SHERIFF APPEAL COURT

[2020] SAC (Civ) 18
INV-A50/16
INV-A51/16

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF WILLIAM HOLLIGAN

in the cause

WALTER FINLAYSON AND CATHERINE FINLAYSON, residing together at Caladh. Coul Road, Contin, by Strathpeffer, Ross-shire, IV14 9ES, and ANDREW FINLAYSON, residing at Oran, Coul Road, Contin, Ross-shire, IV14 9ES and COLIN FINLAYSON, residing at Eden, Coul Road, Contin, Ross-shire, IV14 9ES

Pursuers and Respondents

against

GORDON MUNRO, residing at Smithy Croft, Contin, by Strathpeffer, Ross-shire, IV14 9ES

Defender and Appellant

Defender and Appellant: McLean QC; Murchison Law
Pursuers and Respondents: Walker QC; Harper McLeod

3 December 2020

Introduction

[1] This appeal concerns heritable property situated at Contin in the county of Ross. In conjoined actions the pursuers and respondents sought declarators that they have the sole and exclusive ownership of certain heritable subjects which lie immediately adjacent to heritable subjects belonging to the defender and appellant. In this Opinion we shall refer to

the parties as the pursuers and the defender. Craves for removing and interdict were also sought. For present purposes the substantive interlocutor of the sheriff is that of 9 January 2019 ("the January 2019 interlocutor") in which the sheriff granted decree of declarator in favour of the pursuers. He refused to grant the pursuers' crave for interdict and continued consideration of the pursuers' crave for decree of removing. The January 2019 interlocutor was issued after proof. The defender has appealed to this court.

[2] The first pursuers are husband and wife. The second pursuers are the sons of the first pursuers. The defender is a neighbour of the pursuers. In essence the dispute between the parties relates to ownership of adjoining pieces of land. Putting the matter broadly, the defender owns land lying on the corner of two roads: the first pursuers own lands to the south of his property (for present purposes, farm buildings and a house); the second pursuers own farm land to the east of his property. Resolution of this matter requires examination of the respective titles of the parties. All deeds are registered in the Register of Sasines and all of the deeds are registered in the register for the county of Ross and Cromarty (as all deeds are in the same county we will describe them as GRS only).

The pursuers' title

[3] (a) The starting point is a deed which precedes the ownership of the pursuers altogether. It is a disposition granted by Hugh Noble in favour of Major General John Combe recorded GRS 27 December 1954. The disposition relates to six discontiguous areas of land, one of which contains the land at Contin Mains ("the 1954 disposition"). The precise description of the subjects is not relevant. There is a plan annexed to the disposition.

(b) The pursuers' interest in the title begins with the disposition by Simon John Fraser in favour of the first named pursuer. The deed is recorded GRS 16 January 1996 ("the 1996 deed"). The relevant part of the dispositive clause reads as follows:

> "ALL and WHOLE that area or piece of ground in the Parish of Contin and County of Ross and Cromarty extending to Four hectares and Twenty-seven decimal or One Hundredth parts of an hectare or thereby lying generally on or towards the east of the A835 Garve to Muir of Ord road and generally on or towards the north of the A834 (T) Contin to Strathpeffer road which area or piece of ground forms the north-eastmost portion of those six discontiguous areas or pieces of ground being the subjects described in, disponed by and shown delineated in red and coloured pink on the plan thereof annexed and executed as relative to Disposition by Hugh Cameron Noble in favour of Major General John Frederick Boyce Combe"

Accordingly, the description has a superficial measurement (4.27 hectares) and a very limited description by reference to two roads. The plan is not described as either taxative or demonstrative. The subjects comprise one of the areas of ground contained within the 1954 disposition. The 1996 deed goes on to specify that the subjects acquired by the first named pursuer are under exception of five subjects which lay within the 1954 subjects. Of those five only two are relevant. They are described as follows: (first) disposition by Duncan Ross in favour of William Smith recorded GRS 20 February 1964 ("the 1964 deed"); (second) disposition by Royal Bank of Scotland, with consent, in favour of Roderick McLeod Munro (the defender's father) recorded 3 December 1965 ("the 1965 deed"). We refer to these in more detail in paragraph [4](a) and (b) below. Therefore, put generally, and it is not disputed, the first named pursuer acquired all of the subjects contained within one of the six subjects referred to within the 1954 disposition with the exception of the five subjects narrated in the 1996 deed, two of which came into the ownership of the defender's father either immediately on break off or at a later date.

