced off and ceased taking access from the private road. In 1880, the defender reopened the original entrance and recommenced access over the private road. The pursuer sought interdict to prevent him accessing the private road. On appeal, Lord Young held that if the action had been raised in 1856, a prescriptive right over the private road might have been proved; however, any such right was abandoned after the new entrance was formed and the private road ceased to be used. It is noteworthy that the Extra Division did not suggest that mere non-use could allow the court to conclude that a servitude right had been abandoned; non-use is relevant to the question of whether a right has been lost by the operation of negative prescription. Lord Young observed that the question was one of intention:

> "I think the whole history of the disuse of this entrance for a long period has a very material bearing on the question of whether abandonment really was intended. I think it was and that [the defender] did not intend to transmit any such right to his successors… on the evidence, it is clear that [the defender] meant to abandon": p.748.

[70] The evidence established that between 1856 and 1880, the servient proprietor was not troubled at all; not only was no right of access exercised over the private road, the defender had unilaterally created an obstacle by erecting a fence and thereby clearly indicated that he had no intention or desire to exercise any right of access over the servient tenement.

[71] The sheriff considered that as this case could not be distinguished from *Magistrates of Rutherglen*, the pursuers had abandoned their prescriptive right in 2016 when they ceased to use the original tank. Against that decision, the pursuers cross-appeal.

[72] As the facts in the present case are materially different, we do not agree with the sheriff that he was bound by the decision in *Magistrates of Rutherglen.* The evidence did not establish that the pursuers clearly and unequivocally intended to abandon the servitude of drainage. Their actings were not consistent with an intention to renounce, abandon or extinguish a right. Since 1977, a pipe has drained sewage from Spring Garth to the grounds of Willow Cottage. Mr Whitworth explained in his affidavit:

> "The drainage pipes for the [pursuers'] property ran from their house under the mutual driveway/access road and out into the Mansons' field. When I installed the new septic tank and soakaway pipe, I installed new pipework from the septic tank so the original pipework from the house to the field was not replaced . . . this work involved digging up a section of the [defenders'] field."

[73] Until 2016, the pipe from Spring Garth led to the original septic tank. Thereafter, it led to the replacement tank. The pipe has been used continuously for the same purpose since 1977. In 2016, the pursuers were entitled to insist upon the original septic tank being replaced in the same location. In what was no doubt a neighbourly act, they agreed to an alternative location for the new septic tank more convenient to the proprietors of the servient tenement. What changed was not the character of the right exercised by the pursuers, nor their entitlement to exercise that right, but rather the means by which they did so. Discussions had taken place between the pursuers and the Mansons about the possibility of relocating the tank on the grounds of Spring Garth. Those discussions had concluded that that was not feasible. Spring Garth was not connected to the mains sewer system. Unlike the position in *Magistrates of Rutherglen,* there is no indication that it was no longer necessary for the pursuers to exercise a right of drainage or that an alternative means of drainage from Spring Garth had been used. There was no basis upon which to conclude that, by agreeing to relocate the septic tank to a new location within the grounds of the servient tenement, the pursuers had clearly and unequivocally intended to abandon a

servitude right of drainage from Spring Garth to Willow Cottage and deny their successors in title that right. The defenders submitted that the old septic tank was beyond repair and had been infilled. Be that as it may, the difficulty associated with re-using the route of the original pipes and the location of the original septic tank does not render it impossible.

[74] We were referred by the defenders to the decision in *Hill* v *Ramsay.* Discerning the ratio of that case is not without difficulty; the speeches in the House of Lords are not reported. The rubric of the reported decision indicates that a servitude right of access was held as having been abandoned by the ploughing of lands over which the servitude was claimed without objection. We agree with Professor Gordon and Mr Wortley (*Scottish Land Law,* Volume II (3rd ed) (2009) at paragraph 24-93) that it is not clear whether the House of Lords accepted the argument advanced by the respondent that "a right founded on possession alone must, from its very nature, depend upon the continuance of that possession and no more discontinuance is necessary to put an end to the right than what is necessary to show that the disuse is deliberate and intentional." On the hypothesis that the House of Lords did accept that argument, we are not persuaded that *Hill* assists the defenders. It would appear that the dominant proprietors used the access occasionally and did not object to the obstruction caused by a unilateral act on the part of the servient proprietor in the form of the ploughing of the land; in the present case, sewage from Spring Garth has been drained through the grounds of Willow Cottage since 1977, the relocation of the new septic tank was by way of mutual agreement and did not indicate an intention to abandon a right.

