SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2025] SC PER 65

PER-A16-24

JUDGMENT OF SHERIFF ALISON MCKAY

in the cause

ALAN JOHN THOW

Pursuer

against

(FIRST) PAUL GEOFFREY DALE

and

(SECOND) ISHBEL HELEN DALE

Defenders

PERTH, 7 August 2025

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

The parties

1. The pursuer is Alan John Thow. He owns and resides at Innerpeffray Cottage (hereinafter referred to as "IC"), Innerpeffray, by Crieff, Perthshire PH7 3QW. The pursuer is a joiner/carpenter and carries on his business from his home address.

2. The defenders are Paul Geoffrey Dale and Ishbel Helen Dale. The defenders are a married couple. They jointly own and reside at Mossgiel (hereinafter referred to as "MG"), Innerpeffray, by Crieff, Perthshire PH7 3QW. The defenders are both in employment.

3. The defenders purchased the property at MG on or about 12 September 2014. At that time Helena Bell was the proprietor of IC.

4. The pursuer purchased IC on or around 25 September 2015.

The titles

5. The pursuer is the heritable proprietor of IC, being the subjects registered in the Land Register of Scotland under title number PTH46232 (pursuer's production 5/2/1). IC was first registered in the Land Register on 7 October 2015.

6. The defenders are the heritable proprietors of MG, being the subjects registered in the Land Register of Scotland under title number PTH44155 (pursuer's production 5/2/2). MG was first registered in the Land Register on 12 September 2014.

7. The properties at IC and MG are neighbouring titles.

8. Both IC and MG are situated on the north side of the B8062 road running between Crieff and Auchterarder in Perthshire. IC is situated to the west of MG. MG is situated to the east of IC.

9. The properties are adjacent to one another and are physically separated by a driveway which runs from the B8062 road to each property.

10. The pursuer and the defenders each own a one-half pro indiviso share in a mutual access drive which services both properties.

11. Section A of the title sheet relative to IC provides a short title description.

12. Section A of title sheet relative to MG provides a longer property description together with details of servitude rights and boundaries.

13. The boundaries detailed therein are specified as follows:

> "The boundaries between points indicated on the Title Plan are as follows:
> A-B West Boundary centre line
> C-D West boundary centre line
> E-F North boundary Centre line
> F-G East boundary Centre line".

14. The cadastral map referred to in title sheet PTH46232 relative to IC depicts two neighbouring properties. IC is delineated in red. To the eastside of the area delineated in red is a shaded blue rectangle depicting the ground which comprises the mutual access drive.

15. The cadastral map referred to in title sheet PTH44155 again depicts two neighbouring properties. IC is the area shaded in yellow shown on the left-hand side (west) of the plan. MG is the area shaded in pink on the right-hand side (east) of the plan. Between these areas, for a distance of approximately half the length of the whole length of the boundary to the east of IC and to the west of MG is a shaded blue rectangle depicting the area of ground which comprises the mutual access drive.

16. The areas shaded pink and blue are marked with the letters A, B, C, D, E and F. The mutual access drive is shown on the cadastral map to lie to the east of the area shaded in yellow which delineates the whole garden ground relating to IC and to the west of the area shaded in pink.

17. The line marked A-B described as the "West boundary centre line" appears to run from south (at the road) to north, for approximately two thirds or three quarters of the whole length of the mutual access drive. Point B is marked by the letter B and a line with a small circle or arrow.

18. Title PTH46232 relative to IC founds upon a disposition by Guy Vivian Rowan Hamilton in favour of Mr and Mrs Bell dated July 1991 (hereinafter referred to as "the 1991 disposition")(number 5/3 of process).

19. The 1991 disposition narrates a bounding title in respect of the subjects at IC.

20. The 1991 disposition also narrates a bounding title in respect of the mutual access drive in the following terms:

> "a one half pro indiviso share in ALL and WHOLE that piece of ground extending to Eighteen decimal or one thousandth parts of a hectare or thereby Metric Measure bounded as follows, videlicit: On or towards the South southwest by the said public road from Crieff to Auchterarder along which it extends Four Metres and Ninety centimetres or thereby; On or towards the West northwest by the centre line of a hedge along which is extents Twenty nine metres and Thirty five centimetres or thereby; On or towards the West, North and East by undefined boundaries along which it extends Eight metres and Sixty five centimetres, Four metres and Ninety centimetres and Eight metres and Sixty five centimetres or thereby respectively and on or towards the East southeast by the centre line of a hedge along which it extends Thirty metres and Twelve centimetres or thereby all as the said piece of ground is marked 'mutual access' and shown delineated and coloured green on the said plan annexed hereto…"

21. The 1991 disposition makes reference to an attached plan (hereinafter referred to as "the 1991 plan"). A photocopy of the 1991 plan (production number 5/3/5) shows the property at IC shaded pink. To the east of IC is an area delineated in blue, which is the shared mutual access to both properties. To the west is MG, which appears not to be shaded at all but which the description key to the right hand side of the plan suggests is coloured green.

22. On the 1991 plan the south-most boundary appears to be the mouth of the driveway itself, where it meets the main road passing both properties to the south. The north-most boundary and the north-most section of the west boundary are noted as "undefined boundary". Both the east and west boundaries are shown virtually parallel to one another. Both the east and the west boundary lines are marked as "Centre line of hedge".

23. The 1991 plan has a measurement key which confirms all measurements are in metres.

24. At the mouth (south) of the mutual access drive is a measurement of 4.900.

25. At the top (north) of the mutual access drive is a measurement of 4.900 together with the printed words "scaled size".

26. A number of other measurements on the 1991 plan are referred to as "scaled size".

27. The 1991 plan was prepared by Bell-Ingram, Building Surveying and Architectural Division. The areas coloured pink (IC), blue (mutual access drive) and green (MG) are further described in terms of acres and hectares.

28. The disposition relative to the 1991 plan declares "that the said plan is demonstrative only and not taxative and that the areas and measurements thereon while believed to be correct are not guaranteed".

29. The measurements referred to in the 1991 plan are inaccurate. The deed itself clearly states that said plan is demonstrative only, and "that the areas and measurements thereon while believed to be correct are not guaranteed".

30. The 1991 plan is more detailed than either of the plans attached to the Land Certificates for IC and MG. In particular, the area where the frontage of IC adjoins the B8062 road is stated as measuring 19.250 metres, the area where the frontage of MG adjoins said road is stated as measuring 20.550 metres and 6.200 metres and the area where the "mutual access" adjoins said road is stated as measuring 4.900 metres. The measurement of 6.200 is also noted as "(scaled size)".

31. On the IC side of the subjects the 1991 plan depicts a tree in the garden of IC. It also shows a hedge running along the eastern side of the garden at IC on the westward side of

the mutual access drive. The hedge does not extend to the full length of the mutual access drive depicted on the 1991 plan.

32. The 1991 plan also depicts a tree on the MG side of the subjects. The 1991 plan shows a hedge running along the western side of the garden at MG on the eastward side of the mutual access drive. The tree on the MG side of the mutual access drive is partially sited within the hedge there, effectively within the hedge. Again, the hedge does not extend to the full length of the mutual access drive depicted on the 1991 plan.

33. The 1991 plan shows a straight line running through each of these hedges. Both of these straight lines are marked as "Centre line of hedge".

34. The mutual access drive between IC and MG runs for some part of its length between hedges on either side.

35. The northmost end of the mutual access drive referred to west, north and east has no identified or defined boundaries on the 1991 plan.

36. The additional length of the mutual access drive beyond the length of the hedge depicted on the IC side, the additional length of the mutual access drive beyond the length of the hedge depicted on the MG side and the far end of the mutual access drive further from the main road are identified by three arrows and the words "undefined boundary" being on or towards the west, north and east for distances of "Eight metres and Sixty five centimetres, Four metres and Ninety centimetres and Sixty five centimetres or thereby respectively".

The locus

37. Both IC and MG are situated on the north side of the B8062 road running between Crieff and Auchterarder in Perthshire. IC is situated to the west of MG. MG is situated to the east of IC.

