**SHERIFF APPEAL COURT**

**[2023] SAC (Civ) 33**
**FTW-B92-18**

Sheriff Principal D C W Pyle
Appeal Sheriff Tait
Appeal Sheriff Hamilton

OPINION

of

SHERIFF PRINCIPAL D C W PYLE

in appeal by

ARDNAMURCHAN ESTATES LIMITED

Pursuer and Appellant

against

MICHAEL ROY MACGREGOR and KAREN JUDITH MACGREGOR

Defenders and Respondents

**Pursuer and Appellant: Mure KC; Frances E Sim Limited**
**Defenders and Respondents: McLean KC; Murchison Law**

1 December 2023

**Introduction**

[1] This lamentable litigation, which began over four years ago, concerns a small unremarkable piece of scrubland adjoining a much larger tract of land which includes a farm, a visitor centre and holiday lets. The motivation of the respondents to achieve legal certainty on ownership is obvious given what development on the ground they have

undertaken since their purchase in 1992. The motivation of the appellant is much less clear – and indeed the sheriff was unimpressed with its explanation of it.

[2] In broad summary, the respondents purchased a farm which according to the sale particulars included the disputed ground. Whether or not they still thought so just prior to settlement of the transaction is another matter, which I discuss later. The farm is within the Ardnamurchan peninsula. The respondents, under advice, later granted to themselves an *a non domino* disposition of the disputed ground, which disposition this court decided was invalid. The appellant purchased a substantial estate part of which was contiguous to the respondent's farm. Thereafter it instructed its solicitor to identify who was the owner of the disputed ground. Under advice, it decided that the respondents were not the owners and after various further steps obtained a title from a successor trustee whom it was advised was the true owner. The relative disposition was presented for registration. The Keeper of the Registers of Scotland registered the deed under certain reservations on indemnity, one of which remains in place and will be resolved only on conclusion of this action.

[3] The sheriff was faced with a difficult task. She had to consider in considerable detail title deeds dating back nearly a century, as well as numerous plans and drawings with complex expert evidence on them. The parole evidence was heard over only two days, but that was because the parties had produced affidavits for all of the many witnesses. On top of that, she had to analyse a considerable body of complex case law, which she then had to apply to the facts. She is to be commended for producing a judgment which is set out in an admirably non-technical manner, such that it should have been easily understood by the parties themselves. Nevertheless, as will become clear, I am satisfied that of the sheriff's approach some of the criticisms by senior counsel for the appellant are justified, such that this court requires to look at the evidence *de novo* and come to its own conclusions on it.

Given that the credibility of the witnesses (other than Mr Donald Houston, the controlling mind of the appellant, whose evidence I do not find to be of any importance) is not questioned and that much of the evidence was technical in nature, this court is as well placed as the sheriff to consider it (*W* v *Greater Glasgow Health Board* [2017] CSIH 58).

[4] Again in broad summary, the principal issues to be resolved in this appeal are, first, whether a plan in a disposition, which is stated to be demonstrative only, is determinative of the boundaries and if it is, secondly, whether, despite that, the disposition is still habile to found a prescriptive right of ownership based on uninterrupted possession. There is also a subsidiary issue about whether the disputed subjects can be included in the "pertinents" of the subjects disponed.

[5] For the purposes of this introduction I should also mention that the appellant has conceded that no matter the question of ownership the respondents do have a servitude right of access over the disputed ground to a property they had built adjacent to it. To that extent therefore, matters have moved on since the dispute first arose.

**The Title Deeds**

[6] In 1934 Clark's Trustees conveyed the whole of the Ardnamurchan peninsula to Baron Trent of Nottingham. Part of that, known as Glenborrodale Estate (described in the disposition as Glenborrodale Deer Forest), was conveyed by Baron Trent to Hector Speirs in 1951. The relevance of the latter conveyance is that in the plan of the subjects conveyed, which plan is stated to be demonstrative only, the south west corner of the subjects appears to cover a public road which proceeds in a north westerly direction and that it definitely does not include the land contiguous to the south west side of the road, which is the disputed land.

[7] In 1953 Baron Trent conveyed to the Boots Pure Drug Company Limited ("Boots") six tracts of land or properties with land, one of which is described as part of Glenborrodale Deer Forest (different from the subjects in the 1951 disposition and despite that deed purporting to be a conveyance of the deer forest as a whole). Another tract of land is described as follows:

> "ARDSLIGNISH and GLENMORE FARMS, extending to Four thousand and nine acres or thereby, with the farm buildings, two houses and three cottages, and all other buildings and erections thereon, all as at present occupied by the said Boots Pure Drug Company Limited, and as shown coloured yellow and marked '2' on the said plan".

Internal to that land are two pieces of property, which were also conveyed, namely Glenmore Croft and a site at Glenmore on which the county road workers hut was erected. All public roads running through the subjects are expressly excluded. The plan is declared to be "demonstrative only and not taxative and its accuracy is not guaranteed, nor are the acreages or areas stated herein guaranteed". There is no dispute that some of the disputed subjects are included in the area coloured yellow. But a small area at the northwest top part of them is not coloured at all. Parties are agreed that the area represents just 20% of the disputed subjects. It is not obvious *ex facie* the deed and given the terms of the plan in the 1951 disposition why that should be so, given that the result is that the uncoloured ground is in effect stranded in the middle of subjects conveyed in the 1951 disposition and others in the 1953 one. There was evidence on that, which I discuss later.

[8] In 1957, the trustees and executors of the by then deceased Lord Trent conveyed to his widow what senior counsel for the respondents described as the rump of the Ardnamurchan peninsula, being the subjects contained in the 1934 disposition under exception of various tracts of land and properties sold subsequent to it. Obviously, such excepted subjects included the land in the 1953 disposition. The respondents' position is

that given this transaction there is no sense to the notion that the trustees and executors would have wished to retain ownership of the disputed subjects; *a fortiori*, the uncoloured piece of ground on the 1953 map.

[9] In 1969, Boots conveyed to James Thomson the subjects contained in the 1953 disposition, albeit under exception of a number of pieces of ground previously sold, *inter alia*, to the local authority. The disposition included Ardslignish and Glenmore Farms, as per the 1953 disposition under a description by reference to that deed.

[10] In 1973, by way of an *ex facie* absolute disposition (that being the usual form of deed where a proprietor had borrowed on the security of heritable property – prior to the introduction of standard securities) the Bank of Scotland with the consent of Thomson conveyed the same subjects to Viscount Devonport.

[11] The following year, Viscount Devonport conveyed the same subjects – and others and subject to exceptions - to the General Accident Fire & Life Assurance Corporation Limited ("General Accident"). Each parcel or piece of ground, including Ardslignish and Glenmore Farms, is subject to a description by reference to the previous relevant deed, but there is also a plan attached to the disposition, which outlines in black ink the whole subjects of sale. The plan purports to exclude all of the disputed subjects (including the uncoloured area), as contained in the plan to the 1953 deed. The plan, that is the one in the General Accident disposition, is declared *in gremio* "to be demonstrative only and not taxative".

[12] In 1978, General Accident conveyed its interest to Grampian Properties Limited, a company within the General Accident group of companies. The description in the disposition is the same as in the 1974 deed, including the reference to the demonstrative plan outlined in black ink.

[13] In 1985, Grampian Properties Limited conveyed to Dugald MacGillivray a small croft house and adjoining croft land, known as number twenty seven Glenmore, being part of the whole subjects in the 1953 disposition. A full bounding description is given and a reference to an annexed plan. It is not stated that the plan is either demonstrative or taxative.

[14] By feu disposition dated 13 March 1992 and recorded in the Sasine Register on 6 November 1992, Grampian Properties sold to the respondents the following (in so far as relevant for present purposes):

> "ALL and WHOLE those areas or pieces of ground extending in total to Four hundred and sixty four acres and five decimal or one tenth parts of an acre or thereby lying in the Parish of Ardnamurchan and County of Argyll shown outlined in red on the demonstrative plan annexed and executed as relative hereto; Together with (i) the dwellinghouses known as Glenmore House and Glenmore Cottage and the Visitors Centre and Audio Visual Centre and all other buildings erected on the said areas or pieces of ground,… (v) the parts, privileges and pertinents thereof,… which said areas or pieces of ground hereby disponed are hereinafter referred to as "the Feu" and (i) form part and portion of ALL and WHOLE Ardslignish and Glenmore Farms lying in the said Parish and County and extending to Four thousand and nine acres or thereby and shown coloured yellow and marked "2" on the plan annexed and signed as relative to the Disposition by The Right Honourable John Campbell, Baron Trent of Nottingham, D.L., LL.D, in favour of Boots Pure Drug Company Limited dated the Fifth and recorded in the Division of the General Register of Sasines applicable to the County of Argyll on the Twelfth both days of June Nineteen Hundred and fifty three; and (ii) includes (a) Glenmore Croft extending to One acre and six decimal or tenth parts of an acre or thereby all as more particularly described in and disponed (FOURTH) by and shown coloured pink and marked "4" on the plan annexed and signed as relative to the said Disposition by The Right Honourable John Campbell, Baron Trent of Nottingham, D.L., LL.D, in favour of Boots Pure Drug Company Limited and (b) the site at Glenmore more particularly described in and disponed (FIFTH) by and shown coloured black and marked "5" on the plan annexed and signed as relative to the said Disposition by The Right Honourable John Campbell, Baron Trent of Nottingham, D.L., LL.D, in favour of Boots Pure Drug Company Limited; But the whole subjects hereinbefore in feu farm disponed are so disponed under exception of (One) all public roads running through the said subjects; (Two) ALL and WHOLE the site of the croft house known as Number Twenty seven Glenmore, Salen, Acharacle, Argyll and those areas of croft land comprising croft Number Twenty seven Glenmore aforesaid being the whole subjects more particularly described in and disponed (IN THE FIRST PLACE) and (IN THE SECOND PLACE) (Primo) and (Secundo) by and delineated in red and blue on the plan annexed and executed as relative to the Disposition by us the said Grampian Properties Limited in favour of Dugald MacGillivray dated the Third day

> of January and recorded in the said Division of the General Register of Sasines on the Thirteenth day of February both months in the year Nineteen hundred and eighty five; and (Three) ALL and WHOLE the solum of the Deer Larder located within the Visitors Centre Complex at Glenmore in the said Parish and County and the deer larder itself"

The original of this deed is lost. An extract registered copy was lodged. That is in black and white. Thus, the attached plan does not disclose the boundaries in red as set out in the dispositive clause. There was some discussion before us and the sheriff about the probity of another plan which showed the boundaries in red and I discuss below the sheriff's view of the deed plan. Nevertheless, for my part I have no difficulty in concluding that the relevant part of the north east boundary does not on the plan include the disputed subjects – and I do that on the basis of the extract, never mind the other plan produced.

[15] By disposition dated 27 November 1992 and recorded in the Sasine Register on 3 December 1992, Grampian Properties conveyed to John and Angela Grisewood their remaining interests in the peninsula.

[16] Purely on the basis of the title deeds, the position can be summarised thus:

(a) Contiguous to the disputed subjects on the east or north east there is a public road. Across that road are the subjects sold in 1951 by Lord Trent;

(b) Putting to one side the disputed subjects, the land to the west or south west of the road was the subjects sold in 1953 by Lord Trent to Boots;

(c) Based only on the demonstrative plan in the disposition for that sale there is a very small area of ground, being 20% of the disputed subjects, which was retained in the ownership of Lord Trent;

(d) Access to that small area can be reached from the public road, but that apart there is no sense why Lord Trent would wish to retain it;

(e) The land sold to Boots goes through various hands until eventually owned by Grampian Properties which then sells it to the respondents. The plan in the disposition excludes not only the white area of the disputed subjects but also the remaining part of it, which was included within the yellow boundary in the 1951 disposition. Again, on the basis only of the plan, there is no sense why Grampian Properties would wish to retain it;

(f) On any view, at least based upon the title deeds, the disputed subjects have never been described as part of Glenborrodale Deer Forest, part of which is the land on the north east of the subjects and includes the *solum* of the public road.

[17] In 1994 the respondents recorded an *a non domino* disposition of the disputed subjects, which this court has since held to be invalid.

[18] The appellant's involvement in the peninsula began in 1996 when it purchased the subjects owned by Mr and Mrs Grisewood. It was not fully explored before the sheriff, but from the evidence of Mr Houston it appears that it or other companies in which Mr Houston has an interest purchased part (or perhaps the whole) of Glenborrodale Deer Forest and certainly an area of ground opposite the disputed subjects to the north east upon which a distillery has been built. When these transactions took place was not explained. In 2014, the appellant purchased the rump of Lord Trent's original estate from the assumed executor of the then deceased Lady Trent. At the same time the executor purported to convey to the appellant, by way of a separate disposition, the disputed subjects. The land registration certificate for the latter had two qualifications – one for the title of the executor which was resolved; the other for the adverse possession by the respondents.

**Admissibility of Extrinsic Evidence**

[19] Senior counsel for the appellant was critical of the sheriff's conclusions on the expert evidence which related primarily to the calculation of the acreage of the subjects contained in the 1992 disposition. I shall return to that. But before I do so, I have to consider whether it was right as a matter of law for the sheriff to admit extrinsic evidence at all to assist the construction of the 1992 deed as well as the critical earlier ones.

[20] Under reference to *Reid* v *McColl* (1879) 7 R 84 (Lord Justice-Clerk at p 90) and *Rankine*, The Law of Land-ownership in Scotland (1909), pp 102-105, the sheriff states (para 39 of her judgment):

> "It is clear then that a bounding title is one for which it can be said that the title described in the deed is precise, intelligible and unambiguous, and will allow the boundaries of the conveyance to be determined without any further enquiry and therefore by reference to the deed only".

She also cited a passage from *Halliday*, Conveyancing Law and Practice, 2nd edit, 1997, para 33.13, that in construing a Sasine title the essential principle is to establish what the true intention of the contracting parties was.

[21] Senior counsel criticised this approach. First, *Reid* v *McColl* was authority for the proposition that if the boundaries are specified and if they can be identified they will receive effect. Secondly, the passage in *Rankine* upon which the sheriff relied is when the author was dealing with verbal descriptions and ignored the later passage (at p 104) that a "plan docketed and referred to in the titles is 'fully as good as any words describing the line of boundary'" under reference to *North British Railway* v *Magistrates of Hawick* (1862) 1M 200. Thirdly, the passage in *Halliday* was in the context of inconsistencies between boundaries and not, as here, between an acreage and a boundary line on a plan. I shall return to this issue.

[22] Having determined the test for the construction of dispositions, the sheriff went on to deal with the two critical issues: first, the stated acreage and her conclusion on the expert evidence that there was a discrepancy despite the measurement having added after it the words "or thereby", and secondly, the plan which she correctly noted was demonstrative only. She considered that on the evidence the discrepancy in the acreage was material and that the plan was imprecise. She concluded that the description is a "general description, not a particular description and the 1992 Disposition is not a bounding title" in the sense that "the description taken as a whole is not so precise and intelligible in its terms to enable the Court without further enquiry to fix the boundaries". Senior counsel for the appellant also criticised this conclusion, not just on the merits, but also because the sheriff had misunderstood the terms "general description" and "bounding title". A general description is one which describes land without reference to measurements or boundaries, whereas a bounding title is one where the subjects are limited by boundaries, which would include a description by reference to a plan with boundaries marked on it (*Halliday*, paras 33-07 and 33-09; *Gordon & Wortley*, Scottish Land Law (3rd edit) Vol 1, para 3-04). I agree with that submission.