[75] For these reasons, we consider that the sheriff erred by concluding that the original prescriptive right was abandoned in 2016.

[76] Accordingly, we shall allow the second ground of the cross-appeal and make a further finding in fact and law in the following terms:

> "2. That the servitude right of drainage, created by the operation of prescription, from Spring Garth through the grounds of Willow Cottage to the septic tank illustrated by a blue hatched box on the plan lodged as production 5/1/3 together with the pipe the location of which is illustrated by a green line to the point at which it intersects with and continues as a blue line on the same plan, has not been extinguished by virtue of the operation of abandonment."

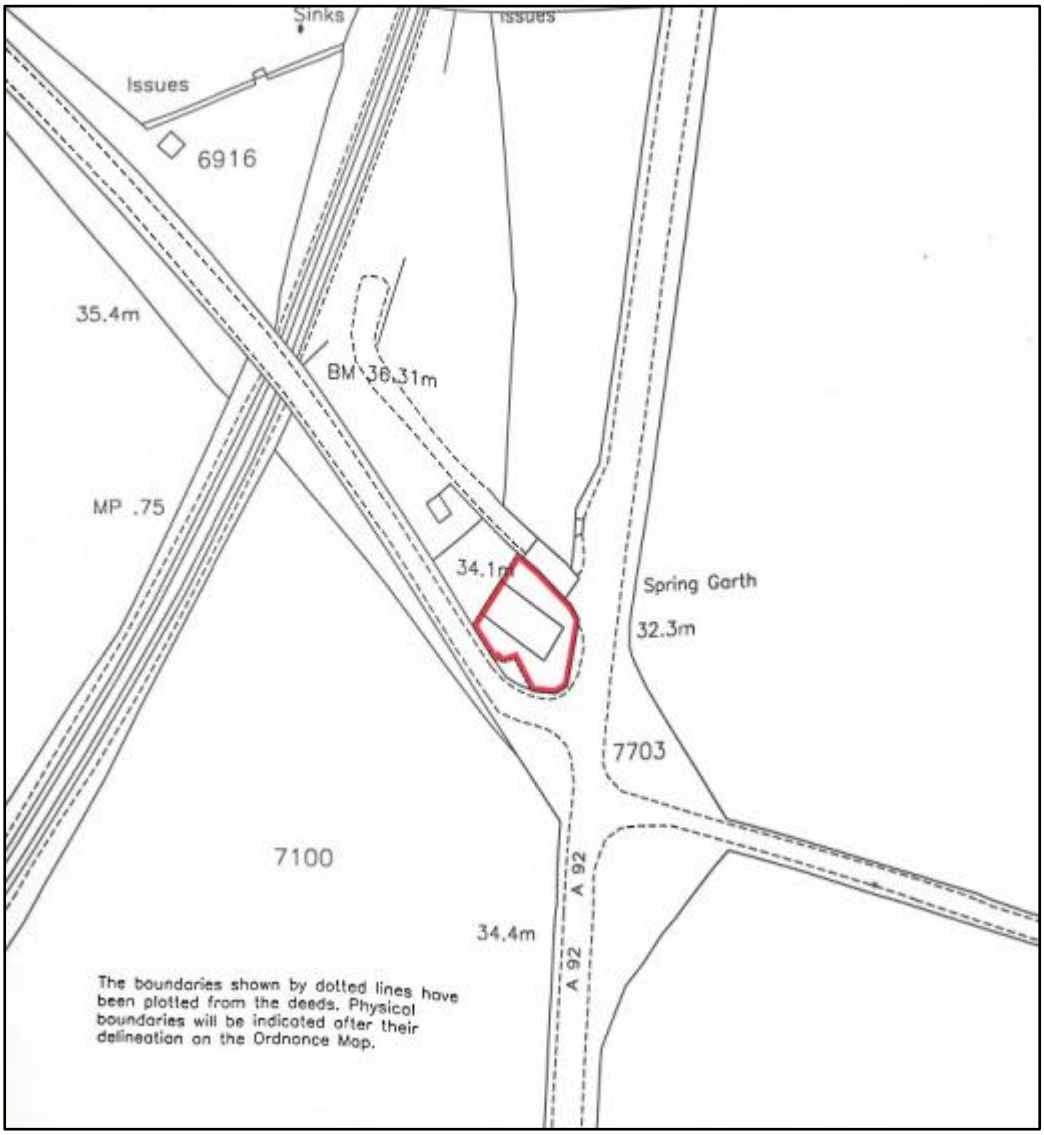
[77] However unsatisfactory that outcome may be, in practical terms, the parties will need to choose whether the pre-2016 arrangements should be reinstated or whether it would be more expedient and cost effective for them to execute deeds giving legal effect to the present arrangements and bind their successors.