38. The properties are adjacent to one another and are physically separated by a driveway which runs from the B8062 road to each property.

39. The mutual access drive services both properties and runs from the B8062 public road at its southern end to the rear of the dwellinghouses at its northern end.

40. Viewed from the B8062 road the subjects at IC are on the left-hand side of the mutual access road and the subjects at MG are on the right-hand side.

41. A hedge runs part of the way along the drive on the eastern side of the mutual access drive to the west of MG (hereinafter referred to as "the MG hedge"), separating the front garden at MG from the mutual access drive.

42. A hedge runs part of the way along the drive on the western side of the mutual access drive to the east of IC (hereinafter referred to as "the IC hedge"), separating the front garden at IC from the mutual access drive.

43. Production number 5/4/1 is a "google" street view image taken from the B8062 road in March 2009. This image shows both properties, together with the mutual access drive and the trees and hedges depicted in the 1991 plan.

44. As at 2009 the hedges on both sides of the mutual access ground were wide and full. Both hedges were neatly trimmed.

45. In 2009 there were two mature trees growing at the locus, one on each side of the mutual access drive leading from the B8062 road to the subjects at IC and MG.

46. The tree in the garden of IC was situated fully within the garden ground thereto.

47. The tree pertaining to MG was not situated fully within the garden ground pertaining thereto. The tree grew within the hedge between the garden ground of MG and the mutual access drive.

48. The west most side of the tree trunk on a vertical plane was in line with the west most side of the hedge itself.

49. The tree trunk itself was bare. The tree had grown and expanded in width since planted, such that the hedge appeared to grow around it on the MG, or east side. The privet hedge was pushed to one side by the growth of the tree.

50. With the exception of the area where the hedge curved around the bare tree trunk, the hedge otherwise ran alongside part of the length of the mutual access drive in a comparatively straight line.

51. Production number 5/12/6 includes a further image depicting a "google streetview" of the locus in or about 2009. At that time two metal fence posts are visible along the length of the hedge on the MG side of the mutual access drive, both slightly further away from the B8062 road than the oak tree within the hedge.

Changes at the locus in 2015

Tree felling

52. When the defenders took possession of MG the large tree at the bottom of the mutual access drive on the MG side of same and the large tree at the bottom of IC within the garden ground depicted both on the 1991 plan and 2009 google image were standing.

53. Helena Bell, the previous proprietor of IC, approached the defenders with a request that the oak tree pertaining to MG was felled to improve both the light within her property and access to the mutual access drive.

54. Both the tree at IC and the oak tree at MG were felled in or about February 2015 by agreement between the then respective proprietors of the properties, namely the said Helena Bell and the defenders.

55. The felling of the tree at IC had no impact upon the hedge to the west most side of the mutual access drive, which remains in place to date.

56. The felling of the tree at MG did have an impact upon the hedge on the east most side of the mutual access drive. A large proportion of the existing privet hedge on the MG side of the mutual access drive was damaged.

57. The oak tree was not felled to ground level. The stump of the tree remained. The first defender hired equipment and ground the stump down as far as he was able to do so.

Dwarf stone wall

58. In or about April 2015 the defenders erected a dwarf stone wall to the west side of the garden ground at MG adjacent to the mutual access drive.

59. The dwarf stone wall erected by the defenders runs along part of the length of the mutual access drive, separating the mutual access drive from the front garden of MG.

60. The purpose of the dwarf stone wall was partly to shore up the remnants of the tree stump and partly to cover the remnants of the tree stump with the intention that it would rot *in situ*.

61. Given its purpose the site of at least part of the length of the dwarf stone wall was dictated by the site of the remains of the oak tree trunk on the MG side of the mutual access drive.

New hedging

62. Shortly after erecting the dwarf stone wall the defenders replaced the hedging which had been damaged when the MG oak tree was felled. The defenders planted bare-root beech hedging rather than privet hedging. The beech hedging was planted as closely as possible to where the damaged hedging had originally been. At some points along the mutual access drive the bare-root hedging was planted behind the dwarf stone wall (on the MG side).

Changes at the locus in 2020

Dwarf stone wall

63. In or about 2020 the dwarf stone wall was moved further to the east by the defenders, at the request of the pursuer.

64. The purpose of this request was to accommodate vehicular access to the mutual access drive for delivery of materials to IC in connection with the pursuer's business. The defenders agreed to the pursuer's request to avoid damage being caused to the defenders' dwarf stone wall and hedge by large vehicles, as had occurred in the past.

65. The first defender moved the dwarf stone wall himself. He moved the stones eastwards towards the garden ground at MG as far as practical. The re-emergence of the remains of the original oak tree stump was a limiting factor in this regard. The remnants of the oak tree stump continue to be situated within the dwarf stone wall.

66. Due to the presence of the original oak tree stump it is not possible for the defenders to move the dwarf stone wall any further eastwards from its present situation.

67. The existence of the dwarf stone wall on the MG side of the mutual access drive creates a "bell mouth". The mouth of the mutual access drive at the roadside is now wider than when the parties took entry to their respective properties.

68. The dwarf stone wall is not stable. Vehicles accessing the mutual access drive repeatedly hit the dwarf stone wall and the hedge on the MG side of the mutual access drive. Individual stones have required to be reinstated on the dwarf stone wall many times. On each occasion the defenders have returned these stones to a point as close as possible to their original location.

Metal fence posts

69. At some point after taking entry to IC the pursuer cut back the hedge growing along the IC side of the mutual access drive. When he did so he revealed a line of metal fence posts along the length of the hedge, on the mutual access drive side of the hedge.

70. Production number 5/5/1 is a photograph of the locus taken after the pursuer cut back his hedge. This image clearly shows a line of metal fence posts along the length of, and within the hedge on the IC side of the mutual access drive.

71. Production number 5/5/1 also clearly shows the dwarf wall erected by the defenders prior to the pursuer taking entry to IC, together with a number of metal fence posts similarly positioned on the MG side of the mutual access drive and within the hedge.

72. When the defenders took entry to MG there were only two fence posts on the west side of the hedge pertaining to MG on the side of the mutual access drive.

73. In or about July 2020 the defenders erected additional metal fence posts along the length of the hedge on the MG side of the mutual access drive.

74. The metal fence posts on the MG side of the mutual access drive were erected by the first defender. He erected the fence posts as close to the existing hedge as possible, without damaging the roots of the hedge. He identified two fixed points where base wire from an earlier fence was visible. He used these two fixed points and a string line to establish where the fence posts should be reinstated.

75. In identifying where to situate new fence posts the first defender was also assisted by the site of the remnants of the oak tree trunk which he knew had previously grown directly adjacent to the mutual access drive.

76. The defenders erected metal fence posts along the length of the mutual access drive in order to protect their hedge, which has been significantly impacted and damaged by delivery vehicles using the mutual access drive.

77. The defenders did not erect metal fence posts with the intention of obstructing access to the mutual access drive.

78. Whilst on occasions the metal posts do not stand straight, this is because they have been struck by vehicles using the mutual access drive and displaced. On occasion the fence posts have required to be replaced.

79. The metal fence posts on the IC side of the mutual access drive do not obstruct or impinge upon the defenders' access to their property.

80. The metal fence posts on the MG side of the mutual access drive do not obstruct or impinge in any way upon the pursuer's access to his property.

81. The metal posts on the MG side of the mutual access drive do not limit the width of the mutual access drive to the same extent as the oak tree which previously grew on the MG side thereof.

Use of the mutual access drive

82. Since taking entry both parties have erected extensions at their respective properties. When these extensions were being built both parties received delivery of building materials to their properties from vehicles using the mutual access drive. The defenders' extension was finished in or about 2015.

83. Since then the defenders have created a second drive in order to access MG without using the mutual access drive. They no longer use the mutual access drive on a daily basis. On occasions vehicles making deliveries to the defenders' address will use the mutual access drive. These vehicles are usually small vans, of the type ordinarily driven by persons working for general courier companies such as "Amazon" or "DPD". These vehicles are small enough to negotiate the mutual access drive without colliding with the defenders' hedge.