[23] In any discussion of the admissibility of extrinsic evidence there is the general rule of construction of any writing, namely that the intention of the parties must be discovered from the writing itself. Only where there is in the language of the writing a doubt or difficulty to the facts of the case is extrinsic evidence admissible. Moreover, the purpose of extrinsic evidence is not to discover the writer's intention separate from the words used, but to determine the proper meanings of those words. These general principles apply equally to conveyancing and the construction of a disposition as they do to any other form of writing. In the Joint List of Authorities there is a comprehensive list of the case law, as well as some

15 textbooks, including therein passages from the institutional writers and such seminal books as *Rankine* and *Halliday*. Some within the list are to do with the issue of prescriptive right, but many are concerned with the construction of the title deed itself to identify what subjects were conveyed. Not all of the authorities were referred to in the submissions before us. Professor Halliday was no stranger to the practical as well as the theoretical aspects of conveyancing. (For a discussion of his contribution to this area of the law, reference should be made to "*A Scots Conveyancing Miscellany, Essays in Honour of Professor J M Halliday*, (1987) W Green & Son Ltd, particularly the foreword by Lord Kilbrandon and the essay by Professor David Walker.) So as a starting point, I rely upon the following passage from *Halliday* (para 33.13):

> "In the description of lands in a conveyance there may be inconsistencies between (1) the boundaries as described in the deed and as shown on a plan; (2) the lengths of boundaries as stated in the deed and as delineated on a plan; (3) the superficial measurement as stated in the deed and shown as enclosed on a plan; or (4) the superficial measurement and the boundaries as stated in the deed. If the matter becomes an issue the court will endeavour to ascertain the true intention of parties, and may admit extrinsic evidence as to the circumstances of the transaction and evidence of possession. Absolute rules as to which alternative is to prevail cannot be formulated since circumstances differ, but from the decisions of the courts certain broad presumptions may be deduced."

Professor Halliday then goes on to give four examples, but all of them are in the circumstance of "boundaries" being expressly stated in the deed. I acknowledge the point made by senior counsel for the appellant that the heading of the passage is "Inconsistencies between boundaries", but the points made may equally apply to a circumstance as here where there is (apparently) an inconsistency between the measurement of the acreage and of the plan – and indeed that appears to be close to the third circumstance to which Halliday refers.

[24] Senior counsel for the appellant submitted that there were two key questions in construing the 1992 feu disposition: first, whether there is any conflict between the elements of the description of the subjects; and, secondly, if there is, which, if any, elements are meant to be the controlling interest. As I understood him, senior counsel was making a fundamental point: if there is a difference between the measurement of acreage, of whatever size, and a plan, demonstrative or not, it is of no moment because it is the plan – and the plan alone – which sets the boundaries. For that proposition, he relied upon a passage in *Gretton & Reid*, Conveyancing (4th edit), para 12-18:

> "If a property is described solely by plan, without a detailed verbal description, a discrepancy cannot arise and no purpose is served by declaring the plan either taxative or demonstrative."

He also relied upon *Currie* v *Campbell's Trustees* (1888) 16R 237 where, he said, the description by reference to the boundaries was found to prevail although inconsistent with measurements and with a plan.

[25] In my opinion, while understandable that he does so, there is an underlying difficulty in senior counsel for the appellant relying on *dicta* from cases, which do not necessarily represent the *ratio* of each case. Examples of that are in the authorities upon which the appellant relies, admittedly in the context of what senior counsel described, perhaps unfairly, as the sheriff's determination to find the plan in the 1992 feu disposition as imprecise.

[26] For example, senior counsel relied on a passage from the opinion of Lord Justice-Clerk Moncrieff in *North British Railway Co* v *Moon's Trustees* (1879) 6R 640:

> "I am of opinion, in the first place, that Moon's title is a bounding title. The plan shews quite plainly what it was he got and what it was he did not get, and it shews clearly enough that he did not get this small plot at the side of the bit of ground which he bought."

The disposition described the land conveyed as "That portion of ground measuring 3.750 acres, as laid down on a plan thereof subscribed of even date…" It then goes on to give a bounding description without measurement. The evidence was that the extent of the subjects on the plan measured exactly the 3.750 acres. From the Lord Ordinary's opinion, it is clear that there was a discrepancy between the boundaries as shown on the plan and two of the boundaries as described *in gremio* of the deed. It is plain from the opinions of the Inner House that the reason for their conclusion was not just the plan but also the measurement of the acreage (Lord Ormidale at p 651; Lord Gifford at p 654). That the Lord Justice-Clerk does not in terms mention the acreage does not, in my view, suggest that it was not material in his reasoning. Indeed, the *ratio* of the case depends upon it. The overall point is that unlike the present appeal the case is one in which the measurement of the acreage is precisely in line with the plan.

[27] Again, in *Leafrealm Land Limited* v *The City of Edinburgh Council and Others* [2021] CSIH 24, the court held that the plan to a recorded minute of agreement was determinative. But the description in the operative clause offered no alternative, whether bounding measurement or acreage. Instead, the reclaimers unsuccessfully sought to rely upon other clauses in the deed, which related to matters essentially ancillary to the main purpose which was to give up land for road widening. *The Trustees of Niall Calthorpe's 1959 Discretionary Settlement* v *G Hamilton (Tullochgribban Mains) Limited and Another* [2012] CSOH 138 is a case about prescriptive possession. As I explain later, a bounding title is determinative when deciding if a deed is habile to found prescriptive possession. Accordingly, such cases should be treated with caution in the context of construction of a title. It can also be distinguished in that, like *Leafrealm*, the alleged ambiguity related to clauses other than the dispositive clause. And in *Paul Munro* v *The Keeper of the Registers of Scotland and Borthwick*

*Campsite LLP* (unreported 20 March 2017), a decision of the Lands Tribunal of Scotland, the plan was considered to be determinative of the boundaries, but in the context of the unsuccessful party relying on a fence maintenance burden (never mind that the case is also about prescriptive possession).

[28] Another case relied upon by the appellant in the criticism of the sheriff's overall approach was Rankine's citation of *North British Railway* v *Magistrates of Hawick* (*supra*) to support the statement that a "plan docketed and referred to in the titles is fully as good as any words describing the line of boundary". The conveyance in question arose out of the exercise by the railway company of its statutory powers to insist on a sale of land to construct their railway. The conveyance gave a measurement of the acreage "or thereby". There was no bounding description within the deed but there was reference to a plan (which was not stated to be demonstrative only or taxative) in which the boundaries were coloured red. The dispute was about whether the land was bounded by a river, in which case the railway company would be entitled to the pertinent of the *alveus ex adverso*. The fuller passage by the Lord President is as follows:

> "It appears to me that the conveyance here is to be regarded as one conveying a limited and precise portion of ground. I can conceive no description more clearly taxative than that which we have here. We must remember the purpose for which the ground was conveyed. It was conveyed to the North British Railway Company for the purposes of their statute. The conveyance describes the ground as consisting of a specific quantity specially mentioned, and it makes reference to a plan upon which that ground is delineated. All that is conveyed is delineated on the plan by certain lines. That is fully as good as any words describing the line of boundary of this property."

It is difficult to discern from the report on what basis the railway company alleged that the property was bounded by the river, other than that the general description of the property was under the title name of the Under Common Haugh and that this was the case for a long period prior to the conveyance. But the case does not assist the appellant in that it differs

from the present case where it is alleged that there is a discrepancy between the acreage as stated in the deed and the boundaries shown on the plan. Indeed, it is difficult to imagine a conclusion other than what the court reached standing the description contained in the disposition under reference to the plan.

[29] In my opinion, the true position, relying upon *Halliday*, is that in the construction of descriptions of the subjects to be conveyed in a disposition the correct approach is as follows: (1) each case turns upon its own facts and circumstances; (2) there are no hard and fast rules unless either the measurement of the acreage or the plan is declared to be taxative and the other is not; (3) in so far as the authorities give guidance, only "broad presumptions" rather than rules may be deduced; (4) where there is an inconsistency extrinsic evidence is admissible and that can include evidence of possession.
(Professor Halliday does not state so in terms, but I assume that he is referring to prior possession by the grantor rather than post possession by the grantee.)

[30] And to these should be added the normal general rules for the construction of writings, including that so far as possible meaning be given to every word used by the parties. It is also worth repeating in the current circumstances of a conveyancing deed that there is a rebuttable presumption that in writings drawn up by lawyers the words are used as legal terms of art (eg, *Sydall* v *Castings Limited* [1967] 1 QB 302; *L Schuler AG* v *Wickman Machine Tool Sales* [1974] AC 235, per Lord Simon at p 264).

[31] I now turn to the description itself. There are two specific matters which must be addressed before deciding whether the sheriff was right to take into account extrinsic evidence: first, the use of the words "or thereby" after the figure for the acreage and, secondly, the fact that the plan is stated to be demonstrative only.

[32] Senior counsel for the appellant submitted that the words "or thereby" mean that the title makes no guarantee that the disponees will become the owners of any precise acreage. Even if there was a slight discrepancy between the statement of the acreage and the extent of land within clear boundaries on the plan, that does not make the description ambiguous. Extrinsic evidence cannot be used to create an ambiguity where none appears on the face of the deed. The public are entitled to rely upon the faith of the registers (*Robertson Trustees* v *Bruce* (1905) 7F 580, at p 588). The mere statement of acreage says nothing about where the acres are located. The other descriptive element, the boundaries on the plan, by contrast, are perfectly clear in excluding the disputed subjects. The plan prevails. The words "or thereby" merely indicate that slight variations or discrepancies may exist (*Hetherington* v *Galt* (1905) 7F 706, per Lord Justice-Clerk Macdonald at p 712 and Lord Kyllachy at p 713) and that the courts allow for a reasonable measure of variation which will be considered in its proper context (eg, *Young* v *McKellar Ltd* 1909 SC 1340). The use of the word "demonstrative" in the disposition takes nothing away from the role that the plan plays in identifying the subjects conveyed. Where a property is described solely by a plan without a detailed verbal description, a discrepancy does not arise and no purpose is served by declaring the plan demonstrative or taxative (*Gretton & Reid* (*supra*), para 12-18; *Rivendale* v *Clark* 2015 SC 558).

[33] Senior counsel for the respondents submitted that the appellant's approach is to all intents and purposes treating the plan as if it was stated to be taxative, despite the conflict with the stated acreage – a "map reading exercise". The correct meaning of "demonstrative" is "indicative". In contrast, "taxative" means "definitive". Indeed, during the course of the hearing he went further: a demonstrative plan by definition means that there is no certainty, which in turn means that extrinsic evidence is allowed – *a fortiori* in a case, as here, where on

the face of the deed (after being subject to extraneous mathematical analysis) there is an acreage measurement which conflicts with the plan. The expression "or thereby" will have a significance only after one considers the whole evidence, including the nature of the subjects disponed.

[34] I accept that heritable titles cannot be construed by reference to extrinsic evidence with the same freedom as for contracts. This is because they are part of a public registration system, whether Sasine or land registration, upon which the public is entitled to rely. The introduction of a land registration system has removed most, if not all, of the inherent uncertainties in Sasine titles. But cases like the present one will continue to arise until all heritable property in Scotland has been the subject of first registration. To that extent therefore, historic rules on the construction of dispositions will remain important, probably for generations to come. Much of the law of landownership under the Sasine system can seem arcane to the modern eye, but in applying that law to the construction of dispositions it is important to recognise that the task is to identify the intention of the parties at the time of execution of the deed. Thus, comments such as that latterly conveyancers added phrases like "demonstrative only" as a matter of form without any particular meaning are of no assistance. Indeed, we may already be very close to the position that the corporate memory of conveyancing practice for Sasine titles is lost forever. That is a further reason for seminal texts such as *Halliday* to be treated with particular respect.

[35] In my opinion, any plan (unless little more than a rough sketch) should be approached on the basis that it has been prepared with the intention of being accurate. The same applies to the measurement of acreage. Adding "demonstrative only" or "or thereby" is no more than a recognition that there may be unexpected errors or inaccuracies, which can be resolved by extrinsic evidence. In some cases, the plan might be so precise as to brook no

further discussion; in others, the surrounding circumstances might point the other way. As I have said, each case must depend upon its own facts and circumstances.

[36] In this appeal, we have a demonstrative plan which even without extrinsic evidence looks surprising in the context of the progress of titles. But there is also an acreage measurement which, it is argued, is not in line with the plan. There is nothing stated to be taxative; nor on the face of the deed itself can anything being taxative be implied. Accordingly, standing the uncertainty I agree with the sheriff (albeit she does not address the issue expressly) that extrinsic evidence is admissible.

[37] I now turn to the evidence led at the proof. In doing that, I begin with the expert reports about which there remains controversy.

**Expert Reports**

[38] Miles Davis, the respondents' expert, opined that on measuring the subjects conveyed on the plan the true acreage of their land if the disputed subjects were included was just over 463 acres, which is less than an acre short of the acreage in the deed. If the disputed subjects were excluded, the difference increased to over two acres (2.341 acres). The question then posed would be the materiality of that difference in identifying the intention of the parties to the 1992 disposition. Senior counsel for the appellant questioned the reliability of the calculation because the verges should have been excluded by proper measurement, rather than the rougher calculation done by Mr Davis because of advice he received from the instructing agents that the verges should be treated universally as three metres each side of the road. This advice was incorrect: the Roads (Scotland) Act 1984 expressly provides that the verges form part of the public road.

[39] I do not understand the significance of this objection to the present dispute. The calculation of just over 463 acres includes all the verges. If the verges are excluded, the size of the whole subjects per the plan decreases to just under 460 acres (459.310) which would increase the difference between the size per the plan and the size stated in the disposition to over 5 acres (5.190). So any taking into account of verges, of whatever size, is bound to increase the difference from the stated one in the report of 2.341 acres. In other words, senior counsel's objections, if they assist anyone, assist the respondents, not the appellant. In any event, none of this matters: the key difference is the shortfall caused by the exclusion of the disputed subjects, which Mr Davis says is 1.518 acres – the measurement which I accept, notwithstanding an alternative of 1.54 acres. It is pointless to speculate what including the verges does to the overall shortfall. As senior counsel for the appellant said, Mr Davis himself identified one area where the verge was considerably wider than three metres (report, p 9); others may be considerably narrower. If the overall difference is greater than the 5.190 acres, it may suggest other problems or simply a difference caused by the more sophisticated technology now available to cartographers. The primary point is that Mr Davis has identified a shortfall which as a minimum can be explained in part by the exclusion of the disputed subjects. It is no more than one adminicle of evidence which the court is entitled to take into account in construing the disposition to identify the intention of the parties. On its own, I would agree that it is not conclusive and its value has to be considered in the light of the whole circumstances. The same point can be made about the further criticism, based upon the report of the appellant's expert, Dr Forrest (p 12), that tarmac areas of the road and the verges may have changed over time. In any event, overall Dr Forrest had no reason to question the accuracy of the areas quoted by Mr Davis (*ibid*).