(c) The first named pursuer sold his half interest in the subjects contained within the 1996 deed to the second named first pursuer, his wife, by disposition recorded GRS 26 April 2007

("the 2007 deed"). The 2007 deed has no plan attached. The subjects disponed are described by reference both to the 1954 disposition (less the five areas) and the 1996 deed in favour of the first pursuer.

(d) The first pursuers disponed part of their interest in the 1996 deed to the second pursuers by disposition dated GRS 1 April 2008. The disposition specifies a superficial measurement (3.807 hectares) but, other than a passing reference to the A835, contains no detailed description of the subjects. The first pursuers retained ownership of certain small pieces of land which are relevant to the present action.

The defender's title

[4] (a) The defender's father acquired title to the subjects, which became known as Smithy Croft by the 1965 deed referred to above. It is one of the five excepted subjects narrated in the 1996 deed. As the description of the 1965 deed is of significance it is necessary to set it out in detail:

> "ALL and WHOLE that plot or area of ground lying to the East of, but not adjacent to, the Public Road leading from Garve to Muir of Ord in the Parish of Contin and County of Ross and Cromarty extending to Six Hundred and Twenty-three decimal or one thousandth parts of an acre or thereby bounded and measuring as following videlicet: On or towards the North by the road, leading from the said public road, to Coul Mains along which it extends One Hundred and Ninety Feet or thereby; On or towards the East and South by other lands vested in us along which it extends Two Hundred and Seventy-five feet or thereby and Eighty feet or thereby respectively; and on or towards the West by land belonging to the said Roderick MacLeod Munro along which it extends Two Hundred and Thirty-four feet Six Inches or thereby; all as the said plot or area of ground is delineated in red and coloured pink on the plan annexed and subscribed as relative hereto"

Again, the plan is said to be neither demonstrative nor taxative.

(b) By the 1964 deed Duncan Ross disponed to William Smith subjects which were referred to before us as the Filling Station although when the Filling Station was actually built is less clear. It is necessary to set out the description of the subjects:

> "ALL and WHOLE that area or piece of ground extending to Two Hundred and Twenty-four decimal or one-thousandth parts of an acre or thereby… lying on the Eastern side of the public road leading from Contin to Garve in the Village and Parish of Contin and County of Ross and Cromarty, and bounded and measuring said area or piece of ground as follows, videlicet; On the West by the said public road leading from Contin to Garve along which it extends Two Hundred and Thirteen feet or thereby; On the North-West by the road leading from the said public road to Coul Mains along which it extends Fourteen feet Six inches or thereby; On the North-East and on the South by other land belonging to me along which it extends Two Hundred and Thirty-four feet Six inches and Sixty-three feet Six inches or thereby respectively; ---as the said area or piece of ground is delineated in red and coloured pink on the Plan thereof annexed and signed as relative hereto".

There is a plan, neither taxative nor demonstrative. Accordingly, the 1964 and 1965 deeds share a common border extending to two hundred and thirty four feet six inches.

(c) William Smith disponed his interest in the Filling Station to the defender's father by disposition recorded GRS 1 September 1965 ("the Smith 1965 deed"). There is no plan. The description of the subjects is brief and refers to the grant contained in the 1964 deed.

(d) In 1996 Roderick Munro sold his interest in the Filling Station subjects to Mr and Mrs Fraser and Alan Fraser. The disposition is recorded GRS 8 April 1996. The deed conveyed three parcels of land comprising: (1) all of the subjects contained in the 1964 deed; (2) a small part of the subjects contained in the 1965 deed; and (3) a very small triangular piece of land to the south of the subjects. The descriptions of the first two subjects refer to the 1964 and 1965 deeds. There is a plan. It is not described as taxative or demonstrative. The total area of ground extends to 0.28 hectares as opposed to 0.224 hectares in the 1964 deed. It shows what the parties thought comprised what was by then the Filling Station area.