84. The pursuer has no alternative access route to IC. He regularly uses the mutual access drive to access his property, as do delivery drivers and the like attending there. The pursuer drives a large pick-up type vehicle and on occasions tows a trailer. When towing a trailer the only way for the pursuer to access the mutual access drive is to reverse his vehicle from the main road.

85. The pursuer receives regular deliveries of materials to IC. These deliveries are often conveyed by way of large motor vehicles.

86. Large lorries attending at IC require to reverse along the mutual access drive from the main road, because there is insufficient room for larger vehicles to turn at the end of the mutual access drive furthest from the main road if they access the mutual access drive by driving forwards.

87. On occasions the trailer towed by the pursuer has collided with the defenders' hedge, causing damage thereto.

88. Large vehicles attending at IC have also regularly collided with the defenders' hedge, causing damage thereto.

89. The defenders have spoken to the pursuer about the damage caused to their hedge. They have asked him to ensure more care is taken when deliveries are made to his property. This had no effect. The defenders also spoke to the local authority and to their local councillor. They reported the issue to the local planning department.

90. Perth and Kinross Council (PKC) issued a Planning Enforcement Closing Report dated 6 December 2021. PKC established that approximately two large vehicles or lorries made deliveries to the property (IC) a month and used the mutual access drive in order to do so. PKC determined that due to the size of the vehicles making deliveries they required to reverse from the public road. PKC also determined that the type and frequency of vehicles constituted a material change of use and the pursuer was advised of this.

91. The pursuer agreed no further deliveries in large vehicles would be made to the property in relation to his business. PKC deemed the breach was resolved to an acceptable level and took no further action.

92. The defenders have installed a CCTV camera at MG which covers the area of the mutual access drive.

93. The second defender regularly reviews the CCTV which she and the first defender have installed at their home. She also regularly inspects the hedge for damage.

94. The pursuer continues to use the mutual access drive himself.

95. Large delivery lorries also continue to attend at IC in order to make deliveries. They do so by using the mutual access drive.

96. Excluding the bell mouth created in or about 2020 the mutual access drive is relatively narrow. It is difficult for drivers of large vehicles to negotiate because of the need to reverse both in and out of the driveway.

97. Delivery vehicles and vehicles driven by the pursuer regularly collide with the defenders' hedge and cause damage to same.

98. On occasions when the second defender has identified from CCTV footage that the pursuer's trailer or other vehicles have run into her hedge she has inspected the hedge afterwards. On occasions she has found branches of the hedge bent or snapped off. She has also found the metal fence posts intended to protect her hedge have been bent out of shape or out of line. On occasions she has found stones knocked from the dwarf stone wall onto the driveway.

99. The side of the MG hedge which is exposed to the garden of MG is flourishing. The side of the MG hedge which is exposed to the mutual access drive is not. On the east most side adjacent to the mutual access drive the defenders' hedge is struggling to survive. It has been subject to constant damage by the pursuer's towed trailer and by other larger vehicles using the mutual access drive to make deliveries.

Steps taken by pursuer

100. When erected the pursuer formed the view that the metal posts installed by the defenders encroached upon the mutual access drive which he owns in common with the defenders.

101. The pursuer checked his title deeds and concluded the mutual access driveway should be 4.9 metres wide at all points. He measured the width of the drive from the centre

line of his own hedge. He found the driveway to be 3.5 metres wide along its length. Accordingly the pursuer asked the defenders to remove the metal posts they had installed.

102. The measurement of 4.9 metres identified by the pursuer is referred to in the 1991 plan. The 1991 plan is clearly stated to be demonstrative and not taxative.

103. The pursuer objected to the installation of the metal fence posts erected by the defenders because in his view they restricted access to the parties' mutual driveway, for the parties themselves and also for deliveries and larger vehicles attending at the properties.

104. Initially the pursuer did not consider the posts to be a major inconvenience. Both parties had built large extensions to the rear of their properties. The defenders had recently finished building works. The pursuer still had more work to be done. However, when the extension work was finished the metal fence posts were not removed despite the pursuer's request. The pursuer therefore consulted his solicitor.

105. Before determining how to proceed the pursuer instructed a survey, via his solicitors, from County Property Services. Mr Craig Ivey attended at the locus. He surveyed the property using GPS guidance and mapping tools, and mapped out the area. He prepared a report to accompany his findings (production number 5/6).

106. On 24 November 2021 the pursuer's solicitors, Messrs Kippen Campbell, wrote to the defenders asking the defenders to remove the fence posts installed by the defenders and "all other obstructions" within 7 days (production number 5/8).

107. The pursuer gave the defenders time to move the fence posts which had been installed, but this was not done.

108. On 9 February 2022 the pursuer's solicitor sent a further letter, this time to the defenders' agents rather than direct to the defenders. The pursuer's solicitor repeated the pursuer's concern that the defenders had encroached upon common property and erected

boundary features upon that common property, namely the mutual access drive (production number 5/9).

109. Again the defenders did not remove the posts which had been installed on the west side of the hedge bounding the property at MG from the mutual access drive.

110. By December 2023 the pursuer had instructed alternative solicitors. On 14 December 2023 the pursuer's new agents wrote to the agents instructed by the defenders again calling upon the defenders to remove "gate posts and stones" immediately and to refrain from erecting any further obstructions upon the mutual access drive (production number 5/10).

111. The metal fence posts erected by the defenders in 2020 remain in place to date.

The boundary

112. The 1991 disposition identifies the east southeast boundary on the MG side of the mutual access drive as defined by the centre line of a hedge along which it extends for 30 metres and 12 centimetres.

113. The 1991 plan indicates a hedge on the MG side of the mutual access drive, with a dark blue line running through the centre thereof. The dark blue line depicts the boundary between the mutual access drive and the garden ground at MG. The hedge depicted does not extend for the full length of the dark blue line.

114. The existing hedge and the dwarf stone wall separating the front garden of MG from the mutual access drive are the nearest physical boundary features to those which are indicated by the line A-B on the cadastral map relative to MG.

115. There is no single physical feature at the locus whose location precisely coincides with the whole length of the boundary line between the mutual access drive and MG.

116. Taken together the existing hedge and the dwarf stone wall separating the front garden of MG from the mutual access drive do not extend for the full length of said drive.

117. Part of the existing hedge at MG was not *in situ* when the 1991 disposition and relative plan were prepared.

118. The dwarf stone wall was not *in situ* when the 1991 disposition and relative plan were prepared.

Findings in fact and in law

1) The pursuer is the heritable proprietor of IC, being the subjects registered in the Land Register under title number PTH46232.

2) The defenders are the heritable proprietors of MG, being the subjects registered in the Land Register under title number PTH44155.

3) The pursuer and the defenders own neighbouring properties.

4) The pursuer and the defenders each own a one-half pro indiviso share of the mutual access drive situated between their respective properties.

5) The mutual access drive is shown marked blue on the cadastral maps relative to IC and MG.

6) The base map relative to the subjects at IC and MG is the Ordnance map.

7) The Ordnance map is not absolutely accurate. The accuracy of the Ordnance map is limited by a number of factors, including the scale of the map used, how recently the Ordnance map was updated and whether any physical features on the map are obscured in any way.

8) The 1991 disposition details a bounding title in respect of the mutual access drive in dispute.

9) The bounding description detailed in the 1991 disposition makes no reference to the full length of the eastern boundary of the mutual access drive shown tinted blue on the title plans relative to IC and MG as being defined by the centre of a hedge.

10) The bounding description detailed in the 1991 disposition makes reference to the mutual access drive being partially identified by the centre line of two hedges, one to the west northwest, for a distance of 29 metres and 30 centimetres or thereby and one to the east southeast, for a distance of 30 metres and 12 centimetres.

11) The bounding description detailed in the 1991 disposition makes reference to part of the length of the east, west and north boundaries of the mutual access drive as undefined.

12) Only conveyancing and registration of an appropriate deed can change the location of a boundary in law.

13) No conveyancing affecting the boundary between the mutual access drive and the defenders' property has been carried out since the defenders took entry to MG in or about 2014.