[40] It may be that the purpose of this criticism is primarily to support a submission that in a general sense Mr Davis's evidence is unreliable. But he is a cartographer, not a lawyer. He understandably read the disposition as excluding only the roads themselves because that is what the deed says. I see no basis in this submission to raise a doubt about the soundness of Mr Davis's expert opinion. Dr Forrest does not question the measurements, accepts that the method used by Mr Davis was appropriate for the task and on the matter of the verges he states that whether they be included or not and to what extent is not his area of expertise. He makes only a very minor point about the verges in the disputed subjects and considers only that the plan marked in red might have been a better guide. Neither he nor any other witness for the appellant offered an alternative calculation. Overall, I agree with the sheriff that there was little difference between the evidence of the experts.

[41] Senior counsel also criticised Mr Davis's conclusions on the basis that he did not have access to the best evidence, that is the plan marked in red. It is obvious that this criticism cannot be in respect of the best evidence rule, given that the original of the 1992 disposition is lost. To proceed on the basis of the extract is plainly correct. Mr Davis was alive to the problems with that. I do not regard this point as one which undermines his conclusions.

[42] The other expert led by the respondents was Jennifer Robertson about man-made archaeological features. I touch upon her evidence below.

**Extrinsic Evidence**

[43] The evidence of the experts was *inter alia* to address whether there was a difference on the face of the disposition between the plan and the stated acreage – and to identify whether there was an ambiguity, sufficient to allow other extrinsic evidence about the

overall intention of the parties. It is to the latter which I now turn. But before doing so, I address what I regard as the fundamental point made by the appellant. Senior counsel submitted that even if extrinsic evidence is admitted, it will not affect the overall point that it is the disposition plan – and only the plan – which identifies the boundaries. If there is a discrepancy in the acreage, that is irrelevant; the difference could be anywhere within the whole subjects. In my opinion, that submission would have much greater force if the disputed subjects were, say, on the northern hill ground of the subjects in a part where there was no natural and obvious boundary (see Mr Davis's supplementary report, para 3.5). But I do not regard the plan as so definitive - and therefore brooking no further debate - when, as I have pointed out above, there is no sense on the face of the title deeds for the disputed subjects to be excluded from the overall subjects conveyed in the 1992 disposition. I accept, differing from the sheriff, that the plan is formidable evidence, but I do not regard it as conclusive given where the disputed subjects are situated.

[44] The sheriff made certain findings about the 1953 disposition. Senior counsel for the appellant complained that she does not explain why her findings could raise a doubt about a new break-off writ and plan in 1992. In my opinion, the reason is obvious: if that deed, properly construed, excluded part of the disputed subjects, it is self-evident that the successors in title could not obtain a valid title to it, which would be the end of the matter (ignoring arguments based on prescriptive possession). The same applies to the other deeds in the progress of title. Indeed, in my opinion the progress of title is relevant in order to understand the surrounding circumstances which led to the content of the 1992 disposition. I therefore turn to them next.

*The 1953 Disposition*

[45] The respondents offered to prove on record (Statement of Fact 3 in the Counterclaim) that the colouring on the plan in the 1953 disposition:

> "was carelessly carried out by the draughtsman in various respects, such as the inconsistent colouring of the Glenmore River. In particular, a small portion of the lands known and occupied as Ardslignish and Glenmore Farms, on the approach to the Glenmore River bridge from the south, was not coloured yellow as it should have been. This area ("the 1953 error") is generally as shown coloured in green on Map II in the report of Mr Miles Davis, cartographer, which is 6/6/2 of Process. The 1953 error extended to an area of approximately 0.123 hectares (.304 acres). The south western boundary of the 1953 error roughly followed the line of a former head dyke as shown on the OS Second Edition map of the area (published in 1900), which had been used as the base map for the title plan attached to the 1953 Disposition. That former head dyke had been associated with a pre improvement field system for Glenbeg township, and did not signify a title boundary. Reference is made to the archaeological report of Jennifer Robertson... As at 1953 the dyke is unlikely to have been utilised for any practical agricultural purpose in living memory. The area of the 1953 error was probably mistaken by the draughtsman as representing the road approaching the bridge from the south, which road could not easily be made out at the scale of the plan used… On a correct construction of the 1953 Disposition, the 1953 error was included within the said general description of Ardslignish and Glenmore Farms conveyed thereby…"

So, we are dealing here not with the whole of the disputed subjects but the very small area at the northwest tip of it. I note that, unlike the 1992 disposition, the 1953 deed has a verbal description: "Ardslignish and Glenmore Farms". It is therefore admissible to consider extrinsic evidence of that description. Senior counsel for the respondents relied only upon evidence from the appellant's solicitor and Mr Davis's opinion on the plan and related maps. In my opinion, however, it is relevant to consider some of the other evidence led at the proof. The first respondent was first employed in 1975 by General Accident as their wildlife ranger and stalker on what he described as the "Ardnamurchan Estate" and that "in that estate is the area known as Glenmore". He then goes on to refer to "Glenmore Farm". In his affidavit he states that the estate was totally deer fenced from coast to coast and on both western and eastern boundaries. He recollects that in 1975 there was a deer fence in

place running alongside the B8007 public road with an access gate at its edge for an access track which was in use to enable access to the "part of Glenmore Farm which lay to the east of the Glenmore River. That access route had been there for many years before I arrived." The second respondent first came to Ardnamurchan in 1980 as an undergraduate to carry out research for a dissertation on agricultural management techniques. She described the estate as a closed estate, meaning that it was totally deer fenced. She also described part of the estate as Glenmore Farm. Colin Strang Steel, formerly of Knight Frank & Rutley, was the managing agent of Ardnamurchan Estate from 1975 to 1980. He also confirmed that the estate was fully deer fenced and that if the fencing was on the road side of the disputed subjects that was what he would expect. "Everything that lay within the deer fencing was, so far as I was concerned, part of Ardnamurchan Estate. If I had been asked which particular part of Ardnamurchan Estate [the disputed subjects] comprised, I would have said that it was part of Glenmore Farm." Patrick Porteous was brought up on Ardnamurchan and during his teenage years was a ghillie on the estate. His earliest memory of the disputed subjects was when aged 14 – in 1984. He recalled the deer fence adjacent to the public road and he "always understood the whole of [Glenmore Farm], including [the disputed subjects] was Glenmore Farm up to the public road." John Maxwell was employed as the general manager of the estate between 1968 and 1976. He knew the estate "from a management point of view as Ardslignish and Glenmore". The whole area to the eastern side of the Glenmore River, including the disputed subjects, "was occupied during the years that I was there as part of the farming activities of Glenmore". That area was "fenced from the public road". Mr Maxwell was followed as general manager by Drew Pringle. He also confirmed that the whole of the disputed subjects were part of the farming activities of Ardslignish and Glenmore and that the fence was along the public road.

Finally, there is the opinion of Mr Davis: that the land valuation map (produced between 1910 and 1915) and the Crofting Commission map (prepared by agricultural officers who carried out face-to-face interviews of landowners and managers in the late 1970s and early 1980s) indicate that the historical occupational boundary between Glenmore and the land to the north east of the road is the southern edge of the public road all the way from the bridge over the Glenmore River to the extreme south east of the disputed subjects (Report, para 8.5).

[46] In my opinion, this is all admissible and relevant evidence about the true meaning of the verbal description in the 1953 disposition.

[47] Senior counsel for the respondents relied upon Mr Davis's view that the map in the 1953 disposition was "very strange". As a cartographer, Mr Davis (while accepting that any attempt at an explanation would be speculative) offered the following (Transcript of evidence, second day, p 113-114; Joint Appendix p 797-798):

> "That on all the other maps that we have looked at the way the land was managed the road was the boundary, and this shading this yellow shading along the edge of the road all the way up until this line (witness indicating). And so I find that very strange because that little and between the line is unshaded and the road why would you not include that. Why would you want to exclude that from this particular title. To have that tiny wee strip that you could do nothing with. And I thought if you ever thought of widening the road you would not use that. You would use the north side because of the angle of the bridge you would have to sweep out. So it made, I just could not comprehend the logic of it. And I can only think that they thought that that line was the road because the difference between the road which should be double edged but the way that they have scaled this it looks like one line. And the curved line that they shaded in yellow up to is very similar because of the, this looks like a reproduced plan. So that the road doesn't appear as two dotted lines."

[48] Senior counsel for the appellant submitted that the respondents' averments about the so-called 1953 error were speculative. No evidence was led to support them. The missives for the sale were not produced showing the underlying contract. Both Mr Davis and Dr Forrest agreed that the line on the plan followed the line of a dyke as marked on the then

Ordnance Survey map. No action has been raised to seek rectification of the disposition or plan. The sheriff could not properly modify what that 1953 deed and plan show – in contrast with *Glasgow Feuing and Building Co Ltd* v *Watson's Trs* (1887) 14R 610 where partial reduction was possible.

[49] In my opinion, properly construed the 1953 disposition did include the disputed area as part of the subjects conveyed thereby. I reach that view for the following reasons:

1. While the plan is compelling evidence, it is not taxative. As I have said, being demonstrative means no more than the drafter was trying to be accurate but the term allows for unforeseen errors. On the plan itself, there are indications of the yellow ink having strayed over the boundaries along Glenmore River and on to the public road immediately to the north of Glenmore Bay. These contradict the plan to the 1951 disposition. Indeed, in that disposition there are also indications of the pink ink having strayed. In his evidence the appellant's solicitor understandably could not comment on the practice of colouring plans in 1953, but he did acknowledge that "it would have been done a lot more manually than it is now and inevitably lead to maybe some colour wash and perhaps overlaps where they were not intended to be" (Transcript of evidence, first day, p 118; Joint Appendix p 656).

2. The intention of the disponer was to convey "the lands known as and occupied as Ardslignish and Glenmore Farms". While it is true that there is no direct evidence of what this verbal description was understood to mean in 1953, there is evidence, which is un-contradicted, that certainly from 1968 onwards the disputed subjects were commonly regarded as part of Glenmore or Glenmore Farm and were fenced, whether stock proof or deer fencing, accordingly. Moreover, there is the opinion of Mr Davis about the 1910-1915 Land Valuation Map.

3. As I have already observed, the 1951 disposition of the Glenborrodale Estate is significant because it conveys the subjects contiguous to the disputed area. That takes out of account the possibility that it was always the intention of Baron Trent to treat the disputed area as part of that estate. No detailed analysis is available – by way of a plan – to explain exactly what other areas of the peninsula were disposed of by Lord Trent. We do know, however, from the 1957 disposition by Lord Trent's trustees and executors to his surviving spouse that substantial areas of ground had been sold by him in the late 1940s and early 1950s over and above the lands in the 1951 and 1953 deeds. We also know from the disposition by Emma Houston in favour of the appellant that his widow also conveyed various pieces of land between 1958 and 1971. It is therefore not possible on the evidence to establish exactly what is the extent of the rump of the peninsula which remained with the Trent successors until conveyed to the appellants, except to record *quantum valeat* that in the estate for confirmation of the Trent successor executor the value of the rump is stated at a nominal £100, that figure being the estimate of its value as at Lady Trent's death in 1975 made by the appellant's solicitor whose firm also acted for the executor in that process, the cost thereof being paid for by the appellant. Thus, while not conclusive, all of these factors are at least circumstantial evidence of a *lack* of intention by Lord Trent to retain in his ownership the disputed area.

4. While it is true that there is no direct extrinsic evidence of Lord Trent's intention in 1953, that is a double-edged sword, in that it is equally true that there is no evidence of what could possibly be the intended use of the disputed area by Lord Trent. Mr Davis considered but excluded the retention of the ground for road widening. It is in my view entirely relevant to ask the rhetorical question: why

would Lord Trent wish to retain ownership of a tiny piece of scrubland of little or no value, never mind use?

5. The existence of the old dyke does not assist – on the evidence of Jennifer Robertson it was associated with a pre-improvement field system for Glenbeg township and did not signify a title boundary. But on the evidence of Mr Davis its existence does offer an explanation as to why the error occurred – the drafter simply followed the wrong line.

6. The lack of proceedings for rectification is irrelevant. That is an issue in the context of the law of remedies, which is dealt with by the competing craves in this action. The need to establish exactly what subjects were conveyed in the 1953 disposition is no more than a precursor for those craves, on the simple basis that if the disputed area was never conveyed in 1953 it necessarily follows without further debate that for that area the respondents could never succeed in their claim to it (ignoring the arguments on prescription and pertinents). *Glasgow Feuing and Building Co Ltd* does not assist the appellants (albeit it is an example of how easily errors can occur in the drafting of deed plans). In that case the need for partial reduction arose from a live issue about an obligation to build a road which was, in modern parlance, a collateral obligation separate from the issue of title to the heritable property itself as recorded in the Register of Sasines and arose in the context of an action for payment on the face of the feu disposition.

*The 1974 Disposition*

[50] The importance of this deed is the plan attached to it. One of the subjects included in the sale (under exceptions but which, as I understand it, are irrelevant to the present

dispute) is described as "Ardslignish and Glenmore Farms" with, as in the earlier deeds, a stated acreage. There is also a description by reference to the 1953 disposition. Thus, there is a conflict between the plan in the 1953 disposition (whether or not I am correct in my conclusion on the disputed uncoloured area (*supra*)) and the plan to the 1974 deed. That in turn creates an ambiguity on the face of that deed, which renders extrinsic evidence admissible. As I have described, there is uncontroverted evidence about what was understood to be included in the verbal description of the farms and the fencing arrangements.

[51] In my opinion, the disputed subjects were included in the subjects conveyed in the 1974 disposition for the following reasons:

1. The 1974 plan does not suffer from the same potential for colour wash as in the 1953 plan. But the line is a broad one which of itself compares unfavourably to modern techniques and runs the risk of confusion on the margins. It appears on the face of the plan that it is at the very least an attempt to exclude the disputed subjects. On the other hand, Jennifer Robertson, an archaeologist who is accustomed to studying maps and plans in the course of her work, considered the scale of the plan to be so small that identification of the line of the earth and stone dyke feature on early Ordnance Survey maps could not be equated with any certainty (Report, p7; Joint Appendix p 284). In similar vein, because of the plan scale it is uncertain whether the line equates with the yellow and uncoloured area in the 1953 plan. It is impossible in the absence of the evidence of the disponer or the drafter of the plan to understand why it was considered necessary to draw the line as has been done. It may well be that the conveyancer decided to adopt a cautious approach. But that makes more sense for the uncoloured area; less so for the area below it coloured

yellow in the 1953 plan. The plan is stated to be demonstrative only. If it was intended to exclude the disputed subjects, the wiser course would have been to narrate them as excepted subjects in the dispositive clause. That was not done. Accordingly, on the face of the deed the subjects being disponed were the two farms with the same acreage as in the 1953 deed. The same point can be made in another way: it is one thing for a conveyancer to proceed cautiously in the drafting of a disposition; it is quite another whether he or she has been successful in doing so. In any event, such cautious steps do not automatically cause a doubt about the underlying intention of the disponer who in this case on the face of the dispositive clause still intended to convey the whole of the two farms.

2. By the date of this sale, we have parole evidence that for at least six years the disputed subjects were regarded as part of Glenmore Farm or Glenmore and with the fencing on the boundaries. I of course accept that the relevance of that must also go back to the time of the 1953 disposition, in which case the same points can be made as I have made in respect of that deed and about which we have the opinion of Mr Davis about the 1910-1915 map.

3. Similarly to the 1953 deed, it is difficult, if not impossible, to envisage a reason for the disponer wishing to retain title to the disputed subjects. Indeed, if he did not own any other land on the peninsula, about which I accept there was no evidence, there would be even more reason to conclude that he wished to divest himself of all of the land within the farms.