(e) The final deed is a disposition by Roderick Munro in favour of the defender recorded GRS 17 June 2011. The description of the subjects is brief, setting out the superficial area and a brief description to the effect of "lying to the east of but not adjacent to the Public Road leading from Garve to Muir of Ord …". There is a plan annexed. It is not said to be taxative or demonstrative. Put broadly the subjects comprise Smithy Croft ("the 2011 deed").

[5] To summarise. In 1965, the defender's father acquired the subjects which later became known as the Filling Station and Smithy Croft. There is other undisputed evidence that at one time the defender's father owned and operated a garage across the road from these two properties. The Filling Station and Smithy Croft subjects lie on the corner of the A835 and the road at one time described as the road to Coul Mains (see for example the plan to the 1965 deed). Smithy Croft is the bigger of the two subjects. The house was built by the defender's father and was the home where he grew up. The Filling Station runs north to south; its western boundary is adjacent to the A835; the southern boundary is adjacent to Contin Mains, the first pursuers' subjects. Its eastern boundary runs alongside Smithy Croft. There was photographic evidence before the sheriff which showed an embankment providing a physical boundary between the Filling Station and Smithy Croft. Its northern boundary extends a very short distance along the Coul Mains Road. The western boundary of Smithy Croft is the eastern boundary of the Filling Station. Its northern boundary runs along the Coul Mains Road. Its eastern boundary runs adjacent to the field, generally speaking, belonging to the second pursuers. The southern boundary is adjacent to Contin Farm belonging to the first pursuers. So far as the defender is concerned the 1996 deed in favour of the first named pursuer, largely set out in the plan annexed thereto, was wrong and purported to dispone land which the first named pursuer did not own and which belonged to the defender, particularly at the southern end.

[6] In their craves the first pursuers seek declarator of ownership of two triangles of land shown etched in blue on the plan which is 5/5/21 of Process (page 75 of the appendix). One triangle lies to the north east of the Smithy Croft subjects, extending a distance from the Coul Road boundary to near the rear of the house at Smithy Croft. Another triangle lies to south of the Filling Station area. The second pursuers seek a declarator of ownership of one triangle of land shown hatched red on a plan 5/1/1 of Process (page 1 of the appendix). That triangle lies to the south eastern boundary at Smithy Croft. It would appear that, according to the defender, the area within the red triangle remains or remained within the executry of the defender's late father. Nothing turns on that. An examination of the 2011 title plan shows that it was not included in the disposition to him. In paragraph 6 of the joint minute the parties have agreed that, without prejudice to their rights and pleas, the first pursuers have ownership of the north most area of the two triangles shown on 5/5/21. In this opinion we will refer to the various triangles as the "disputed areas". It has to be said it would appear that the areas of land contained within the disputed areas are of modest dimensions. Much of the argument before the sheriff and before us concerned a detailed examination of the title position, particularly the 1964 and 1965 deeds and whether they did, or could, encompass the disputed areas.

The sheriff's decision

[7] In the proof, the pursuers led evidence from Mrs Finlayson, her son Andrew, and an expert witness, Caroline Cook. The defender gave evidence. He also called two experts, Gordon Crichton and George MacDonald. Most of the sheriff's judgement is taken up with a recitation of the evidence of the witnesses and an importation into the judgment, *ipsissima verba*, of the submissions on behalf of the parties (a practice we do not find at all helpful).

[8] The part of the judgment in which the sheriff sets out his reasoning is, in comparison, brief. There are passages in which the reasoning of the sheriff is not easy to follow. It has to be said that neither counsel expressed any enthusiasm for the judgment. One of the criticisms of the sheriff's judgement is the treatment of the evidence of the experts. It would appear that the three experts were tendered and accepted as such by parties although the issue of their particular expertise was not much explored before the sheriff. One major issue was whether the 1964 deed contained a bounding description. In concluding that it was the sheriff relied upon the evidence of Miss Cook. He did not decide the matter for himself. He also concluded that the 1965 deed was a bounding title. He held that, even if one accepted that the 1965 deed was wrong in some respects, the 1964 and 1965 deeds were not habile to cover the disputed areas and that as a matter of logic, the pursuers must therefore have ownership. The logic being that any subjects not excepted from the 1954 subjects must therefore belong to the first pursuers. Having reached that conclusion the sheriff considered that he did not have to take into account evidence of possession. He did make a brief and unfavourable reference to the evidence of car parking near the boundary lying between the southern part of Smithy Croft and the Filling Station and Contin Farm but that was all. Other than commenting favourably on the evidence of Miss Cook he made no findings as to the credibility and reliability of the witnesses.