14) Physical boundary features can move without any conveyancing being carried out.

15) The mutual access drive is not uniform in width throughout its length.

16) The mutual access drive is narrower at the end towards the houses at IC and MG than at the end where it joins the main road running past the front gardens pertaining to each property.

17) The hedge *in situ* at MG does not extend to the full length of the boundary between the mutual access drive and MG and has never done so.

18) The boundary between the mutual access drive and the subjects at MG cannot be identified by reference only to the centre line of a hedge which does not extend to the whole length of the boundary between the mutual access drive and MG.

19) The hedge currently *in situ* at MG is not in exactly the same location as that referred to in the 1991 plan.

20) The separate plants comprising the hedge currently *in situ* between the mutual access drive and MG does not extend along its length in a straight line.

21) The physical boundary between the mutual access drive and the subjects at MG is not straight. The existing privet hedge and the new beech hedging do not extend in a straight line along the drive.

22) The current centre-line of the hedge on the eastern MG side of the mutual access drive does not coincide with the legal boundary in terms of the title deeds between the mutual access drive and the defender's property.

23) The ordinary use of the mutual access drive is to allow the pursuer and the defenders, and anyone attending at their respective properties, to access the subjects at IC and MG, whether to make deliveries or for any other purpose.

24) The defenders have at no time placed obstructions on the parties' mutual access drive.

25) Metal fence posts have been erected by the defenders to protect their hedge from vehicular collision and resulting damage.

26) The metal fence posts erected by the defenders were not intended by them to obstruct or impede the pursuer's access to the subjects at IC.

27) The metal fence posts erected by the defenders do not obstruct or impede the pursuer's access to IC.

28) The dwarf stone wall erected by the defenders is situated to the east of the hedge depicted in the 1991 plan.

29) The dwarf stone wall erected by the defenders is not situated upon the mutual access drive.

30) The dwarf stone wall erected by the defenders does not obstruct or impede the pursuer's access to IC.

31) The defenders have at no time prevented, obstructed or impeded the pursuer's vehicular access to and egress from IC using the mutual access drive.

32) The metal fence posts and the dwarf stone wall erected by the defenders at the subjects do not prevent the pursuer's reasonable enjoyment of the mutual access drive.

33) The defenders have not unlawfully interfered with the pursuer's reasonable enjoyment of his property and have shown no indication that they will do so in the future.

THEREFORE

Repels the pursuer's first, second and third craves and ordains the sheriff clerk to assign a hearing in respect of the expenses of the action.

NOTE

Evidence

[1] The pursuer was represented by Mr Nicholson, solicitor. The defenders were represented by counsel, Mr Innes.

[2] I heard evidence in this case on 23 and 24 September and 19 November 2024 and 10 January 2025.

[3] The parties themselves gave evidence. I also heard evidence from Mr Craig Ivey, an expert witness called on behalf of the pursuer, from Mr Neil Cross, an expert witness called on behalf of the defenders and from Mr Allan Audsley who is a work colleague of the

second defender and who created aerial images with OS boundaries and metal fence post locations on her behalf.

[4] A joint minute of admissions was entered into in relation to the documentary and photographic evidence which was made available to the court.

Witnesses

[5] All parties gave evidence in a relatively straightforward manner. The pursuer and the first defender confirmed details in respect of their respective purchases of their homes, with the first defender providing information regarding the layout of the subjects prior to the pursuer taking entry to IC and the felling of the trees in the gardens of IC and MG.

[6] It seems all parties were initially civil and neighbourly towards one another. Regrettably, the relationship has deteriorated to such an extent that not only are the parties involved in these court proceedings but each household has installed CCTV in order to record any transgressions by the other upon the mutual access drive. The pursuer is aware the defenders contacted the local authority and that the concerns raised regarding the running of a joinery business from IC which led to the Planning Enforcement investigation were raised by the defenders.

The pursuer

[7] Overall, I found Mr Thow to be somewhat dogged and bullish in his evidence. He made every effort to exaggerate any level of "obstruction" caused by the defenders, whilst minimising vehicular impact with the defenders' hedge and any damage caused by him and those making deliveries to his address. Having initially denied ever causing damage to the

defenders' hedge with his trailer, he then insisted any damage caused was "minimal" and then went on to suggest that this happened on both sides of the driveway.

[8] Mr Thow made reference to the metal posts erected by the defenders "appearing overnight". It appears to me he took umbrage at their installation without ever identifying whether the placement of the metal posts had any impact upon his use of the mutual access drive. I did not accept his evidence when he stated he did not know why the defenders had installed the metal fence posts. I am satisfied he knew very well the defenders were not happy about the number of large lorries delivering materials to his property and he knew in addition the defenders were unhappy about these vehicles, and his own, repeatedly impacting upon their hedge and causing damage to it.

[9] I was not impressed by Mr Thow's evidence in relation to "obstruction". It seemed to me that whilst he repeatedly used the words "obstruction" and "encroachment" these were used deliberately for emphasis rather than in circumstances where he could properly provide examples of genuine obstruction or encroachment.

[10] Although adamant that the metal fence posts erected by the defenders were erected upon the mutual access drive Mr Thow conceded that the hedge on the MG side of the drive has not moved since he took entry to IC. He repeatedly maintained that the metal fence posts amounted to obstructions notwithstanding they have clearly been placed as close to the hedge as possible, and at some points effectively stand within the branches of the hedge.

[11] Mr Thow made reference to one occasion when he required to move a metal post because it was hanging in the direction of the driveway and causing an "obstruction" but, at the same time he conceded the post must have been hit by a vehicle.

[12] There was no suggestion, even in the pursuer's own evidence, that the defenders had installed the metal posts in such a way as to deliberately obstruct vehicles travelling along

the mutual access drive. In fact, Mr Thow knew that the metal posts were erected in order to provide the defenders' hedge with some protection from vehicles which, in fairness, must find it hard to reverse along the whole length of the mutual access drive from the road.

[13] In his evidence Mr Thow also indicated that he took issue with "stones which appeared as well". He talked about a "pile of stones" at the bottom of the driveway, about stones appearing "overnight" and stones appearing "out of the blue". In fact, it is clear from production number 5/5/1 that the dwarf wall erected by Mr Dale was *in situ* when Mr Thow took entry to IC and Mr Thow gave no evidence regarding other stones or boulders. Mr Thow confirmed in his evidence that the photograph forming production number 5/5/1, which clearly shows the defenders' replacement hedge and dwarf wall, correctly depicted the locus at the time he took entry to IC.

[14] Mr Thow made reference to stones being on the mutual access drive, but at the same time he appeared to concede that these stones had "spilled" from the dwarf stone wall rather than being physically placed upon the mutual access drive by the defenders. In particular, when referred to the photograph comprising production number 5/1/12 Mr Thow confirmed this was a photograph taken by him to illustrate the mutual access drive where he stated "one of the stones is on my side of the hedge". In fact, my own interpretation of the same image is that a single white stone is on the verge of the mutual access drive on the MG side and in no circumstances does it pose an obstruction to the pursuer or anyone else seeking access to IC. In this regard I accepted the evidence of the defenders that on occasion a stone or stones would be dislodged from the dwarf stone wall by vehicles colliding with the hedge or the metal fence posts in that vicinity and when that occurs they are returned to the wall.

[15] Further, I found the pursuer's evidence was not credible on a number of issues.

[16] Firstly, whilst Mr Thow contended that the metal posts erected by the defenders restricted his access to the mutual access drive, there was no evidence of this. On the contrary, there was clear evidence that rather than making access to the mutual access drive more difficult the defenders agreed to move the dwarf wall originally created by them in order to widen access at the mouth of the drive.

[17] Secondly, it is difficult to understand how the metal fence posts on the MG side of the mutual access hedge amount to an "obstruction" or "obstructions" in circumstances where almost identical fence posts are in place on the IC side of the mutual access drive. At no point did Mr Thow suggest that the metal fence posts on the IC side of the mutual access drive amounted to an obstruction and nor I should add did the defenders.