4. Standing the terms of the dispositive clause, to accept the plan alone as conclusive would be in breach of the general principle that so far as possible every word in a disposition should be given meaning and taken into account.

*The 1992 Disposition*

[52] David Robb was in 1992 the assistant property manager for General Accident (by way of its property arm: Grampian Properties) and was in charge of the disposal of the Ardnamurchan Estate. Strutt & Parker were instructed to advertise the estate for sale. Included in the sale particulars was an extract of an Ordnance Survey map with the boundaries mirroring for the most part the plan in the 1974 disposition. By simply looking at the Strutt & Parker map, it is difficult to say with certainty that it included the disputed subjects, but both the first respondent and Mr Robb said it did. Mr Robb put it down to the likelihood that Strutt & Parker would have carried out a physical inspection of the boundaries visible on the ground rather than an examination of the title. Having been unable to secure a sale of the whole of the estate in one lot, a sale of part of it was agreed with the respondents. Mr Robb was very clear in his evidence that the subjects to be sold to the respondents were "the entire Glenmore section" (affidavit, para 9; Joint Appendix p 1092) and that this was the instruction given to Mr Simpson, the solicitor instructed in the sale (affidavit, para 12; Joint Appendix p 1092): "[Grampian Properties] not to retain any land within the locality" and "to remove itself from any potential residual liabilities associated with the sale". I take from this last phrase that he was encompassing any future obligations which might arise from ownership of residual land which Grampian Properties thought they had sold as well as the more obvious point which follows: "and most certainly not accept any risk of a claim against it for selling an area which it did not have title to". In cross-examination of Mr Robb, there was the following exchange:

> "And was any advice given to your recollection was any advice given about that point? - From our legal advisors?

> Yes, from Mr Simpson? – Yes, This is what he advised us that he did not believe that [the disputed subjects] was part of the plan, part of the sale.
>
> So, just so I get this right, Mr Simpson you are saying advised that this little slither (*sic*) of land wasn't part of the sale, is that correct? – This is what he advised us at the time, yes."

[53] Further evidence on this matter was given by each of the respondents. They both recalled that a few days before the settlement of their purchase they had sight of a plan which showed that the disputed subjects were outwith the subjects to be purchased. They appeared to understand the general import of this, which they put down to the sellers being "risk averse", but on the evidence of the first respondent no amendment was made to the acreage to be purchased. But their understanding was that they were purchasing "Glenmore" or "Glenmore Farm". They did not take advice from their lawyers on the issue of the plan, being anxious to proceed quickly to settle the transaction. The first respondent considered that the map attached to the sale particulars included the disputed subjects. It was, according to him, a double A3 map, which is much larger than the copy available to the court.

[54] There was little evidence about how the acreage measurement in the plan came about. Normal conveyancing practice in 1992 would be for the purchaser's solicitor to prepare the draft disposition for revisal, but for any acreage measurement for agricultural land or for shooting estates and the like to be prepared by the selling agents or a cartographer instructed by them or the seller, whether on their own account or through their solicitors. We do not know what happened in this case. On the other hand, the first respondent gave the following evidence in re-examination:

> "Is the plan that you are talking about which is black and white and the text was black and white was that part of the missive contract. In other words the agreement between you and Grampian Properties before the deal was done? - Yes.

So when you are talking about a plan, a black and white plan, it was nothing to do with the deed but it was to do with the process, is that right? – That's right.

And as I understood your evidence,… at a late stage when the deal was about to be done, the plan was changed, is that right? – Yes.

And how was the plan changed? – With this black line through this piece of ground. The original plan we were negotiating the sale with was drawn on the Strutt and Parker map. It was quite a big map. Again it was probably double A3 which is included with the brochure. What we eventually agreed was the area for sale on the western boundary down the burn. The road was the boundary the B8007 on the other side and that is what we agreed. But when we got this map on the 10th of March with the black lines on it it was different. It took this wee bit out for some reason.

And the wee bit you are talking about is the disputed subjects? – Yes.

And at that stage had the acreage been sold to you changed? – No the acreage never changed.

The acreage never changed? – No. *It's 464.5 acres what Strutt Parker had when we bought that part. In theory it could have been less but the price had been less in some respect if we were getting less land than we agreed with Strutt Parker and Grampian.*

But the price and the acreage stayed the same? – Yes." [Italics added]

This evidence appears to confirm, as one might expect, that there was a negotiation between the selling agents and Grampian Properties on the one part and the respondents on the other during which the precise acreage was agreed. That in turn indicates that the acreage was known at the negotiation stage which proceeded on the understanding by all parties that the disputed subjects were included (as confirmed by the sale particulars and indeed the proper inference to be drawn from the discussion between Mr Robb and Mr Simpson that the title problem was something which Grampian Properties had not anticipated). Accordingly, I am satisfied that it can be found in fact that the acreage measurement stated in the deed reflects the whole subjects as including the disputed subjects. Indeed, the fact that this acreage proved to be over two acres more than the actual acreage as found by Mr Davis lends further support to that conclusion.

[55] Senior counsel for the appellant submitted that the plan clearly shows that the subjects conveyed did not include the disputed ones. A much larger plan had been signed by the sellers at the same time as the disposition and was in the hands of the appellant's solicitor. None of the witnesses who were asked to compare this plan with the copy contained in the extract copy of the 1992 disposition, and which included the respondents and Mr Robb, identified any discrepancy between them. The plan in the respondents' *a non domino* disposition identified the disputed subjects in the same way, as did the plan prepared by the Keeper following the respondents' later first registration of the subjects of sale and in which the disputed subjects were excluded. Mr Robb's evidence made clear that the sellers were not conveying any land which they were uncertain that they owned, particularly when they granted full warrandice. The disposition was a break-off writ. It did not contain a verbal description that the subjects formed "Glenmore Farm". The shortfall in the acreage does not assist the respondents - "or thereby" means that slight variations or discrepancies may exist (eg, *Hetherington* v *Galt* (*supra*)). The discrepancy in this case falls within the definition of slight and can therefore be ignored. The plan is the only means by which the subjects conveyed can be identified. That it is demonstrative takes nothing away from the role the plan plays in identifying the subjects. Evidence of intention or understanding is not admissible to construe the deed which should be construed according to what the parties have said or have done and not what they intended to say or do. Even if such evidence was admissible, Mr Robb's evidence was clear about the advice from Mr Simpson and that his advice would be followed. Moreover, the respondents themselves were clear that the plan did not include the disputed subjects. Instead, they say they just decided simply to act as if they owned them.

[56] Senior counsel for the respondents submitted that the additional larger plan should be disregarded. The genesis and purpose of it were unclear. It is not identical to the deed plan. No matter the advice from the seller's solicitor, he did not effectively exclude the disputed subjects from the conveyance. To hold that the disputed subjects were excluded because of the deed plan is to ignore the calculation of the acreage. On the face of the deed, if it had been the seller's intention to exclude those subjects, it would be expected that there would be created a servitude right of access in favour of the respondents and a burden upon them to erect a deer fence along the disputed boundary to the west and south west. The appellant relies upon a desk-top exercise looking at the plan, rather than taking into account the lie of the land and the whole surrounding circumstances.

[57] In my opinion, the disputed subjects were included in the subjects conveyed.

[58] Senior counsel for the appellant submitted that the evidence of the respondents and Mr Robb was inadmissible in so far as it was evidence of intention or understanding of the parties. But that is a red herring: it is clear from the disposition itself and the later disposition conveying the remainder of the land owned by Grampian Properties that General Accident always intended to dispose of all of their land holdings on the peninsula and, in particular, that the whole eastern part of those holdings was to be sold to the respondents. The location of the disputed subjects on the ground confirms that.

[59] As Mr Robb made clear, the instruction to Grampian Properties' solicitor was equally clear: convey the whole of the eastern part of the land to the respondents. The only reason that a problem arose was Mr Simpson doubting whether the disputed subjects formed part of that land. But, as Mr Robb confirmed, Mr Simpson, unlike Strutt & Parker, did not inspect the site. Nor did he apparently consider the verbal description in the 1974 disposition. In such a situation, a competent solicitor could do several things: he could, for

example, have framed the disposition to exclude the disputed subjects from the absolute warrandice and instead to grant only fact and deed warrandice. Or he could have investigated the site and obtained evidence locally of what was understood to be meant by Ardslignish and Glenmore Farms and, following *Halliday* (*supra*), who historically possessed them. It is within judicial knowledge that with supporting affidavits on this point it would have been open to Mr Simpson to obtain title indemnity insurance. Instead, he amended the plan but failed to consider the acreage which on the evidence of the first respondent was calculated on the basis of the plan attached to the sale particulars which, again on the evidence of the first respondent, who had seen the larger double A3 original, and Mr Robb, included the disputed subjects. By his actings, Mr Simpson left his client in the worst of all possible worlds: it would face the prospect of a dispute with the respondents if they had carried out a later measurement of the subjects purchased (albeit a complication would be the rule that the *actio quanti minoris* does not form part of Scots Law) or, if Mr Simpson was right, it continued to own ground which it did not want and, if later purportedly included in the conveyance of the rest of the estate to Mr and Mrs Grisewood, a complaint by them that they never wanted the ground, on the basis that ownership of land is not just about rights but also about obligations. Despite the valiant efforts of Mr Houston to find a purposive use of the disputed subjects, it is plain on the evidence that a small piece of scrubland had no value to or interest for anyone other than the owner of the adjoining land to the west.

[60] It is trite law that in construing any deed, whether a conveyance or a contract, so far as possible all words should be given a meaning. The plan is a formidable factor in favour of the appellant. As senior counsel for the appellant rightly said, it is the only indication of exactly where the boundaries lie. But equally so, the stated acreage deserves consideration, as does the situation of the disputed subjects within the whole subjects described in the

dispositive clause. As I have said, it must have been the intention of whoever measured the lands that the measurement be an accurate one. On the evidence of Mr Davis and despite the lingering doubt about the verges, it has been proved in my opinion that to be accurate it had to include the disputed subjects. That still left a small shortfall but I can speculate that this can be explained away by the more sophisticated modern techniques for the measurement of land. "Or thereby" is not a satisfactory explanation for the difference found by Mr Davis. Instead, on the evidence, it has been shown that it is the failure of Mr Simpson, if that was his intention, to alter the measurement. That Grampian Properties accepted his advice is nothing to the point. Their intention remained unchanged. As I have said in relation to the 1974 deed, it is one thing for a conveyancer to proceed cautiously in the drafting of a disposition; it is quite another whether he or she has been successful in doing so. Such cautious steps do not automatically cause a doubt about the underlying intention of the disponer.

[61] *Hetherington* v *Galt* is instructive. The difference in that case was, at one end, one foot more and, at the other, one foot less, being a boundary of trees between two residential properties. The Inner House looked at the whole surrounding circumstances, in particular the use made of the disputed ground, the past actings of the original feuars to plant trees to create the boundary and the subsequent possession. It is instructive because it is plain that the court took a common sense approach to a dispute in the light of the whole circumstances and not just on a strict reading of the plans. That is the approach I have taken here.

[62] In reaching this conclusion I do not rely on the respondents' submission that on the face of the deed, if it had been the seller's intention to exclude the disputed subjects, it would be expected that there would be created a servitude right of access in favour of the respondents and a burden to erect a deer fence along the disputed boundary to the west and

south west (a matter not dealt with by the sheriff). I regard this as speculative. These issues were not raised with Mr Robb. The deer fence relates to a matter ancillary to the main purpose of the disposition (cf *Leafrealm Land Limited* v *The City of Edinburgh Council and Others* (*supra*)).

[63] Given the decision I have reached, it is strictly unnecessary to consider the other grounds of appeal. But out of deference to the submissions made, I give my views on them, although I am able to do so in short compass.

**Prescriptive Possession**

[64] Section 1(1) of the Prescription and Limitation (Scotland) Act 1973 is in the following terms:

> "(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed–
>
> (a) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in–
>
> (i) that land; or
>
> (ii) land of a description habile to include that land; or
>
> (b) the registration of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in—
>
> (i) that land; or
>
> (ii) land of a description habile to include that land,
>
> then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge."

[65] Senior counsel for the appellant submitted that the 1992 feu disposition was not a habile title for the purposes of the prescriptive possession. Reference should be made only

to the deed as the foundation writ (*Auld* v *Hay* (1880) 7R 663, per Lord Justice-Clerk Moncrieff, pp 668-669; *Troup* v *Aberdeen Heritable Securities Co* 1916 SC 918, per Lord Justice-Clerk Scott Dickson, p 923). The deed only needs to be conceived in terms capable of being so construed as to include the disputed land (*Auld* v *Hay*, at p 668) But provided the boundaries in a bounding title are both specified and identifiable they must receive effect and the proprietor cannot prescribe beyond them (*Johnston*, Prescription and Limitation, 2nd edit, para 17.47). The boundaries in the disposition are specified and identifiable. They have been mapped without difficulty by both of the cartographic experts and by the Keeper of the Land Register of Scotland. They have been recognised by the respondents themselves. The quantity of the measurement is irrelevant (*Ure* v *Anderson* (1834) 12S 494, per Lord Justice-Clerk Boyle at p 496). The purpose of the plan in the disposition was "to denote with reasonable accuracy the extent of the subjects conveyed" (*Rivendale* v *Clark* (*supra*), at para [24]; see also *The Trustees of Niall Calthorpe's 1959 Discretionary Settlement* v *G Hamilton (Tullochgribban Mains) Limited and Another* (supra) and *Paul Munro* v *The Keeper of the Registers of Scotland and Borthwick Campsite LLP* (supra)). As both cartographic experts agree, for much of its length the boundary line between the 1992 subjects and the disputed subjects follows the line found on the current Ordnance Survey Mastermap. That line itself follows the line of a physical feature, namely an escarpment or rocky outcrop, as well as very closely the line shown on the 1:2500 Ordnance Survey map produced following a new land survey in 1972.

[66] Senior counsel for the respondents submitted that the 1992 feu disposition was habile on a reasonable construction to incorporate the disputed subjects. Keeping the plan in its proper place as non-taxative, the deed can be construed by giving primacy to the acreage

figure provided and the expert evidence which shows the material difference between the actual acreage and the one stated in the deed.

[67] In my opinion, the appellant's submissions should be preferred.

[68] It is important to emphasise that the prescriptive right of possession based upon a habile title is quite separate from the rules which apply to the construction of deeds to determine title. The right is a statutory one, albeit its historical derivation is within the common law. It is based upon the terms of the deed itself, without regard to the progress of titles and extrinsic evidence. Otherwise there would be possession "contrary to the written title" (*North British Railway Company* v *Hutton* (1896) 23R 522, per Lord McLaren at p 525). A bounding title is an example of that (*ibid*). On that basis, it is obvious in this case that the boundaries are specified and identifiable. The error in the acreage is irrelevant. Accordingly, prescription cannot arise.