Disposal

[78] We shall sustain the appeal and cross-appeal each in part. We will: (i) recall the sheriff's interlocutors of 4 November 2024 and 26 November 2024; (ii) delete finding in fact (K) and amend findings in fact (AX) and (T) as set out above; (iii) insert new findings in fact and law as set out at paragraph [63] and [76] above; (iv) uphold the pursuers' third plea-in-law and the defenders' third plea-in-law; *quoad ultra* repel both parties' remaining pleas-in-law; and (v) grant the pursuers' third crave.

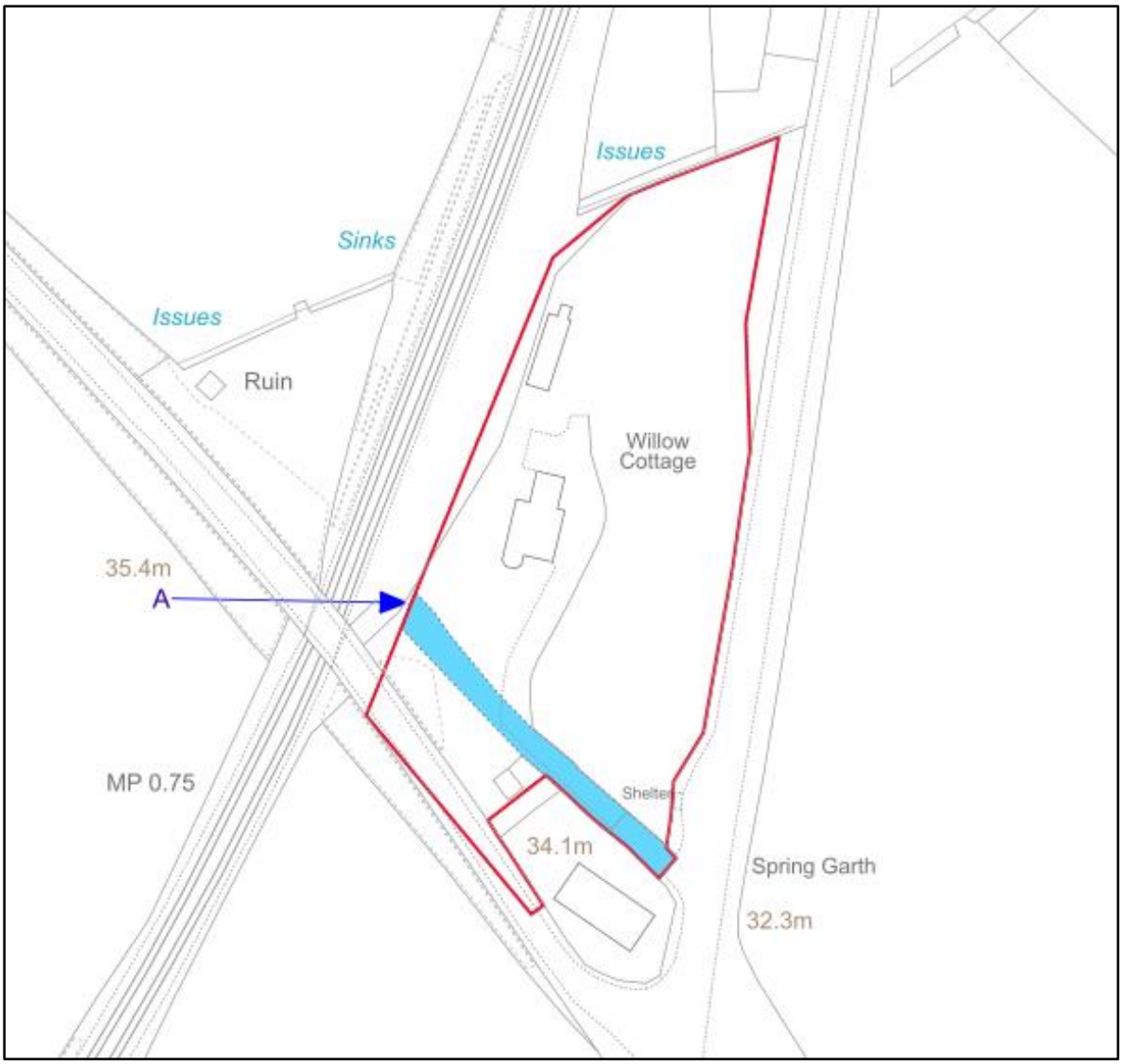
[79] Parties should attempt to agree expenses within 21 days, which failing a hearing will be assigned.