[18] Thirdly, Mr Thow indicated in evidence that the stones which form the dwarf stone wall were not present when he took entry to IC, despite there being clear photographic evidence to the contrary. The presentation, appearance and location of the dwarf stone wall appears to have altered since Mr Thow took entry to IC but there is no doubt that there was a dwarf stone wall of some kind in place when he did so.

The first defender

[19] Mr Dale appeared to me to be a more measured witness than the pursuer. He provided a detailed history of the felling of the oak tree in the garden of MG and the manner in which remedial work had taken place due to the destruction of part of the existing hedge as a result.

[20] I accepted Mr Dale's evidence that the dwarf stone wall had been erected prior to Mr Thow taking entry to IC. Whilst Mr Thow disputed this, he at no point acknowledged

that the stones on the MG side of the mutual access drive amounted to a deliberate effort to create a wall, preferring on each occasion to refer to just "piles of stones".

[21] I accepted Mr Dale's evidence that the pursuer had later asked him to move the dwarf stone wall erected by him in order to widen the mouth of the mutual access drive, and that Mr Dale had agreed to do so. In fact, the pursuer may have conceded this although he insisted that he had asked the first defender to move "a pile of stones", rather than recognising or accepting that the stones were present in order to form the dwarf stone wall erected when the oak tree was felled.

[22] I accepted Mr Dale's evidence that the dwarf stone wall was moved eastwards in order to create a greater bell mouth at the main road end of the mutual access drive, in order to prevent further damage to the defenders' hedge and to facilitate larger vehicles obtaining access to the locus.

[23] When describing how the metal fence posts were erected Mr Dale described how he identified two existing posts together with a base wire which appeared to run the whole length of the drive. He explained how he had used two fixed points to run a string line between them and erected metal fence posts as closely as possible to the imaginary line identified by doing so. The suggestion put to him by Mr Nicholson that he was not qualified to do so, or that this was specialist work, struck me as frankly ludicrous in the context of ordinary garden work.

[24] Mr Dale opined that the metal fence posts erected by him were "approximately" in the same place as those which had fallen down over the years and which he was endeavouring to replace. He also mentioned that some of the bare-root hedging was planted behind the dwarf stone wall, on the MG garden side of the wall and I accepted his evidence in this regard.

The second defender

[25] Mrs Dale primarily gave evidence in relation to a number of the photographic productions, and repeated evidence provided by her husband in relation to specific deliveries and instances of damage to the defenders' hedge by lorries and the pursuer's trailer. In light of the strained relationship between the parties I completely accepted her evidence that when she reviewed CCTV footage and identified instances of lorries or the pursuer's trailer being perilously close to the hedge she immediately inspected the hedge and noted any damage caused.

[26] Whilst not an expert witness it was apparent from her evidence that Mrs Dale is a keen gardener and I also accepted her evidence that the MG hedge is thriving on the side which is open to her own garden, and her assessment that the reason the hedge is not thriving on the side open to the mutual access drive is damage caused by vehicles impacting, or colliding with, the hedge. I accepted her evidence that the purpose of the fence posts erected by her husband are to protect the hedge as much as possible, with no deliberate intent to cause any obstruction to the mutual access drive. I also accepted Mrs Dale's evidence that on occasions vehicles driven by the pursuer or other persons accessing IC have collided with the fence posts and knocked them over to lie at an angle, sometimes impacting upon the hedge when they were pushed.

[27] Like her husband, Mrs Dale appeared to me to be a measured and straightforward witness who made no attempt to exaggerate or minimise her evidence.

[28] Taken together I found both Mr Dale and Mrs Dale to be credible and reliable witnesses. Their evidence was clear and straightforward and consistent with the productions put to them in evidence.

[29] In many respects I preferred the evidence of both defenders to that of the pursuer and in general I have accepted their evidence over any contrary evidence given by the pursuer whose evidence, at some points, appeared to me to be somewhat self-serving rather than accurate.

Craig Ivey

[30] Mr Ivey is a director at County Property Searches. He has a background in architecture. His business assists solicitors in translating title deeds and comparing these with entries in the Land Register. He has been carrying out this type of work for approximately 7 years.

[31] Mr Ivey was instructed by the pursuer's previous agent to carry out an assessment of the issues raised in this case and is the author of three separate reports, each subsequent report being based upon additional information provided to him for his consideration.

[32] Mr Ivey gave his evidence in a straightforward manner. I found his evidence to be credible and reliable. However, for the reasons given in his own report (5/12/3) it is not possible to rely upon Mr Ivey's evidence to determine where the boundary line on the east of the mutual access drive lies, for a number of reasons.

[33] Mr Ivey himself notes that some of the dimensions noted in the 1991 plan are "scaled size" and so may not have been measured site dimensions taken at that time. This appears to be absolutely clear by the comment "all dimensions to be checked" at the top of the plan.

[34] He further notes that whilst the 1991 title describes the boundary features of the mutual access drive as the centreline of the hedges at either side of the access, the distance between the centreline of the hedges is not consistent with the 4.9 metres width noted in the title. This is reinforced by the fact that the 1991 plan is clearly referred to as demonstrative

only, and not taxative and further makes reference to the dimensions detailed therein not having been checked. In any event, as I have already concluded, the reference to the centreline of hedges in the 1991 title did not identify the whole length of the mutual access drive, either on the IC or the MG side of same.

[35] Mr Ivey also notes that whilst the measurement of 4.900 metres appears at both ends of the mutual access drive on the plan, his own measurement of the mutual access drive indicated that the drive was not uniform in width along its whole length, and narrowed as it reached the parties' respective homes. Again, this serves to reinforce the limitations of the 1991 plan.

[36] It should also be noted that the words "scaled size" are noted in brackets at the end of the mutual access drive furthest from the main road, and also that the relevant disposition clearly refers to the plan as being "demonstrative only" and not taxative and that "the areas and measurements thereon whilst believed to be correct are not guaranteed". Mr Ivey opines that the reference to "scaled size" suggests that not all dimensions were taken and/or checked on site when the plan was prepared.

[37] Another difficulty identified by Mr Ivey is that his own measurements disclosed anomalies in the dimensions of the frontage of the properties, meaning that the total length of the southern boundaries did not appear to "fit" between the physical features on the ground, thereby diminishing any ability to use them accurately to determine the boundary position of the mutual access drive. In my view this limits the validity of his own findings.

[38] Further, whilst reaching his own conclusions Mr Ivey made reference to an additional plan which was not lodged in court and therefore it has not been possible for me to properly assess any of his evidence which arose from his interpretation of that plan.

[39] Mr Ivey indicated that it can be difficult to accurately identify measurement lengths from PDF documents, that scaling was an issue, and that he was aware of occasional errors in Ordnance maps particularly in rural areas, which the locus clearly is.

[40] In cross-examination Mr Ivey conceded that there can be a build-up of soil around the roots of a hedge over time and furthermore that the roots of a hedge can spread over time. He accepted that there was no single cohesive trunk comprising the hedge on the MG side of the mutual access drive, and also that individual hedging plants may grow at an angle to the ground rather than directly upwards.

[41] Mr Ivey confirmed it can be difficult to ascertain where the centre line of a hedge actually is at the point where it reaches ground level. He agreed that the line formed by the hedge at MG might be different from when it was planted years ago, and also that it was unlikely that a hedge would grow in an entirely straight line.

[42] Essentially Mr Ivey sought in his evidence to use the hedge on the IC side of the mutual access drive as a physical feature which he was satisfied delineated the boundary of the mutual access drive on its west side more accurately than the Land Register title. He thereafter used the measurements of the demonstrative 1991 plan to plot the boundary of the same mutual access drive on the east, MG side.

[43] In doing so Mr Ivey did not take into account the tolerance acknowledged in his own reports and the Keeper's "Midas touch".

Allan Audley

[44] Mr Audley shares an office at Stirling University with Mrs Dale and is a technical specialist within the faculty of natural sciences. He became aware that Mrs Dale was

involved in a dispute with her neighbour and saw it as an opportunity to use technology which was available to him in order to assist her.