[69] The sheriff considered that the disposition was habile for a number of reasons. First, she relies upon the acreage measurement, in that the inclusion of the disputed subjects does not take the area of land possessed outwith what was clearly intended to be conveyed. The difficulty with that is the acreage measurement does not of itself assist in the determination of the boundaries. Secondly, she relies on the subjects conveyed as forming part "of Glenmore farms". (I assume that she meant to say: part "of Ardslignish and Glenmore Farms".) And that "the disputed subjects as possessed, according to the evidence, have always been known locally to form part of Glenmore farm". Neither of these points assists in identification of the boundaries on the face of the deed. Thirdly, the subjects are described as lying within the Parish of Ardnamurchan, as are the disputed subjects. But again, that does not assist the boundary issue. Fourthly, she states that although the disputed subjects are not contained within the lines drawn on the plan, they are contiguous

to them. Again, that does not assist. Fifthly, she states that on the maps the disputed subjects appear to form part of a large body of land with the natural expected boundary being the public road. That is relevant for construction of the title deeds but it does not assist the habile question.

**Pertinents**

[70] The sheriff decided that the disputed subjects could not be part of the pertinents of the whole subjects. But she did not address the argument on its merits, merely concluding that as the disputed subjects formed part of the whole subjects they could not be a pertinent. I do not agree that if the respondents wished to argue the point they did not need to lodge a cross-appeal. The point of notes of appeal and cross-appeals is so that this court knows what the issues are in the appeal, as well as giving notice to parties what matters are to be argued. Nevertheless, senior counsel for the appellant was able to make full submissions on the matter. Accordingly, I am prepared to express, albeit briefly, an opinion on it.

[71] Senior counsel for the respondents submitted that areas of land adjacent to and used in conjunction with the principal subjects can be considered as parts and pertinents (*Earl of Leven* v *Findlay* (1711) M 10816; *Magistrates of Perth* v *Earl of Wemyss* (1829) 8S 82). Possession will show whether or not that is the case. Further support could be found in the Full bench decision of *Cooper's Trustees* v *Stark's Trustees* (1898) 25R 1160. In the instant case, the disputed subjects are 1.518 acres in extent, which is about 0.3% of the whole subjects. They have been occupied and used by the respondents since they took possession in 1992 and, in particular, since 1995 as part of the woodland garden ground forming the setting of and approach to Otter Lodge and cared for, including planting trees, tending to vegetation and strimming the verges. On that basis, they form a pertinent.

[72] Senior counsel for the appellant submitted that as a matter of law there can be no prescriptive possession to land that is outside of a bounding title, such that it can be regarded as a pertinent (Nov 17 1671 *Young contra Carmichael* (9636); *Stair* Institutes ii.3.26; *Bankton* ii.3.45; *Bell's Principles*, para 739; *Gordon* v *Grant* (1850) 13D 1; *Kerr* v *Dickson* (1842) 1 Bell's App 499; North *British Railway* v *Magistrates of Hawick* (*supra*); *Cooper's Trustees* v *Stark's Trs* (*supra*)). The point is illustrated by *Nisbet* v *Hogg* 1950 SLT 289 where the majority found that the pursuer's title was not a bounding one. Had the disputed subjects been a pertinent, there would have been no need for the respondents to resort to the invalid *a non domino* disposition. *Earl of Leven* v *Findlay* and *Magistrates of Perth* can be distinguished from the present case on the facts. In the latter there was no bounding description. In the same vein, in *Cooper's Trustees* the majority of the court considered that the defender's title was not a bounding one and hence did not limit the potential for acquisition of an appropriate pertinent.

[73] It has not gone unnoticed by me the irony of senior counsel for the respondent pointing to the considerable size of the disputed subjects in *Earl of Leven* v *Findlay* and *Magistrates of Perth* but then remarking upon the small acreage in this case. It is obvious from the authorities that the size of the subjects is irrelevant. More importantly, it is also obvious from the authorities that a bounding description by definition excludes the prospect of land outwith it being considered a pertinent. That has been the position from as long ago as *Stair* and *Erskine*. Senior counsel for the respondents submitted that this case falls squarely within the *ratio* of *Cooper's Trustees*. That is simply not true. As all of the majority opinions in that case make clear, there was no bounding title. The same applies to *Earl of Leven* v *Findlay* and *Magistrates of Perth*. In this case, there is a bounding description on the face of the deed. Without the other aspects of the dispositive clause, reference to the

progress of titles and the application of extrinsic evidence, all of which cannot be considered when looking at a prescriptive right, the bounding description is contained in the plan. That is the end of the matter. Accordingly, even if this issue had been raised properly by way of a cross appeal, it would be bound to fail.

**Findings-in-Fact**

[74] In light of the decision I have reached, I have to consider amendments – and additions to – the sheriff's findings-in-fact. Senior counsel for the appellant has made certain proposed findings. At the hearing on the first day, we invited counsel to discuss whether there could be an agreement on some of the findings. The invitation was not taken up, but since then senior counsel for the respondents has produced his own proposed findings and senior counsel for the appellant has commented upon them. In an already lengthy judgment, I do not wish to extend it unnecessarily by discussing every argument and counter-argument. I propose the following changes to the findings-in-fact:

a) In finding 4, delete "south-easterly" and substitute "south and south westerly";

b) In finding 9, delete the first two sentences and substitute "The scale of the said demonstrative plan is 4 inches to one mile."

c) In finding 14, add before "Glenmore" the words "Ardslignish and";

d) In finding 15, (1) delete "south" and substitute "north" and (2) delete "Glenmore farm" and substitute "Ardslignish and Glenmore Farms";

e) In finding 16, delete "Glenmore Farms" and substitute "Ardslignish and Glenmore Farms";

f) In finding 17, in the second sentence delete "Glenmore farm" and substitute "Ardslignish and Glenmore Farms";

g) In finding 18, in the second sentence delete "Glenmore farm" and substitute "Ardslignish and Glenmore Farms";

h) In finding 19, in the second sentence delete "Glenmore farm" and substitute "Ardslignish and Glenmore Farms";

i) In finding 20, in the second sentence delete "Glenmore farm" and substitute "Ardslignish and Glenmore Farms";

j) In finding 21, (1) in the first sentence, delete "properties" and substitute "Properties" and delete "comprising what was known as Glenmore Farm"; (2) in the last sentence, delete "Glenmore farm" and substitute "the area of land disponed"; (3) add at the end "The 1992 Disposition identified a number of buildings that were included within the subjects conveyed, such as the dwelling houses known as Glenmore House and Glenmore Cottage and the Visitor Centre and Audio Visual Centre. The Disposition also conveyed the parts, privileges and pertinents of the subjects otherwise conveyed thereby.";

k) In finding 22, delete "whole of Glenmore Farms" and substitute "disputed subjects" and add the following: "In 1991, Grampian Properties Limited had marketed the Ardnamurchan Estate as including the disputed subjects, as shown in the map in the sale particulars. The disputed subjects had at this time been occupied and possessed as part of the Ardslignish and Glenmore Farms section of the Ardnamurchan Estate since at least the early 1950s. Pursuant to that marketing, the defenders agreed to buy, and Glenmore Properties Limited agreed to sell, all of the land they owned at Glenmore to the defenders. This included the disputed subjects. The relative area to be conveyed to the defenders had been measured, to the nearest half-acre, at 464.5 acres. The plan

for the disposition, contrary to the boundaries contained in the map in the sale particulars, was drawn with the disputed subjects excluded from the subjects to be conveyed, but the area to be conveyed remained unchanged, as did the price. The reason for the difference between the plan and the subjects the parties to the deed had agreed to be conveyed was that Mr Simpson, the solicitor acting for Grampian Properties Limited, thought that the disputed subjects were not part of the subjects owned by Grampian Properties Limited. Grampian Properties Limited did not wish to retain any land in the Glenmore area."

l) In finding 23, (1) delete the first three sentences; (2) add after "462.159" the following: "(once there have been removed from the area shown enclosed within the lines on the plan three subjects which the verbal description in the Disposition stated were to be excluded from the subjects conveyed, namely the public roads, the area of Croft 27, Glenmore, and the *solum* of the Deer Larder at the Visitor Centre complex at Glenmore)"; (3) add after sentence ending with the words "intended to be conveyed" the following: "The plan bears to show the public roads, Croft 27 and the *solum* of the Deer Larder as being part of the land conveyed, contrary to the verbal description."; (4) add at the end "The original of the 1992 Disposition has been lost. An extract registered copy is lodged as 6/8/3 of process. The coloured A3 plan lodged within 5/6/39 and 5/4/21 of process was provided to the pursuer's solicitor in 1996 by solicitors acting on behalf of Mr and Mrs Grisewood when they sold their property in Ardnamurchan to the pursuer. The plan differs in various respects from the plan annexed to the extract registered copy of the 1992 Disposition but the delineation in red of the

disputed subjects appears to be the same as the delineation in black in the plan to the extract registered copy Disposition."

m) In finding 24, delete "of Glenmore Farm";

n) In finding 25, delete "the lands known as Glenmore farms" and substitute "the subjects conveyed";

o) In finding in fact 26, delete "Farm Woodland Premium" and substitute "Forestry Commission Woodland Grant";

p) In finding 28, in the last sentence delete "their house at";

q) In finding 29 add at the end "and those occupying the disputed subjects with the defenders' permission, such as their tenants at Otter Lodge under holiday lets."

r) Delete finding 32;

s) Add a new finding in fact 32: "In 2017, the defenders registered their title as contained in the 1992 Disposition in the Land Register for Scotland under title ARG23707. Said registered title does not include the disputed subjects. This was because the pursuer had already purported to register title to the disputed subjects under said title number ARG20467 in 2014, meaning that the Keeper would not accept a further application that included the disputed subjects.";

t) In finding in fact and law 2, delete "does not create" and substitute the word "creates";

u) Delete finding in fact and law 3 and renumber the other findings in fact and law accordingly;

v) In finding in fact and law 4, delete "Glenmore Farm" and substitute "Ardslignish and Glenmore Farms";

w) In finding in fact and law 5, add after "is" the word "not";

x) Delete finding in fact and law 7 and renumber the other findings in fact and law accordingly;

y) Delete finding in fact and law 8 and renumber the other findings in fact and law accordingly.

**Interlocutor**

[75] For the reasons I have given, I would refuse the appeal on the first ground, but allow it on the second. I would also refuse the cross-appeal, albeit there is none – in effect it would be refusal of a motion made at the Bar. The content of the interlocutor we should pronounce is not straightforward. If my opinion had prevailed, I would have had a number of questions for the parties on that, but I am content to proceed as proposed by Appeal Sheriff Tait.

**Postscript**

[76] The sheriff was plainly unimpressed by Mr Houston. I can understand why, but it is clear that her view of him did not influence the conclusions she reached. In cross-examination, an attempt was made to paint him as a very wealthy man and habitual litigator, determined to use his wealth in pursuit of much weaker opponents for dishonourable reasons. I do not regard any of this to be helpful. Mr Houston was well within his rights to seek clarification of the ownership of land on the peninsula. If that resulted in him thinking he could take advantage of historical failures in the drafting of titles, so be it. The only criticism I have is his decision not to seek to resolve the issue by entering into a discussion with the respondents and instead proceeding immediately to litigation. I cannot guess at the outcome but it may well have been that the differences

between the parties could have been resolved. It is in keeping with the modern approach to litigation that every effort be made to find common ground without it. That is not just in the interest of the parties; it is also in the public interest that valuable and sometimes scarce public resources are not wasted.

**SHERIFF APPEAL COURT**

**FTW-B92-18**

Sheriff Principal DCW Pyle
Appeal Sheriff F Tait
Appeal Sheriff D Hamilton

OPINION

of

APPEAL SHERIFF FIONA TAIT

in appeal by

ARDNAMURCHAN ESTATES LIMITED

Pursuer/Appellant

against

MICHAEL ROY MACGREGOR and KAREN JUDITH MACGREGOR

Defenders/Respondents

**Pursuer/Appellant: Mure KC; Frances E Sim Limited**
**Defenders/Respondents: McLean KC; Murchison Law**

1 December 2023

**Introduction**

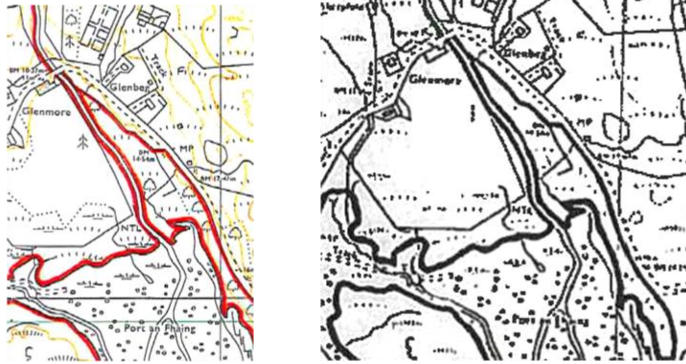
[77] This appeal concerns the ownership of an area of ground at Glenmore, Glenborrodale, Acharacle in the registration county of Argyll, extending to some 1.54 acres and referred to in the pleadings as "the disputed subjects". The disputed subjects form a wooded area of ground and lie between the B8007 public road and other land owned by the respondents, on which is sited a commercial holiday lodge owned by the respondents.

[78] The appellant is the registered proprietor of the disputed subjects under Title Number ARG20467 in the Land Register of Scotland. The Keeper has excluded indemnity "In terms of Section 12(2) of the Land Registration (Scotland) Act 1979 [in respect that the subjects] are subject to possession which is adverse to the said entitlement." The exclusion arises because the respondents granted themselves an *a non domino* disposition of the disputed subjects in 1994.

[79] By feu disposition dated 13 March and 20 July 1992, with entry at 13 March 1992 and recorded in the General Register of Sasines for the County of Argyll on 6 November 1992 ("the 1992 feu disposition"), Grampian Properties Ltd disponed to the respondents:

> "ALL and WHOLE those areas or pieces of ground extending in total to Four hundred and sixty four acres and five decimal or one tenth parts of an acre or thereby lying in the Parish of Ardnamurchan and County of Argyll shown outlined in red on the demonstrative plan annexed and executed as relative hereto; together with […]".

[80] The key issue is whether the subjects disponed to the respondents and delineated on the plan annexed to the 1992 disposition, can properly be interpreted as including, or habile to include, the disputed subjects. The original disposition and plan were not produced by the respondents as they no longer have same. An A4 extract from the Sasine Register is monochrome and available at Core Bundle 5 and Joint Appendix 5. An A3 plan showing the boundary in red is available at Core Bundle 6 and Joint Appendix 6. These are reproduced below.




[81] The parties agreed that the extract plan differed from the original plan annexed to the 1992 feu disposition in respect that the original plan was coloured with delineation in red and was A3 size. The A3 plan showing the boundary in red was produced by the appellant. For the purpose of the present appeal, it was agreed between the parties that the lines shown in red on the plan at Joint Appendix 6 follow the same course in the area of the disputed subjects as the monochrome plan at Joint Appendix 5.

[82] The respondents' counterclaim seeks declarator that they are the heritable proprietors of the disputed subjects and that the Title Number ARG20467 is therefore inaccurate in showing the appellant as the owner. The respondents proceeded on the basis that:

i. the *a non domino* disposition granted in their favour in 1994 gave them valid title. At an appeal following debate before the sheriff, the Sheriff Appeal Court held on 24 February 2020 that the *a non domino* disposition was a nullity and hence could not be relied upon.

ii. on a proper construction the 1992 feu disposition in their favour of 464.5 acres or thereby, as delineated on a plan, included the disputed subjects. After proof, the sheriff sustained the respondents' argument.

iii. in any event, the 1992 feu disposition was habile to include the disputed subjects and that by virtue of their possessory acts since 1992 the respondents were the proprietors through the operation of prescription in terms of section 1 of the Prescription and Limitation (Scotland) Act 1979. After proof, the sheriff also sustained this argument.

iv. finally, the disputed subjects could properly be regarded as included within the respondents' title as a pertinent. The sheriff rejected this argument and the respondents have not lodged a cross-appeal on this point.