APPENDIX



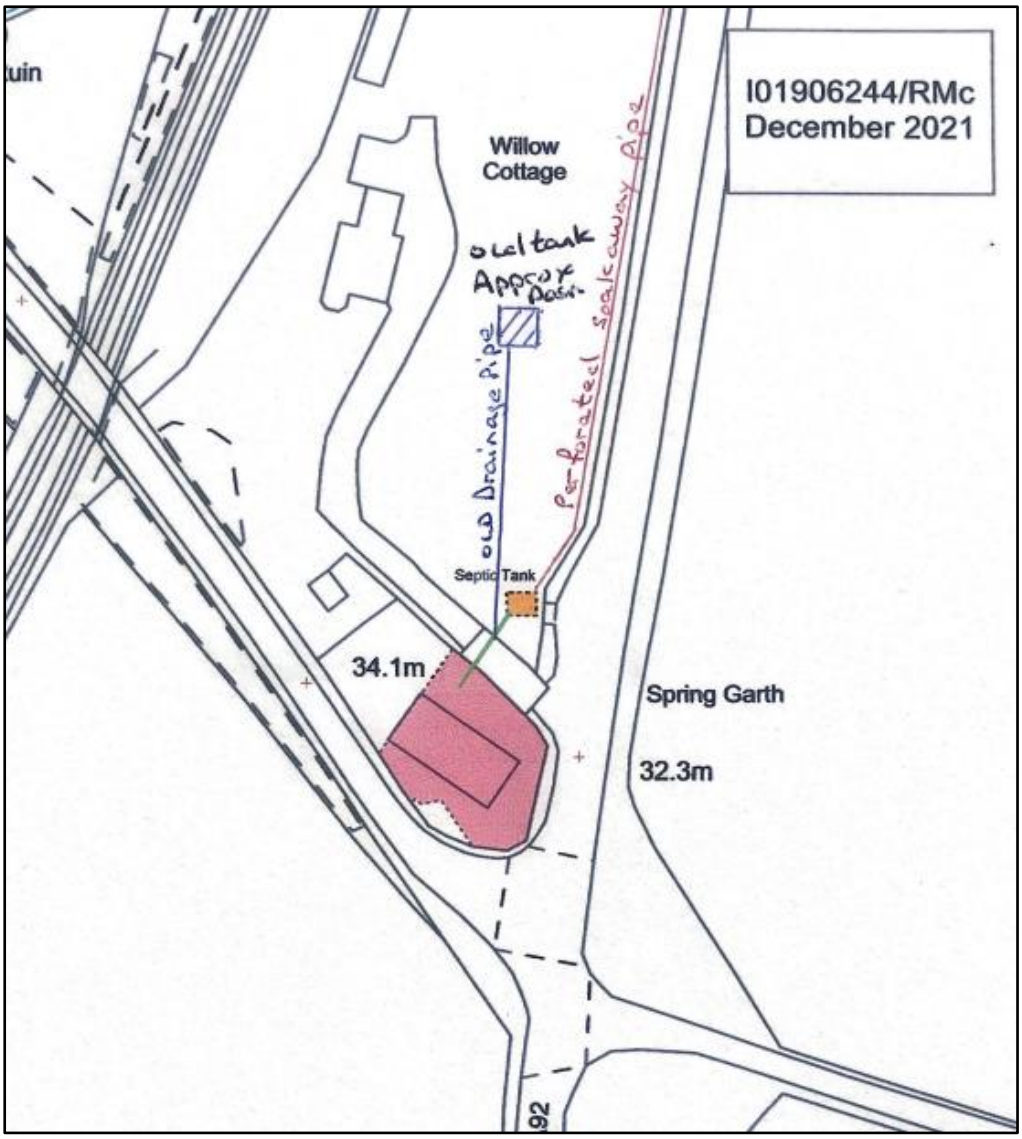
Extract of Title Plan for Spring Garth

ANG16642



Extract of Title Plan for Willow Cottage

ANG12351



Extract of production 5/1/3 showing location of drains and septic tanks