[45] I accepted Mr Audley's evidence in its entirety but with all due respect to the witness I am unable to place any reliance upon it for the reasons identified by Mr Nicholson in his written submissions.

[46] Whilst Mr Audley created digital image to show the location of the fence posts and dwarf wall he did so by using an underlying aerial image sourced from a website named "Digimap" but he was unable to clarify any margin of error attributable to "Digimap" or to the software he used to create the images before the court. In particular, he did not measure the red line on the image which forms the basis of any opinion he is able to express in this case, and cannot speak to its accuracy.

[47] In these circumstances I have left Mr Audley's evidence out of account.

Neil Cross

[48] Mr Cross was called as a witness for the defenders, having completed a report dated 23 March 2022 (production number 6/2). Mr Cross was a land surveyor at the time he prepared his report. He is now a survey manager. His CV is self-explanatory.

[49] Like Mr Ivey, Mr Cross was called upon by the defenders to attend at the locus and to provide some assistance in clarifying the current boundary lines and their accurate on-site positions relative to the mutual access drive.

[50] Like Mr Ivey, Mr Cross attended at the locus and took appropriate measurements before submitting his report.

[51] Whilst Mr Cross used significant technology in the preparation of his report in order to reach his professional opinion, however for a number of reasons I also find it difficult to

rely upon Mr Cross' evidence in order to determine where the boundary line on the east of the mutual access drive lies.

[52] Whilst Mr Cross talked in detail about the manner in which he had used the technology available to him and measured the site at the locus, he also made reference to the requirement to identify a number of control stations upon which to base his conclusions, but he readily conceded that if a control point so identified was incorrect then any boundary line illustrated would also be wrong.

[53] Mr Cross, like Mr Ivey conceded that it was impossible to know how much ground might have gathered around the stumps forming the base of the MG hedge. He confirmed that the accumulation of ground, and leaves and mould at the base of a hedge could lead to variance in identifying the centre line. He also confirmed that it was only possible for him to measure the point at which a hedge stump meets the ground on the day of his visit at the locus, rather than the day when the hedge was actually planted.

[54] Like Mr Ivey, Mr Cross expressed concerns regarding the accuracy of the 1991 plan. He confirmed that his own measurements did not tie in with the measurements stated on the plan. He voiced the opinion that a reference to "scaled size" is a red flag regarding accuracy and further, that in his view, scaled size plans are never accurate. In his view the reference to "scaled size" casts doubt on the accuracy of the plan as a whole.

[55] Although Mr Cross suggested that his own plan was more accurate than the 1991 plan he confirmed that this was due to the high level of technology available to him, which did not exist in 1991.

[56] In his written report Mr Cross stated there were "currently no major or permanent on-site features that delineate with any degree of accuracy the common and legal boundary between Mossgiel and the common and shared area".

[57] When asked about the terms of the 1991 disposition Mr Cross indicated that his report was "plan based" and not based upon the title sheet or "legal jargon". It is of some concern that when asked whether there was a physical feature on the ground at the locus which might be used to identify the eastern boundary of the mutual access drive Mr Cross was unable to identify the hedge which is the subject matter of this dispute, particularly given the wording of the bounding description of the mutual access drive provided in the 1991 disposition. He indicated that whilst it might be good practice to read the whole title to a property that was beyond the expertise of a surveyor.

Submissions

[58] At the conclusion of evidence I invited parties to lodge written submissions. I am most obliged to Mr Nicholson and Mr Innes for the detailed submissions lodged, together with lists of authorities.

[59] Both parties' representatives also invited me to make certain findings in fact and findings in fact and law based upon the evidence before me. I have done so to the extent that my assessment of the evidence coincided with their respective proposals.

[60] Having considered the written submissions and authorities lodged I assigned a hearing in respect of same, which enabled me to clarify a number of points prior to reaching this determination.

Discussion

[61] There was no dispute between parties regarding the law which applies in this case.

[62] In this case the parties own heritable property. The subjects at IC and MG are registered in the Land Register. The titles sheets to both properties were before me, and examined in some detail by parties' representatives.

[63] In terms of section 1 of the Land Registration (Scotland) Act 2012 ("the 2012 Act") the Keeper of the Registers of Scotland is required to manage and control a public register of rights in land in Scotland.

[64] In terms of sections 3 and 4 of the 2012 Act the Keeper must make up a title sheet for each registered plot of land and assign a title number to the title sheet of each registered plot of land which, in accordance with section 5 of the 2012 Act will comprise (a) a property section, (b) a proprietorship section, (c) a securities section and (d) a burdens section.

[65] Section 6 of the 2012 Act requires the Keeper to enter in the property section of the title sheet prepared in accordance with the Act:

> "(a) a description –
> (i) of the plot of land (being a description by reference to the cadastral map), and
> (ii) of the nature of the proprietor's right in the plot of land."

[66] The cadastral map is defined by section 11 of the 2012 Act as follows:

> "(1) The cadastral map is a map—
> (a) showing the totality of registered geospatial data (other than supplementary data in individual title sheets),
> (b) showing for each cadastral unit—
> (i) the cadastral unit number,
> (ii) the boundaries of the unit, and
> (iii) the title number of any registered lease relating to the unit, and
> (c) otherwise depicting registered rights in such manner as the Keeper considers appropriate."

[67] In terms of subsection (5) the cadastral map must be based upon the base map and for the purposes of this action subsection (6) determines that the base map is the Ordnance map.

[68] Section 65 of the 2012 Act deals with the meaning of "inaccuracy" and states:

> "(1) A title sheet is inaccurate in so far as it—
> (a) misstates what the position is in law or in fact,
> (b) omits anything required, by or under an enactment, to be included in it, or
> (c) includes anything the inclusion of which is not expressly or impliedly permitted by or under an enactment.
> (2) The cadastral map is inaccurate in so far as it—
> (a) wrongly depicts or shows what the position is in law or in fact,
> (b) omits anything required, by or under an enactment, to be depicted or shown on it, or
> (c) depicts or shows anything the depiction or showing of which is not expressly or impliedly permitted by or under an enactment.
> (3) The cadastral map is not inaccurate in so far as it does not depict something correctly by reason only of an inexactness in the base map which is within the published accuracy tolerances relevant to the scale of map involved... "

[69] Section 66 is subject to section 66(3) which deals with "shifting boundaries". Whilst counsel for the defenders introduced this issue in his written submissions, it will be seen from my findings in fact that I was not satisfied upon the evidence that this was the crux of the issue in this case.

[70] It is not in dispute that the pursuer and the defenders own neighbouring properties. Both properties are served by a mutual access drive. The pursuer and the defenders own a one-half *pro indiviso* share of the mutual access drive.

[71] These proceedings concern the extent of the mutual access drive and the identification of its eastern boundary, together with the pursuer's averments regarding encroachment and obstruction.

Declarator

[72] The pursuer's first crave invites the court to find and declare that the "eastern boundary of the mutual access … is the centre line of the hedge which is situated to the west of the said centre line on the said mutual access …"

[73] A great deal of evidence in this case centred around the details of the Land Certificates and an earlier disposition and relative plan relative to the subjects, and the interpretation thereof.

[74] Expert evidence was led from Mr Ivey and from Mr Cross, and Mr Audsley provided additional evidence. All had carried out various exercises which essentially related to comparing the subjects depicted on the cadastral maps for each property with the Ordnance map and asserting whether, in their respective opinions, the metal fence posts erected by the defenders were situated within the MG subjects or upon the mutual access drive. Mr Ivey had visited the subjects and taken various measurements in order to reach his conclusion.

[75] However, I am not convinced the evidence provided by these witnesses was of particular assistance to the court, nor that the dispute in this case has been properly addressed or focussed by the evidence led.

[76] I agree with Mr Nicholson's submission that whilst the court may find assistance in skilled evidence, the function of that skilled evidence is not to supplant the court's decision making. The function of the court is to examine all the evidence before it and to reach a conclusion on the basis of that evidence, where it is possible to do so.