[83] The appeal proceeds on the basis that the sheriff has erred in construing the 1992 feu disposition in favour of the respondents and in concluding that the subjects disponed, as delineated on the plan, included the disputed subjects. Further, she erred in holding that the 1992 feu disposition was habile to include the disputed subjects and that by their possessory acts since 1992 the respondents were the proprietors through the operation of prescription under section 1 of the Prescription and Limitation (Scotland) Act 1979. The appellant does not maintain that the respondents have not occupied and possessed the disputed subjects for at least ten years.

[84] The appellant contends that the sheriff misdirected herself in law; failed to take advantage of the evidence led; misapprehended or ignored important evidence and drew inferences which were unsupported by facts. As such, it was submitted to be open to this court to consider the evidence of new and to come to its own conclusions on it and that this court is in as good a position as the sheriff to evaluate the evidence (*W* v *Greater Glasgow Health Board* [2017] CSIH 58).

[85] Finally, access to the lodge from the public road runs across the disputed subjects and use of this access is not in dispute. Parties have agreed that in the event that the court

holds that the appellant has title to the disputed subjects, the respondents will be entitled to a formal order confirming a heritable and irredeemable servitude right across the present access route.

**The 1992 feu disposition and construction thereof**

[86] The description of the subjects in the disposition comprises:

> "ALL and WHOLE those areas or pieces of ground extending in total to Four hundred and sixty four acres and five decimal or one tenth parts of an acre or thereby lying in the Parish of Ardnamurchan and County of Argyll shown outlined in red on the demonstrative plan annexed and executed as relative hereto; (iv) the parts, privileges and pertinents thereof […]; which said areas or pieces of ground hereby disponed are hereinafter referred to as "the Feu" and (i) form part and portion of ALL and WHOLE Ardslignish and Glenmore Farms lying in the said Parish and County and extending to Four thousand and nine acres or thereby all as more particularly described in and disponed (SECOND) by and shown coloured yellow and marked "2" on the plan annexed and signed as relative to [the 1953 Boots disposition JB12] […]; But the whole subjects hereinbefore in feu farm disponed are so disponed under exception of (One) all public roads running through the said subjects[...]. "

***Appellant's submissions: bounding title***

[87] The 1992 feu disposition was a new break-off writ, the seller having acquired title in 1978 by disposition granted by General Accident of Ardslignish and Glenmore Farms extending to 4009 acres or thereby. The location and extent of the boundaries are not set out in a verbal description but only by reference to the annexed plan. The plan is the only part of the deed that shows where the subjects are located.

[88] The 1992 feu disposition is a bounding title, one which can be identified by its boundaries, by a particular description and not by a general description. A bounding title may be created by reference to a plan on which the boundaries are delineated. "The number of ways in which a bounding title may be created are almost infinite, but the following

illustrate some of the more usual: […] (ii) by a plan on which the boundaries are delineated" (Professor Halliday, *Conveyancing Law and Practice* (2nd edition, §33-10). Further, "[a] particular description can be done (a) purely verbally, or (b) purely by a plan, or (c) by both." (Gretton & Reid, *Conveyancing* (5th edn) §12-20.

[89] The questions posed by the respondents for the sheriff were (i) whether the disputed subjects were included in the subjects disponed by the 1992 feu disposition or (ii) whether, in the alternative, that feu disposition was habile to include the disputed subjects. If the answer to these question is in the negative, then this appeal must succeed. These questions are not to be answered by reference to the parties' motivations. They cannot be answered by reference to the parties' subjective intentions, to which the sheriff refers at some length.

[90] The sheriff cited Lord Justice-Clerk Moncreiff in *Reid* v *McColl* (1879) 7R 84 at p90:

> "The true question is whether the boundaries are specified, and if they are, whether they can be identified. If these two concur, they will receive effect, and the proprietor cannot prescribe beyond them."

The evidence was clearly that the boundaries at the disputed subjects could be and had been identified, not least by the respondents themselves who immediately noted on seeing the plan attached to the 1992 feu disposition that it did not include the disputed subjects. While the sheriff cited Rankine *The Law of Land-ownership in Scotland* (1909) at pages 101-102 relating to verbal descriptions, she ignored the section of that work dealing with plans where, under reference to *North British Railway* v *Magistrates of Hawick* (1862) 1M 200 the author stated at page 104: "A plan docketed and referred to in the titles is 'fully as good as any words describing 'the line of boundary'".

[91] The sheriff erred in asking the question: "is the description in the 1992 Disposition sufficiently precise and intelligible to enable the court to fix the boundaries of the conveyance simply by looking at the deed?" The sheriff also erred in accepting what was

the respondent's submission that "the essential principle in construing what a Sasine title means, is to establish what the presumed intention of the contracting parties was" (Halliday, *Conveyancing Law & Practice*, 2nd Edn, 1997, para 33-13). Halliday was dealing with the particular issue of inconsistencies between boundaries. No inconsistency arises in the present case. In any event, it is trite law that presumed intention is to be inferred from the parties' contract itself and what is said in it, construed against the matrix of relevant facts, but not by taking evidence about their respective subjective intentions.

[92] The fact that the disputed subjects lay outside the boundaries on the plan was obvious not only to the respondents but also to the parties' respective cartographic experts. It is inexplicable that, contrary to this evidence, the sheriff found the plan so difficult to read. Since the plan is the only document showing the boundaries of the subjects disponed, the sheriff erred in her reasoning that:

> "The plan is therefore more likely to have been intended as a descriptive tool to enable someone looking at the deed to orient the piece of ground being conveyed within a particular area."

[93] Contrary to the sheriff's conclusion in her Note at [45], the use of the term "demonstrative" does not indicate an intention that the plan should not be an accurately measured depiction of the ground intended to be conveyed.

[94] The sheriff similarly erred in her conclusion that the description in the deed is a general description and not a particular description. As explained in Halliday, *Conveyancing Law & Practice*, 2nd edn, 1997, at §33-07 and §33-09:

> "A general description is one which describes the lands without reference to measurement or boundaries, usually specifying the name by which they are known, and dependent for their definition upon the owner's possession of them and the operation of positive prescription"
>
> "A particular description or bounding title is one where the subjects are limited by boundaries, either in whole or in part expressly or by implication."

[95] Similarly, Gordon & Wortley *Scottish Land Law* (Vol. 1, 3rd edn at §3-07) explains that a bounding title specifically lays down the boundaries, for example by means of a plan.

***Use of "or thereby"***

[96] The sheriff further erred in failing to take account of authority on the use of the term "or thereby" and therefore ignoring the term.

[97] The words "or thereby" indicate that slight variations or discrepancies may exist (*Hetherington* v *Galt* (1905) 7F 706 per Lord Justice-Clerk Macdonald at p712 and Lord Kyllachy at p713). In that case, a discrepancy of up to a foot or so along the 200 feet boundary of urban subjects was allowed for within the expression "or thereby". In the present case, in a rural location including an island (and therefore more challenging to survey and measure), the discrepancies spoken to by Mr Davis, the respondent's cartographer, are of similar proportion, being either 0.823 acres or 2.341 acres out of the 464.5 acres "or thereby".

[98] The sheriff erred in finding that any discrepancy, and hence the breadth of the variation governed by the words "or thereby", should not be considered in its actual context, namely the conveyance of hundreds of acres of land in the western Highlands. The use of the term "or thereby" indicates that slight variations are unavoidable. That must equally be true when measuring land in this area in 1992 and using the same term "or thereby". Each case must be considered in its proper context (*Young* v *McKellar Ltd* 1909 SC 1340 at 1344).

[99] The courts allow for a reasonable measure of variation where a deed uses the term "or thereby" in connection with a superficial measurement of the sort provided in the 1992 feu disposition.

***Case law***

[100] What was termed the sheriff's determination to find the plan imprecise was submitted to be contrary to the practice of courts and tribunals in Scotland, illustrated for her by citation of authority which the sheriff fails to mention in her Note. The sheriff failed to have regard to *North British Railway Co.* v *Moon's Trustees* (1879) 6R 640 at page 657; *Leafrealm Land Limited* v *The City of Edinburgh Council and others* [2021] CSIH 24 at [31]; *The Trustees of Niall Calthorpe's 1959 Discretionary Settlement* v *G. Hamilton (Tullochgribban Mains) Limited and another* [2012] CSOH 138 at [31] and [32]; and *Paul Munro* v *The Keeper of the Registers of Scotland and Borthwick Campsite LLP* 30 March 2017 at [28],[29] and [33].

[101] The foregoing authorities vouch the proposition that the court may, in the appropriate case, identify from an examination of the relevant deed and plan whether particular subjects are or are not included within the delineated boundaries.

***Evidence re disputed subjects***

[102] The sheriff failed to take account of the evidence that the respondents recognised that the plan did not include the disputed subjects but still proceeded with settlement. Similarly, she did not take into account the clear evidence that the seller was advised that it did not own the disputed subjects and that the parties proceeded with the transaction on the basis of a plan which clearly excluded the disputed subjects.

[103] The sheriff erred in concluding at [56] of her Note that:

> "[in] accordance with the extrinsic evidence obtained from the cartography expert, there is a conflict within the deed between the acreage which is to be disponed and the area actually enclosed within the lines of the 1992 deed plan".

She erred in categorising such conflict as the kind of ambiguity referred to in *Suttie* v *Baird* 1992 SLT 133. In any event, the facts in *Suttie* were quite different and were distinguished

where there was a detailed verbal description of the boundaries set out in the feu disposition after reference to the plan.

*Summary*

[104] The two key questions in construing the 1992 feu disposition are (i) whether there is any conflict between elements of the description of the subjects and (ii) if there is, which if any of the elements is meant to be the controlling one. Given the use of the expression "or thereby", there is no inconsistency between the superficial measurement provided in the deed and the area delineated in red on the plan. Even if there were considered to be an inconsistency, it is clear that the plan is intended to be the controlling element. Only the plan indicates boundaries and provides the location of the subjects. The expression of a superficial measurement "or thereby" cannot override reference to such a plan, nor in particular override the plan at any particular point along the delineated boundary, for example adjacent to the disputed subjects.

[105] There is no imprecision or inconsistency in the description. The plan is the only means by which the disponer has fixed the boundaries of the subjects. The use of the words "or thereby" in the superficial measurement given in the deed makes clear that the boundaries fixed by the plan do not guarantee a precise fixed area of land. Moreover, that superficial measurement is not a description of the boundaries of the subjects conveyed; there cannot therefore be an inconsistency between that measurement and the plan, so far as the boundaries are concerned. To put it another way, if the plan delineates an area that is slightly different in extent from the superficial measurement given in the deed, that does not give rise to a dispute about any particular boundary.

[106] In any event, the conclusion reached by the respondent's cartographer, Mr Davis, as to the acreage of the subjects demonstrates no more than that by including the disputed subjects the area measured by him is brought closer to the superficial measurement given in the 1992 feu disposition, than if the disputed subjects are omitted (as the plan indicates). Given the extent, location and character of the subjects within the red line delineation, including long boundaries adjacent to rivers and the seashore, and the fact that Mr Davis focused only on the area adjacent to the disputed subjects, there can be no confidence that any adjustment, if required, falls to be made at any one part of the subjects within the red line.

***Respondents' submissions***

[107] The key issue is whether the respondents have shown that the disputed subjects, occupied and possessed by them for many years are theirs pursuant to their 1992 title. The sheriff has answered that issue in the respondents' favour.

[108] The sheriff was entitled on the evidence before her and in light of the applicable law to reach the conclusions that she did (in respect of all material matters objected to by the appellant) and to grant decree as she did. She did not err in doing so in any material respect. This Court should be hesitant to overturn the sheriff's decision in relation to any decision she has made in relation to the credibility and reliability of the witnesses from whom she heard. *Esto* the sheriff did err in any material respect, the orders made should be upheld on the basis of the respondents' submissions on the evidence and the law advanced both in writing and orally at the close of the proof before answer.

[109] The sheriff has taken a sensible and practical approach to this dispute over a strip of typical Highland rough land, and one that does not lose sight of the position on the ground.

She has not lost sight of the realities of landscape, land use over time and possession, all as established in the evidence. She has not lost sight of the essential question of construction in law. The approach which the appellant urges on the court, by contrast, takes essentially a "desktop" approach, seeking to focus on limited aspects of various expressly demonstrative title plans and a large number of legal authorities dealing with other Sasine titles in other settings, to question what is submitted to be the obviously right conclusion to which the sheriff has come. There is no authority binding on this court that determines that the sheriff has been wrong to come to her decision.

[110] As the sheriff found, the 1992 feu disposition in favour of the respondents is not correctly construed as having contained an effective bounding description, in that it does not comprehensively define the boundaries of the subjects conveyed. Under reference to appropriate authorities, she reached the conclusion that the 1992 feu disposition did not achieve a level of precision and intelligibility without reference to extrinsic evidence such that all other evidence could be disregarded in construing the deed. She was correct to do so, for the reasons she gave. The description contains ambiguities in relation to boundaries and conflict between elements of the description; in particular, the written description, including the exceptions and the area said to be conveyed, do not match the plan.

[111] That being the case, the sheriff required to have regard to extrinsic evidence concerning the lie of the land, the historic position as regards conveyancing and land use, surrounding circumstances at the time of the transaction in 1992 and possession in elucidating the boundaries of the subjects conveyed. That evidence all pointed to the conclusion that the 1992 feu disposition carried the disputed subjects to the respondents.

[112] The sheriff did not err by not adopting the appellant's approach to the import of the words **"**or thereby**"** as used in the 1992 feu disposition nor by concluding that the

discrepancy identified in the evidence was "a significant ambiguity". At [57] in her Note, the sheriff explains why, in this case, she was not prepared to treat an area of 2.34 acres as a "slight" discrepancy more than covered by the words "or thereby", but rather a significant ambiguity. She was entitled to so find for the reasons she gives. The area in question was not a "slight variation" or a "minute discrepancy or variation" (*Hetherington supra* per LJC MacDonald at 712 and Lord Kyllachy at p713). When the extent of the area disponed was defined to the nearest half acre, a missing area much greater than that constituted a significant ambiguity. *Young supra* illustrates that even 25 square yards may be too large a discrepancy to be covered by "or thereby".

[113] It is accepted that, at [47] of her Note, where the sheriff suggested that the 1992 feu disposition contained a "general description" was an incorrect use of the term. However, the sheriff did not in any part of her discussion proceed on the basis that the description in the 1992 feu disposition was in fact a general description, but rather and correctly, that it was an attempted bounding description which had failed to achieve the necessary level of precision to exclude extrinsic evidence.

[114] *North British Railway Co*, *Leafrealm Land Ltd*, *Trustees of Niall Calthorpe's 1959 Discretionary Settlement* and *Paul Munro supra* do not undermine the sheriff's approach to the 1992 feu disposition on the basis of legal principle and the facts of this case. A number of different deeds in different circumstances were construed in those cases, with none of the decisions therein governing the appropriate approach in this case. They illustrate the uncontroversial proposition that one may create an effective bounding title including reference to a plan. The attempt to do so in this case has failed, as the Sheriff found, producing an indefinite grant.