[77] Clearly the starting point in this case is the Land Certificates relative to both properties. The details of both properties, together with the mutual access drive, is detailed in the Land Certificates.

[78] The mutual access drive is depicted in the cadastral maps relative to each property.

[79] The Land Certificate for IC does not provide details of the area comprising the mutual access drive beyond an area shaded in blue, to the east side of the subjects at IC.

[80] The Land Certificate for MG shows what appears to be an identical area shaded in blue. Essentially what is depicted is a narrow rectangular shape, which visually appears to be superimposed upon the area shaded pink which depicts the subjects at MG as a whole.

[81] Both the Land Certificate and cadastral map pertaining to MG provide more detail regarding the mutual access drive than that pertaining to IC.

[82] At section A the title sheet for MG states that "the boundaries between points indicated on the Title Plan are as follows" and goes on to make reference to "A-B West Boundary Centre line".

[83] One of the difficulties from the pursuer's point of view is that the line shown between points "A" and "B" does not extend for the full length of the mutual access drive, which is the whole length of the area shaded in blue.

[84] Further, it does not assist the court to turn to the 1991 disposition for assistance.

[85] The 1991 disposition includes a bounding title in respect of the area of ground comprising the mutual access drive, as previously detailed. Reference is made therein to an undefined boundary to the east which extends for 8 metres and 64 centimetres or thereby and also to a boundary "to the East southeast by the centre line of a hedge along which it extends Thirty metres and Twelve centimetres or thereby".

[86] The 1991 disposition makes reference to the described piece of ground being "marked 'mutual access' and shown delineated and coloured green on the said plan annexed hereto".

[87] I heard evidence from various witnesses regarding the 1991 plan. It was not in dispute that the 1991 plan shows the subjects at IC and MG, together with the mutual access drive which is the subject of this dispute.

[88] It was also not in dispute that the 1991 plan shows the mutual access drive between both properties, with hedging depicted to both sides of the mutual access drive together with two circles with crosses depicting the trees which have since been felled.

[89] The 1991 plan includes a dark blue line which it is agreed depicts the boundary line between the subjects at MG and the common area forming the mutual access drive. Again, it is absolutely clear from the 1991 plan that the hedge between the MG garden ground and the mutual access drive cannot possibly form the whole length of the boundary between the mutual access drive and MG for the simple reason that it does not extend along the whole length of the boundary.

[90] The boundary described in the 1991 disposition and relative plan comprises two parts, namely the part depicted by the centre line of the hedge and the additional length of the undefined boundary referred to in the disposition.

[91] The first issue in this case is therefore the specific content of crave 1, and I did raise this with Mr Nicholson at the hearing on submissions. In particular, I raised the fact that my assessment of the evidence was that whilst the mutual access drive was described in the 1991 disposition as being bounded by a hedge, it was not suggested that the hedge comprised the whole length of the specified boundary. Mr Nicholson conceded there was "a gap" but insisted upon his submission that the boundary line was the centre line of the hedge and further that the boundary line was straight.

[92] I am not satisfied that Mr Nicholson is correct, nor that I can find on the evidence that the pursuer's position in terms of crave one is made out. Put simply, the eastern boundary of the mutual access shown tinted blue on the title plans for IC and MG **cannot** be the centre line of the defenders' hedge in circumstances where the cadastral map clearly shows that the eastern boundary extends beyond the hedge. I specifically raised the matter

with Mr Nicholson at the hearing on submissions because it seemed to me that it had become obvious from the evidence that the terms of crave one were incorrect and not borne out by the evidence before me, and I remain of that view.

[93] Both parties referred me to the case of *Dougherty* v *Taylor* [2022] SAC (Civ) 20 which likewise involved a boundary dispute between neighbours.

[94] I accept that the court may look behind the Land Certificates and cadastral maps in this case, not because they are not authoritative but because they are not sufficiently accurate in view of the applicable scaling tolerances, in relation to the particular boundary in dispute.

[95] However, even looking behind the Land Certificates and cadastral maps in this case it is not possible for me to identify a single physical features at the locus which defines the whole boundary between the mutual access drive and the subjects at MG.

[96] I am not satisfied upon the evidence that the existing hedge is in exactly the same position as that which was present in 1991.

[97] In circumstances where a) the existing hedge is not in exactly the same position as it was in 1991, b) the existing or current hedge does not form the same line as it did in 1991 but has been moved eastwards and now forms a dog leg, and c) the existing hedge does not delineate the whole length of the eastern boundary of the mutual access drive in any event, it is not possible for the court to grant the declarator sought by the pursuer.

[98] Mr Nicholson's reference to the guidance produced by the Ordnance Survey and Registers of Scotland does not assist the pursuer's case in circumstances where the present hedge is not capable of accurately delineating the boundary he invites the court to identify.

[99] The black line marked A-B on the defenders' title is the boundary, but there is no physical feature on the ground which can be used to accurately plot the boundary in light of the scaling tolerances permitted and the lack of permanent physical features.

[100] As I have already identified, a closer inspection of the prior Sasine title does not assist me further, since the hedge originally *in situ* is no longer there and, in any event, the hedge which previously existed did not extend to the whole length of the boundary.

[101] I agree with Mr Nicholson's submission that the interpretation of the title to both properties is a matter for the court, and that it is for the court to determine whether or not a drawn feature on the base map corresponds with a physical feature on the ground, and where the legal boundary sits in relation to it. Unfortunately, it has not been possible for me to do so in this case.

[102] I also agree with Mr Nicholson's submission that the import of section 65(3) of the 2012 Act is that the cadastral map can only ever be as accurate as the Ordnance map, such that if the Ordnance map is capable of being interpreted in such a way as showing physical features in a particular place then the title sheet must be interpreted in the same way. However, this court has not been furnished with an Ordnance map but rather a number of interpretations reached by others. In any event, Mr Nicholson himself points out the uncomfortable truth which is that the Ordnance map is not absolutely accurate, as accepted by both Mr Ivey and Mr Cross.

[103] I note that Mr Nicholson invited me to reject the defenders' evidence that the hedge itself has moved since they purchased MG in 2014. I have not rejected that evidence, but even had I done so that does not appear to me to assist the pursuer in circumstances where the precise terms of the declarator sought are not consistent with the bounding title referred

to in the 1991 disposition. However, in the circumstances of this case even if they were so consistent that would not, in my view, assist the pursuer.

[104] It is trite to say that it is for the pursuer to prove his case. He has an evidential burden to discharge and has failed to do so. I agree with Mr Innes' submission that the pursuer has failed to establish that the boundary is, or is not, in the same position as it was in 2015 or in 1991.

[105] Whilst Mr Innes touched in his written submissions upon the issue of acquiescence I should note that I was unable to reach a finding-in-fact to the effect that the pursuer had participated in the defenders' siting of their wall. I found this particular part of the evidence to be somewhat vague and unclear. I was unable to conclude anything beyond the fact that the pursuer asked the defenders to widen the mouth of the mutual access drive at the road.

[106] It is clear that the pursuer, through his agents, has raised the issue of alleged obstruction and encroachment repeatedly. Any suggestion of acquiescence could apply only to the siting of the dwarf stone wall, and not to the erection or installation of the metal fence posts. In any event, given my assessment of the other evidence in this case the issue of acquiescence does not arise and I do not require to consider further the plea of personal bar.

Removal of obstructions

[107] That brings me to the second crave for the pursuer, which invites the court to ordain the defenders to remove "any and all obstructions" placed by them on the mutual access drive and "any boulders situated at the east side of the entrance to the said mutual access drive".

[108] Regrettably, on the basis of the evidence before me and for the reasons I have already detailed, I have not found it possible to conclude whether the metal fence posts or the dwarf

stone wall are situated within the legal boundary of the defenders' property. Equally, I have found it impossible to conclude that the metal fence posts or the dwarf stone wall are situated upon or within the mutual access drive.

[109] Put simply, it is impossible to reconcile the terms of the cadastral map pertaining to MG with the bounding description of the mutual access drive detailed in the 1991 disposition. Even allowing for tolerances of scale the measured plans created by Mr Ivey and Mr Cross do not enable me to reach a firm conclusion in this regard.