[115] The appellant wishes to treat the expressly demonstrative plans in this case as if they were taxative, when they plainly were not designed to be. The fundamental error of the appellant's approach is to proceed as if the plans had been stated to be taxative, when they have not. None of the 1953, 1974 or 1992 demonstrative plans accurately showed what was described as being conveyed, for example because they bore to include the public roads in the area conveyed, when the public roads were expressly excluded in each case. There is no authority requiring such plans to be treated as taxative.

[116] The appellant's approach fails to take account of the whole of the descriptions provided in the relevant deeds. In the 1992 feu disposition, the granters expressly provided for a conveyance of an area of 464.5 acres or thereby, with a plan which does not show the proper extent of the land so conveyed, on the evidence. The result is ambiguity and conflict between elements of the description. The court can in those circumstances have regard to extrinsic evidence, on the basis of authorities to which the sheriff referred, which evidence indicated that each disposition should be read as carrying (*inter alia*) the disputed subjects, including by reason of the possession which followed thereon.

[117] The sheriff's observations at [44] and [45] of her Note are illustrative of broad concerns about the precision of the plan annexed to the 1992 feu disposition. In *Rivendale* v *Clark* 2015 SC 558 at [22], the Inner House stressed the need to have regard to the full wording of the description. This warns against focussing purely on, for example, one aspect of a plan in isolation, as the appellant wishes to do in this case. The sheriff was correct to regard it as significant that the granter of the 1992 feu disposition had specified that the plan attached was demonstrative, as opposed to taxative, where there were conflicts with aspects of the verbal description (Gretton & Reid, *Conveyancing*, 5th Edn, para 12-22).

*Discussion*

[118] In determining whether the disputed subjects were disponed by the 1992 feu disposition to the respondents, the sheriff determined at [43] of her Note that the 1992 disposition:

> "is not sufficiently precise to enable someone looking at the deed to be able to identify the exact boundaries. This is because there is no description in words as to where the boundaries lie, and there is only a reference to the boundaries in the plan which is imprecise."

[119] At [44] of her Note, she expands that:

> "[e]ven without considering any extrinsic evidence it can be said that the plan is not precise and therefore cannot be said to be definitive of the extent of the title. The plan can be seen on the face of it to be imprecise in a number of ways […] It is surprising to me that anyone would have any confidence when looking at that to be able to say what it actually represents on the ground, precisely."

[120] The sheriff concludes at [47] of her Note that:

> "The description in the deed is therefore a general description, not a particular description and the 1992 Disposition is not a bounding title. It is not a bounding title in the sense that the description taken as a whole is not so precise and intelligible in its terms to enable the Court without further enquiry to fix the boundaries. One therefore needs to look at extrinsic evidence to fix the boundaries."

[121] The key issue becomes whether the sheriff was entitled to admit extrinsic evidence to construe the 1992 feu disposition.

[122] Central to extrinsic evidence being admitted is the question whether there is any conflict between the elements of the description of the subjects, that is the area delineated on the plan and the acreage stated to be "or thereby".

[123] As noted above, the sheriff concluded that the description is a "general description, not a particular description and the 1992 Disposition is not a bounding title" in the sense that "the description taken as a whole is not so precise and intelligible in its terms to enable the Court without further enquiry to fix the boundaries". Senior counsel for the appellant

submitted that the sheriff had misunderstood the terms "general description" and "bounding title". A general description is one which describes land without reference to measurements or boundaries, whereas a bounding title is one where the subjects are limited by boundaries, which would include a description by reference to a plan with boundaries marked on it (*Halliday*, paras 33-07 and 33-09; *Gordon & Wortley*, Scottish Land Law (3rd edit) Vol 1, para 3-04).

[124] I agree that the 1992 disposition is a bounding title. The subjects are limited by boundaries; specifically the subjects are described by reference to a plan with boundaries marked on it. I agree that the disputed subjects are not included within the boundary as delineated on the plan. I have no difficulty in reaching that conclusion. I pause to note that both the sellers and the respondents as purchasers were clear that the plan did not include the disputed subjects.

[125] The description also referred to the subjects extending to 464.5 acres or thereby. In his supplementary report (Joint Appendix 43), the respondents' expert cartographer, Miles Davis, measured the extent of the subjects excluding the disputed subjects as 462.159 acres and including the disputed subjects as 463.677 acres. The disputed area was measured at 1.518 acres. Accordingly, the cartographer concluded that the difference between the stated acreage or thereby and the measured acreage inclusive of the disputed subjects is 0.823 acres. Were the disputed subjects to be excluded, the difference would be 2.341 acres.

[126] The use of the term "or thereby" indicates that slight variations might be unavoidable. (*Hetherington* v *Galt* (1905) 7F 706 per Lord Justice-Clerk Macdonald at page 712 and Lord Kyllachy at page 713). I consider that there is force in the appellant's submission that the extent of the variation governed by the words "or thereby" should be considered in its actual context, namely the conveyance of hundreds of acres of land in a

rural location with challenging geographical features. In the proper context of ground extending to 464.5 acres, I consider that the words "or thereby" are adequate to cover the variation of 2.341 acres (when the disputed subjects are excluded). The variation is within a reasonable measure. There is no sufficient conflict between the elements of the description of the subjects.

[127] I agree with the appellant's submission that a slight discrepancy between the acreage and extent of the land within the clear boundaries of a plan does not make the description ambiguous. Further, extrinsic evidence cannot be used to create an ambiguity where none appears on the face of the deed. It seems to me that irrespective of whether the plan is demonstrative or taxative, that the actual discrepancy in acreage does not permit extrinsic evidence to construe the disposition. I disagree that the actual discrepancy in context creates uncertainty such that extrinsic evidence is admissible.

[128] Accordingly, I conclude that the sheriff erred in admitting evidence to construe the 1992 feu disposition. The disputed subjects were not included within the boundaries of the plan, as was apparent to both the seller and to the respondents at the date of settlement. The first of the two questions posed to the sheriff by the respondents, namely whether the disputed subjects are included in feu farm disponed by the 1992 feu disposition, falls to be answered in the negative.

[129] It is next appropriate to consider the second question posed by the respondents, namely whether the 1992 feu disposition is habile to include the disputed subjects. I have had the opportunity to read the Opinion of Sheriff Principal Pyle and in respect that we are agreed on whether the disposition is habile to include the disputed subjects, I adopt and incorporate that part of his Opinion (and in respect of parts and pertinents) to ensure my Opinion is comprehensive on all grounds of appeal. I am grateful to Sheriff Principal Pyle.

**Whether the 1992 feu disposition is habile to include the disputed subjects**

[130] Section 1(1) of the Prescription and Limitation (Scotland) Act 1973 is in the following terms:

> "(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed–
>
> (a) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in–
> (i) that land; or
> (ii) land of a description habile to include that land; or
>
> (b) the registration of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in—
> (i) that land; or
> (ii) land of a description habile to include that land,
>
> then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge."

[131] Senior counsel for the appellant submitted that the 1992 feu disposition was not a habile title for the purposes of prescriptive possession. Reference should be made only to the deed as the foundation writ (*Auld* v *Hay* (1880) 7R 663, per Lord Justice-Clerk Moncrieff, pp 668-669; *Troup* v *Aberdeen Heritable Securities Co* 1916 SC 918, per Lord Justice-Clerk Scott Dickson, p 923). The deed only needs to be conceived in terms capable of being so construed as to include the disputed land (*Auld supra* at p 668). However, provided the boundaries in a bounding title are both specified and identifiable they must receive effect and the proprietor cannot prescribe beyond them (Johnston, Prescription and Limitation, 2nd edit, para 17.47).

[132] The boundaries in the disposition are specified and identifiable. They have been mapped without difficulty by both of the cartographic experts and by the Keeper of the Land Register of Scotland. They have been recognised by the respondents themselves. The

quantity of the measurement is irrelevant (*Ure* v *Anderson* (1834) 12S 494, per Lord Justice-Clerk Boyle at p 496). The purpose of the plan in the disposition was "to denote with reasonable accuracy the extent of the subjects conveyed" (*Rivendale supra* at [24]; *The Trustees of Niall Calthorpe's 1959 Discretionary Settlement supra* and *Paul Munro supra*). As both cartographic experts agree, for much of its length the boundary line between the 1992 subjects and the disputed subjects follows the line found on the current Ordnance Survey Mastermap. That line itself follows the line of a physical feature, namely an escarpment or rocky outcrop, as well as very closely the line shown on the 1:2500 Ordnance Survey map produced following a new land survey in 1972.

[133] Senior counsel for the respondents submitted that the 1992 feu disposition was habile on a reasonable construction to incorporate the disputed subjects. Keeping the plan in its proper place as non-taxative, the deed can be construed by giving primacy to the acreage figure provided and the expert evidence which shows the material difference between the actual acreage and the one stated in the deed.

[134] In our opinion, the appellant's submissions should be preferred.

[135] It is important to emphasise that the prescriptive right of possession based upon a habile title is quite separate from the rules which apply to the construction of deeds to determine title. The right is a statutory one, albeit its historical derivation is within the common law. It is based upon the terms of the deed itself, without regard to the progress of titles and extrinsic evidence. Otherwise there would be possession "contrary to the written title" (*North British Railway Company* v *Hutton* (1896) 23R 522, per Lord McLaren at page 525). A bounding title is an example of that *(ibid)*. On that basis, it is obvious in this case that the boundaries are specified and identifiable. The error in the acreage is irrelevant. Accordingly, prescription cannot arise.

[136] The sheriff considered that the disposition was habile for a number of reasons. First, she relies upon the acreage measurement, in that the inclusion of the disputed subjects does not take the area of land possessed outwith what was clearly intended to be conveyed. The difficulty with that is the acreage measurement does not of itself assist in the determination of the boundaries. Secondly, she relies on the subjects conveyed as forming part "of Glenmore farms" and that "the disputed subjects as possessed, according to the evidence, have always been known locally to form part of Glenmore farm". Neither of these points assists in identification of the boundaries on the face of the deed. Thirdly, the subjects are described as lying within the Parish of Ardnamurchan, as are the disputed subjects. However, that does not assist the boundary issue. Fourthly, the sheriff states that although the disputed subjects are not contained within the lines drawn on the plan, they are contiguous to them. Again, that does not assist. Fifthly, she states that on the maps the disputed subjects appear to form part of a large body of land with the natural expected boundary being the public road. That is relevant for construction of the title deeds but it does not assist the habile question.

**Pertinents**

[137] The sheriff decided that the disputed subjects could not be part of the pertinents of the whole subjects. She did not address the argument on its merits, merely concluding that as the disputed subjects formed part of the whole subjects they could not be a pertinent. We express, albeit briefly, an opinion on it.

[138] Senior counsel for the respondents submitted that areas of land adjacent to and used in conjunction with the principal subjects can be considered as parts and pertinents (*Earl of Leven* v *Findlay* (1711) M 10816; *Magistrates of Perth* v *Earl of Wemyss* (1829) 8S 82). Possession

will show whether or not that is the case. Further support could be found in the Full bench decision of *Cooper's Trustees* v *Stark's Trustees* (1898) 25R 1160. In the instant case, the disputed subjects are 1.518 acres in extent, which is about 0.3% of the whole subjects. They have been occupied and used by the respondents since they took possession in 1992 and, in particular, since 1995 as part of the woodland garden ground forming the setting of and approach to Otter Lodge and cared for, including planting trees, tending to vegetation and strimming the verges. On that basis, they form a pertinent.

[139] Senior counsel for the appellant submitted that as a matter of law there can be no prescriptive possession to land that is outside of a bounding title, such that it can be regarded as a pertinent (*Nov 17 1671 Young contra Carmichael* (9636); Stair Institutes ii.3.26; Bankton ii.3.45; Bell's Principles, para 739; *Gordon* v *Grant* (1850) 13D 1; *Kerr* v *Dickson* (1842) 1 Bell's App 499; *North British Railway* v *Magistrates of Hawick supra*; *Cooper's Trustees supra*). The point is illustrated by *Nisbet* v *Hogg* 1950 SLT 289 where the majority found that the pursuer's title was not a bounding one. Had the disputed subjects been a pertinent, there would have been no need for the respondents to resort to the invalid *a non domino* disposition. *Earl of Leven* and *Magistrates of Perth* both *supra* can be distinguished from the present case on the facts. In the latter there was no bounding description. In the same vein, in *Cooper's Trustees* the majority of the court considered that the defender's title was not a bounding one and hence did not limit the potential for acquisition of an appropriate pertinent.

[140] It is obvious from the authorities that a bounding description by definition excludes the prospect of land outwith it being considered a pertinent. That has been the position from as long ago as Stair and Erskine. Senior counsel for the respondents submitted that this case falls squarely within the ratio of *Cooper's Trustees*. That cannot be the case. As the

majority opinions in that case make clear, there was no bounding title. The same applies to *Earl of Leven* and *Magistrates of Perth supra*. In this case, there is a bounding description on the face of the deed. Without the other aspects of the dispositive clause, reference to the progress of titles and the application of extrinsic evidence, none of which can be considered when looking at a prescriptive right, the bounding description is contained in the plan. That is the end of the matter. Accordingly, even if this issue had been raised properly by way of a cross-appeal, it would be bound to fail.

**Appellant's title**

[141] It is of course not sufficient, for the appellant to succeed in this appeal, that it proves the respondents are not the owners of the disputed area. The appellant has sought declarator that it is the owner of the disputed area.

[142] The appellant has a registered title under Title Number ARG20467. The Keeper has excluded indemnity in terms of section 12(2) of the Land Registration (Scotland) Act 1979 in respect that the disputed subjects were subject to possession adverse to the appellant's entitlement. The appellant seeks declarator that the disputed subjects have not been subject to possession that is adverse to their entitlement. Such a declarator would entitle the Keeper to remove the exclusion of indemnity.

[143] The appellant claims its title flows from the disposition by Emma Houston as *executrix* of Baroness Trent in its favour dated 10 March 2014, and registered under Title Number ARG20467. The respondents claim that the disponer did not have title (to the extent of at least 80%) of the land purportedly conveyed.

[144] In 1934 Clark's Trustees conveyed the whole of the Ardnamurchan peninsula to Baron Trent of Nottingham. In 1953 Baron Trent conveyed to the Boots Pure Drug

Company Limited ("Boots") six tracts of land or properties with land, one of which is described as follows:

> "ARDSLIGNISH and GLENMORE FARMS, extending to Four thousand and nine acres or thereby, with the farm buildings, two houses and three cottages, and all other buildings and erections thereon, all as at present occupied by the said Boots Pure Drug Company Limited, and as shown coloured yellow and marked '2' on the said plan".

[145] There is no dispute that some of the disputed subjects are included in the area coloured yellow. However, a small area at the northwest top part of the disputed subjects is not coloured at all. Parties are agreed that that area represents just 20% of the disputed subjects. In 1957, the trustees and executors of the by then deceased Lord Trent conveyed to his widow, what senior counsel for the respondents described as, the rump of the Ardnamurchan peninsula, being the subjects contained in the 1934 disposition under exception of various tracts of land and properties sold subsequent to it. That included the remaining 20% of the disputed subjects which had not previously been transferred to Boots in 1953.

[146] The Boots 4,009 acres passed through various hands, finally resting in the hands of Grampian Properties Limited. Those acres included the 80% share of the disputed subjects coloured yellow in the 1953 disposition.