[110] Further, both Mr Ivey and Mr Cross were clear that the 1991 plan should not be relied upon as an accurate statement of the measurement of the boundaries.

[111] Nonetheless, it remains appropriate for this court to determine whether the defenders have placed "obstructions" upon the mutual access drive "including any metal posts" and "any boulders".

[112] The defenders did not ask the pursuer if they could erect metal fence posts along the length of the mutual access drive and the pursuer did not consent to these posts being erected. However, that is not the crux of the matter.

[113] The nature of common property is described in Bell's *Principles* paragraph 1072 as follows:

> "Common property is a right of ownership vested pro indiviso in two or more persons, all being equally entitled to enjoy the uses and services derivable from the subject, and the consent of all being requisite in the management, alteration or disposal of the subject. This common and undivided right is continued either by necessity, if a subject belonging to several be indivisible, or voluntarily, if the subject be divisible, until it shall be divided".

[114] Bell also refers to rules which have been established to deal with difficulties that may arise in the course of the management and administration of the common property, included

among which is the rule that one co-proprietor may prevent any "extraordinary use of the subject that may be attempted without his consent".

[115] The default setting in relation to common property is that each co-proprietor is entitled to possess the entire property and to make ordinary use of it. In his decision in *Apps* v *Sinclair* (unreported, 23 February 2006) Sheriff Principal Dunlop took no issue with this proposition and went on to consider the issue of "ordinary use".

[116] As in this case the action concerned a dispute about an area of ground which gave access to two separate properties, and an allegation that one party had attempted to restrict the use of the mutual access way by the other. The Sheriff Principal concluded that the ordinary use of an access way was to afford access over it to the respective properties of the common proprietors.

[117] Upon the evidence in this case I have concluded that the ordinary use of the mutual access drive is to allow the pursuer and the defenders, and anyone attending at their respective properties to access the subjects at IC and MG, whether to make deliveries or otherwise.

[118] In his written submissions Mr Nicholson invited me to find that the defenders' description of the metal posts having been "re-instated" was a premature attempt to argue that their placement was somehow an ordinary use of common property. In fact, that is exactly what I have determined on the evidence. It is quite clear that there is a line of metal posts along the IC side of the mutual access drive and at one point there were at least two metal posts remaining on the MG side of the mutual access drive. What the defenders have done is re-instated a number of further posts in order to create exactly the same line of metal fence posts along their hedge as that which pertains to the hedge on the IC side of the mutual access drive.

[119] On that basis I cannot accept the pursuer's contention that the posts and dwarf wall are an encroachment by the defenders onto property owned in common with the pursuer.

[120] There is no evidence to suggest that the metal fence posts erected by the defenders have at any time obstructed the pursuer's access to IC, or the access of any other person attending at IC.

[121] At this point it may be helpful to note the Collins dictionary defines the verb "obstruct" as "1. to block (a road, passageway, etc.) with an obstacle. 2. to make (progress or activity) difficult…" and the noun "obstruction" as "1. a person or thing that obstructs. 2. the act or an instance of obstructing…"

[122] Whilst, as I have previously indicated, the pursuer took every opportunity during both his examination-in-chief and cross-examination to specifically and repeatedly use the words "obstruction" and "obstructions" he was unable to specify a single occasion when he suggested he had been unable to access IC due to an obstruction. The pursuer furnished the court with no occasion when a metal fence post had prohibited his access to IC. At best, he referred to an occasion when he had required to pick a stone off the ground at the mouth of the mutual access drive and return it to its place on the dwarf stone wall before proceeding on his journey along the drive. Whilst he did make reference to a metal fence post sticking into the mutual access drive, he conceded the reason for this is that the metal fence post had been struck by a vehicle and was out of place.

[123] It is clear from the evidence that the metal fence posts erected by the defenders were erected only for the purpose of protecting their hedge from contact with delivery vehicles attending at both subjects and from contact made with the hedge by the pursuer when towing his trailer along the mutual access drive. The defenders' hedge has been damaged on numerous occasions due to vehicular contact. The purpose of the metal fence posts is not

to obstruct the pursuer's access to IC and I have been unable to identify a single occasion when the metal fence posts have obstructed his access to the subjects.

[124] In these circumstances I have concluded that the metal fence posts to do not amount to an obstruction upon the mutual access drive and to that extent the pursuer's second crave must also fail.

[125] Turning to the dwarf wall, I have likewise concluded upon the evidence that it does not form an encroachment upon the mutual access drive, nor that it forms an obstacle which in any way impedes the pursuer's access to same.

[126] The dwarf wall was created by the defenders of necessity in order to rectify damage to their hedge when the oak tree within the hedge was felled. There is no evidence which enables me to conclude that the dwarf wall lies within the mutual access drive, nor that it encroaches any further upon the mutual access drive (if indeed it does) than the oak tree which it has replaced.

[127] I agree with Mr Innes' submission that the pursuer's averments regarding obstructions and impediments to, and interference with, his use and enjoyment of the mutual access drive are conspicuously unsupported by evidence, even his own.

[128] The existing dwarf stone wall was deliberately situated in order to widen the existing entrance to the drive. The metal fence posts, even when bent and dislodged, provide no barrier to access being taken to the mutual access drive and are generally situated within the canopy of the hedge. At no point in his evidence did the pursuer suggest that the hedge itself is an obstruction or an impediment to his access to IC. Further, the fact that the hedge and the metal fence posts therein appear to be regularly hit by vehicles poorly driven either by the pursuer or others attending at IC does not render the hedge itself, or the metal fence posts an impediment.

[129] In dealing with both the metal fence posts and the dwarf stone wall I have regard to the statement in the Stair Encyclopaedia (Vol 18 paragraph 24) that the dividing line between ordinary and extraordinary use will depend partly on the nature of the property and partly also on its recent history.

[130] The nature of the mutual access drive is that it is an area of ground which by its very nature furnishes the parties with access to IC and MG. The recent history of the subjects, as demonstrated by oral and photographic evidence, is that the mutual access drive has always been partly bounded on each side by a hedge. In the past it appears the hedges along each side of the mutual access drive have themselves been bounded by post and wire fences. It is clear that the hedge on the IC side of the mutual access drive grew to such an extent that at one point the existing fence was enveloped by the hedge and only metal posts remain. It is also clear that on the MG side of the mutual access drive a number of the original metal fence posts were removed, at some point prior to the parties taking entry to their respective homes.

[131] I am absolutely satisfied that the past practice of a post and wire fence running along the length of each hedge on the mutual access drive amounts to ordinary use rather than extraordinary use, on both sides of said drive.

[132] On that basis I have also concluded that whilst it is clear the defenders did not ask for the pursuer's consent when they installed, or re-instated the metal fence posts at issue, they were not obliged to do so. I am further satisfied that the defenders' use of common property insofar as it relates to the erection of metal fence posts along the length of their hedge is not "wrongful or illegal".

[133] I accept the pursuer has not consented to the erection of metal fence posts by the defender. However, I am not satisfied that the purpose of the metal fence posts is to cause

an obstruction, nor that their stated purpose is an intention to obstruct and in any event as I have already indicated, I am not satisfied that the metal fence posts in fact amount to an obstruction.

[134] I am satisfied that the metal posts amount to an ordinary use of common property and do not fall to be removed. Mr Nicholson, in his written submissions, made no mention of boulders as referred to upon record. In any event I am satisfied that the dwarf stone wall which comprises the stones and boulders complained of equally do not amount to an obstruction.

[135] In these circumstances the pursuer's second crave must fail.

Interdict

[136] Having concluded that this court is unable to grant the declarator sought, and further that the metal fence posts and dwarf wall complained of do not amount to obstructions which the defenders should be ordained to remove from the locus it is not necessary for me to deal in any detail with the pursuer's third crave.

[137] The pursuer does not have a *prima facie* case for interdict, and this necessarily fails.

[138] I was asked to reserve the question of expenses and have done so. I will ask the sheriff clerk to assign a hearing thereon, which should take place by WebEx.