***Appellant's submissions***

[147] Even if the white area had been coloured yellow in the 1953 disposition, that would have made no difference to the appellant's title today. In 1992, Grampian Properties Ltd sold to Mr and Mrs Grisewood *inter alia* the following [Jt. App. 22 pdf179]:-

> "(IN THE FIRST PLACE) […] (SECOND) Ardslignish and Glenmore Farms extending to Four thousand and nine acres or thereby being the subjects disponed (SECOND) by and shown coloured yellow and marked '2' on the said plan annexed and signed as

> relative to the said Disposition" [by Baron Trent in favour of Boots] "BUT excepting always from the subjects (IN THE FIRST PLACE) […] (SECOND) hereby disponed the following subjects […] and (Four) the dominium directum as well as the dominium utile of the areas of ground together with the dwellinghouses known as Glenmore House and Glenmore Cottage and the Visitors Centre and Audio Visual Centre and others erected thereon (excluding the Deer Larder as aftermentioned) extending to Four hundred and sixty four acres and five decimal or one tenth parts of an acre or thereby being the subjects described in, disponed by and shown outlined in red on the plan annexed and executed as relative to the Disposition" [by Grampian Properties Limited to the defenders].

[148] The subjects sold to Mr and Mrs Grisewood therefore did not include the subjects disponed to the respondents by the 1992 feu disposition. For the reasons set out above, the subjects disponed to the respondents did not include the disputed subjects. However, the sale to the Grisewoods did include the 80% of the disputed subjects as were coloured yellow on the 1953 plan. When the Grisewoods sold their property to the appellant in 1996 therefore, the appellant obtained title to the disputed subjects so far as coloured yellow on the 1953 plan.

[149] In so far as the 20% of the disputed subjects not coloured yellow on the 1953 plan, they remained in the ownership of Lord Trent and were conveyed to Lady Trent in the estate rump title in 1957: [Jt. App. 15]. At §§11 and 27 in his sworn affidavit at no. 31 of process [Jt. App. 78 pdf969 & 975], Mr Black describes his seeking any writ granted by either Lord Trent or Lady Trent that might include the disputed subjects so far as not coloured yellow on the 1953 plan. None was found. Lady Trent's executor accepted that among the deceased estate's residual interests in land at Ardnamurchan it had title to the disputed subjects and she agreed to grant a disposition of them. The disposition and plan at [CB1, Jt. App. 1] clearly show the disputed subjects conveyed to the appellant. The later grant of confirmation and recording of the Notice of Title perfected the appellant's title by accretion:

and as a consequence the Keeper updated the Title Sheet for ARG20467 by removing the first exclusion of indemnity note seen on the original Land Certificate.

[150] Accordingly, between the disposition from the Grisewoods and the disposition from Emma Houston (as Lady Trent's executor), the appellant is the heritable proprietor of the disputed subjects.

***Respondent's submissions***

[151] The disputed subjects were conveyed to Boots in 1953 and not therefore included in the 1957 "rump" disposition. There had been an "error" in 1953 when the plan was being coloured. All the disputed subjects should now be taken as coloured yellow. Those subjects were transferred to the respondents in 1992.

***Discussion***

[152] The plan annexed to the 1953 disposition by Baron Trent to Boots excluded the northmost part of the disputed subjects, which are not coloured yellow (the 20% part). In 1957, the trustees and executors of the by then deceased Lord Trent conveyed to his widow, "the rump" of the Ardnamurchan peninsula. That included the remaining 20% of the disputed subjects which had not previously been transferred to Boots in 1953.

[153] By 1957 therefore, 80% of the disputed subjects was owned by Boots (4,009 acres – the yellow area) and 20% (the white area) was owned by Lady Trent.

[154] The 4,009 acres eventually were in the ownership of Grampian Properties Limited. In 1992 Grampian Properties Limited split the title and transferred an area to the respondents (shown within the red boundaries on the plan annexed to the disposition in their favour). We have found that the disposition in their favour did not include the 80%

area of the disputed subjects. The 80% area of the disputed subjects therefore remained in the ownership of Grampian Properties Limited. Later in 1992, Grampian Properties Limited transferred the balance of the 4,009 acres to Mr and Mrs Grisewood. At that point Mr and Mrs Grisewood became the owners of the 80% share of the disputed subjects.

[155] By disposition recorded GRS (Argyll) 31 December 1996, Mr and Mrs Grisewood transferred their interest to C. Rob Hammerstein (UK) Ltd. That company, through change of name, is the appellant. The appellant is therefore owner of the 80% area of the disputed subjects.

[156] By disposition by Emma Houston as *executrix* of Baroness Trent in favour of the appellant dated 10 March 2014, and registered under Title Number ARG20467, an area comprising the whole of the disputed subjects was transferred to the appellant. It is unclear to us why the disposition by Emma Houston to the appellant should show all of the disputed subjects (coloured blue) as being included in the transfer, as the appellant appeared to already own what was transferred to them by the Grisewoods. The appellant is therefore owner of the 20% area of the disputed subjects, and hence is owner of all of the disputed subjects.

[157] For completeness, we should mention that there was a further transfer of property by Emma Houston as *executrix* of Baroness Trent in favour of the appellant. That disposition, dated 10 March 2014 and registered GRS (Argyll) 2 April 2014, transferred the "rump estate", but excluded the disputed subjects shown in the other even dated disposition in favour of the appellant. That transfer does not appear to be relevant to the issue before us.

*Findings in fact*

[158] In light of the decision reached, I have to consider amendments to the sheriff's findings in fact. Senior counsel for each of the appellant and respondents have made proposed findings. I make the following amendments:

a) In finding in fact 2, delete "peninsular" and substitute "peninsula";

b) In finding in fact 4, delete "south-easterly" and substitute "south and south westerly";

c) In finding in fact 9, delete and substitute: "The scale of the said demonstrative plan is 4 inches to one mile.";

d) In finding in fact 14, (1) after "1953" add "at least part of" (2) add before "Glenmore" the words "Ardslignish and";

e) In finding in fact 15, (1) delete "south" and substitute "north" and (2) delete "Glenmore farm" and substitute "Ardslignish and Glenmore Farms";

f) In finding in fact 16, delete and substitute: "The 1953 Disposition conveyed approximately eighty per cent (80%) of the area of the disputed subjects to the Boots Pure Drug Company as part of the lands known as Ardslignish and Glenmore Farms.";

g) In finding in fact 17, delete the final sentence and substitute: "These subjects included approximately eighty per cent (80%) of the area of the disputed subjects, which area was part of the area coloured yellow on the said plan annexed to the 1953 Disposition";

h) In finding in fact 18, delete the final sentence and substitute: "These subjects included approximately eighty per cent (80%) of the area of the disputed subjects,

which area was part of the area coloured yellow on the said plan annexed to the 1953 Disposition";

i) In finding in fact 19, delete the final sentence and substitute: "These subjects included approximately eighty per cent (80%) of the area of the disputed subjects, which area was part of the area coloured yellow on the said plan annexed to the 1953 Disposition";

j) In finding in fact 20, delete the final sentence and substitute: "These subjects included approximately eighty per cent (80%) of the area of the disputed subjects, which area was part of the area coloured yellow on the said plan annexed to the 1953 Disposition";

k) In finding in fact 21, (1) in the first sentence, delete "properties" and substitute "Properties" and delete "comprising what was known as Glenmore Farm"; (2) delete the last sentence "This conveyance included the disputed subjects as part of Glenmore farm" (3) add at the end "The 1992 Disposition identified a number of buildings that were included within the subjects conveyed, such as the dwelling houses known as Glenmore House and Glenmore Cottage and the Visitor Centre and Audio Visual Centre. The Disposition also conveyed the parts, privileges and pertinents of the subjects otherwise conveyed thereby.";

l) In finding in fact 23, after the first sentence delete the remainder of finding 23 and substitute the following: "The original of the 1992 Disposition has been lost. An extract registered copy is lodged as 6/8/3 of process. The coloured A3 plan lodged within 5/6/39 and 5/4/21 of process was provided to the pursuer's solicitor in 1996 by solicitors acting on behalf of Mr and Mrs Grisewood when they sold their property in Ardnamurchan to the pursuer. The plan differs in various respects from the plan

annexed to the extract registered copy of the 1992 Disposition but the delineation in red of the disputed subjects appears to be the same as the delineation in black in the plan annexed to the extract registered copy Disposition.";

m) In finding in fact 24, delete and substitute: "On 13 March 1992 the sale by Grampian Properties Limited to the defenders was settled and ownership of the property conveyed therein passed to the defenders.";

n) In finding in fact 25, delete and substitute "From 13 March 1992 the defenders occupied the lands delineated in red on the plan relative to the 1992 Feu Disposition, and also the disputed subjects";

o) In finding in fact 26, (1) delete "Farm Woodland Premium" and substitute "Forestry Commission Woodland Grant; (2) delete "for their land";

p) In finding in fact 28, in the last sentence delete "their house at";

q) In finding in fact 29, add at the end "and those occupying the disputed subjects with the defenders' permission, such as their tenants at Otter Lodge under holiday lets."

r) In finding in fact 32, delete and substitute: "In 2017, the defenders registered their title as contained in the 1992 Disposition in the Land Register for Scotland under title ARG23707. Said registered title does not include the disputed subjects. The pursuer had sought to register title to the disputed subjects under title number ARG20467 in 2014. In 2017 the Keeper would not accept a further application that included the disputed subjects.";

s) In finding in fact 33, add at the end the following: "The said disposition by Emma Houston transferred to the pursuer title to the north most part of the disputed subjects, namely the approximately twenty per cent (20%) of the area of the disputed

subjects which was not coloured yellow on the said plan annexed to the 1953 Disposition. The Land Certificate contains a note in the Proprietorship Section in the following terms: 'In terms of section 12(2) of the Land Registration (Scotland) Act 1979 indemnity is excluded from the entitlement of the above named proprietors in respect that the subjects in the Title is subject to possession which is adverse to the said entitlement.'";

t) Delete findings in fact 10, 11, 22 and 34 and renumber remaining findings in fact accordingly;

u) In finding in fact and law 2, delete "does not create" and substitute the word "creates";

v) In finding in fact and law 3, delete and substitute: "The 1992 Feu Disposition is not a deed which is sufficient in respect of its terms to constitute in favour of the defenders a real right in the disputed subjects. It is not a habile title for the purpose of prescriptive possession in terms of section 1 of the Prescription and Limitation (Scotland) Act 1973 in respect of the disputed subjects.";

w) In finding in fact and law 4, delete and substitute: "Such possession as the defenders have had of the disputed subjects since 1992 is not founded on a deed containing a description habile to include the disputed subjects.";

x) In finding in fact and law 5, delete and substitute: "The defenders are not, and have not been, in adverse possession of the disputed subjects.";

y) In finding in fact and law 6, delete and substitute: "The pursuer is the heritable proprietor of the subjects shown in disposition by Emma Houston as executor of The Right Honourable Margaret Joyce, Baroness Trent of Nottingham, by

disposition in its favour dated 10 March 2014 no. 6/1/2 of process, and now registered in the Land Register of Scotland under Title Number ARG20467.";

z) In finding in fact and law 7, delete and substitute; "The Keeper of the Land Register of Scotland was not at first registration, and is not now, entitled to exclude indemnity in respect of adverse possession on the Title Sheet for Title Number ARG20467 in the Land Register of Scotland";

aa) In finding in fact and law 8, delete and substitute: "The Title Sheet in the Land Register of Scotland with the title number ARG20467 is not inaccurate within the meaning of section 65 of the Land Registration (Scotland) Act 2012 insofar as showing the pursuer as heritable proprietor of the disputed subjects.";

bb) Delete findings in fact and law 9 and 10.

***Interlocutor***

[159] For the foregoing reasons, I would allow the present appeal.

[160] At the appeal hearing, discussion took place about the benefit of assigning a by order hearing to address two anomalies arising from earlier interlocutors of this court and the precise wording of any final order. These arise from the way in which the appellant's second crave has been determined and its reference to the *a non domino* disposition which this court has declared to be invalid.

[161] At the by order hearing, senior counsel were agreed that there should be deleted from this Court's interlocutor dated 24 February 2020 the words from "and have no heritable interest in" to "insofar as said subjects comprise" inclusive. We are satisfied that such deletion addresses the two anomalies.

**SHERIFF APPEAL COURT**

**FTW-B92-18**

Sheriff Principal DCW Pyle
Appeal Sheriff F Tait
Appeal Sheriff D Hamilton

OPINION

of

APPEAL SHERIFF DEREK J. HAMILTON

in appeal by

ARDNAMURCHAN ESTATES LIMITED

Pursuer/Appellant

against

MICHAEL ROY MACGREGOR and KAREN JUDITH MACGREGOR

Defenders/Respondents

**Pursuer/Appellant: Mure KC; Frances E Sim Limited**
**Defenders/Respondents: McLean KC; Murchison Law**

1 December 2023

[162] I have had the benefit of reading the draft opinions of Sheriff Principal Pyle and Appeal Sheriff Tait. I am indebted to Sheriff Principal Pyle for his detailed analysis of the title history of the disputed subjects, and of counsel's submissions and of the relevant authorities.

[163] I agree with Sheriff Principal Pyle's analysis of the various authorities on when a title description might properly be considered as a bounding description, and that ultimately each case must depend upon its own facts and circumstances. I do not agree however that in the particular facts and circumstances in this case the Sheriff was entitled to admit extrinsic evidence to construe the 1992 deed.

[164] I agree with Appeal Sheriff Tait when she says that given the use of the expression "or thereby" in the acreage measurement, there is no inconsistency between the measurement provided in the deed and the area delineated in red on the plan. I too am satisfied that it is clear that the plan was intended to be the controlling element. Only the plan indicates boundaries and provides the location of the subjects. Use of "or thereby" when stating a measurement cannot exclude reference to such a plan, and it does not permit one to override the plan at a particular chosen point along a delineated, and in this case coastal, boundary.

[165] I am of the view that there has to be something which cannot be covered by the "or thereby" before one can look at extrinsic evidence. I agree with the Appellant that extrinsic evidence cannot be used to create an ambiguity where none appears on the face of the deed. I am satisfied that the Sheriff erred in admitting extrinsic evidence to construe the 1992 disposition.

[166] Even if extrinsic evidence were allowed, it would in the first instance to be to identify the intention of the parties at the time of execution of the deed. In this case, the evidence in the affidavits and at proof was quite clear. On the basis of legal advice, the sellers to the Respondents did not believe they owned the disputed area. They were told they did not. They were not therefore prepared to dispone it. Their intention was quite clear. The

Respondents knew that was their position, and knew the plan reflected their position. They elected to proceed.

[167] Whatever the intention of the parties had been during negotiations, (and we did not have their concluded contract), it is clear the intention of parties when drawing up this deed was (if nothing else) to exclude the disputed area. There has to be public confidence in the land registers. A purchaser cannot expect to be party to a deed which clearly excludes an area which the seller is not prepared to dispone, and then expect to be able to introduce extrinsic evidence effectively to amend the public record to which they had agreed.

[168] I need not comment on the arguments in respect of "Pertinents" and "Prescriptive Possession", as these have been adequately dealt with by both Sheriff Principal Pyle and Appeal Sheriff Tait, with whom I am in agreement.

[169] For the reasons above, and for the reasons expressed by Appeal Sheriff Tait, I would allow this appeal.