Submissions for the defender and appellant

[9] Counsel for the defender lodged a detailed note of argument. We do not intend to set it out at length nor shall we record all of counsel's oral argument. In summary he said that the sheriff erred in law in:-

i. accepting the erroneous view of the pursuers' expert as to whether the parties had effective bounding titles when it was his task not that of the witness to do;

ii. holding that the titles in question were effective bounding titles;

iii. adopting uncritically one construction of the title position as advanced by the pursuers' expert, without applying his mind to the correct legal approach;

iv. ignoring evidence of possession as irrelevant when it was highly relevant to the questions he had to address on the correct legal approach.

Given his errors on matters of law or mixed fact and law and in his assessment of expert evidence, the sheriff had gone plainly wrong which allows this court to address matters of new. On the powers of an appeal court to interfere with the decision of a lower court counsel referred to *AW* v *Greater Glasgow Health Board* [2017] CSIH 58, paragraphs [38]-[58].

[10] The defender accepts that the pursuers' title comprises the 1996 deed less the exceptions but the 1964 deed and 1965 deed are very unclear as to what they comprise; when their descriptions are compared to the ground, they cannot be taken as containing effective bounding descriptions. That being so, the extent of the subjects must be defined by possession. Counsel set out at length, partly by reference to documents and partly by reference to the evidence of the defender himself, what he submitted was the relevant evidence relating to possession of the disputed areas and his title is habile to include them. They are therefore his.

[11] The court cannot assume that the pursuers' titles include the disputed areas. The onus is on the pursuers to prove title by way of a title habile to encompass the disputed areas and prescriptive possession of those areas. The pursuers have failed to do so. On the evidence of all three of the expert witnesses there were problems with the descriptions in the

1964 and 1965 deeds. The issues included: the 1964 plan showed an area which was never the shape of the area because the road was curved not straight, both at the western and the northern boundaries; the areas were inaccurate or measurement of distances were inaccurate; the measured shapes enclosed smaller areas than the area figures suggest. The descriptions do not fit with what is happening on the ground and with an ordnance survey map. There were difficulties with the accuracy of the north point which had a distorting effect on the measurements. Contrary to Miss Cook's conclusions, Mr Crichton and Mr MacDonald both concluded that there were ways in which the 1964 and 1965 deeds could be read so as to include most of, if not all, of the disputed areas.

[12] On the legal issues, these are sasine titles. It is therefore for the court to construe the deeds; it is not a matter for expert evidence although expert evidence may be of assistance. The question is one of the presumed intention of the parties (Halliday, *Conveyancing Law and Practice* (2nd edition, 1997) paragraph 33-13). Descriptions may be general or particular i.e. bounding. The particular description will attempt to define the extent of the land by reference to features on the ground, measurements or to a plan of some sort and sometimes all three, and by or reference to titles to other land around the land in question. Reference was made to *Royal and Sun Alliance v Wyman-Gordon Ltd* 2001 SLT 1305, paragraph [18]; and Rankine *The Law of Land-ownership in Scotland* (1909), pages 102 to 105. If the grantor has provided an element of the description to be regarded as taxative, such as measurements, then that indicates that the granter meant that evidence to be definitive – a "controlling" specification (*Gordon and Wortley*, Scottish Land Law, 3rd edition 2009 paragraph 3-08). None of the descriptions has been described in the deeds as taxative. In its absence, what the grantor meant will require all available elements to be construed together. As to the priority amongst the descriptors (including verbal descriptions) reference was made to the

authorities set out above and to Reid and Gretton, *Conveyancing 2017*, pages 178-180; *Veen v Keeper of the Registers of Scotland* 2017 GWD 17-276; and *Munro v The Keeper of the Registers of Scotland* 2017 GWD 17-277. Other than the roads, there are no markings on the relevant deeds, particularly in the case of the eastern boundary of Smithy Croft.

[13] As to the issue of prescription and a title being habile, reference was made to Reid, *The Law of Property in Scotland*, 1996 paragraph 674; and *Auld v Hay* (1870) 7R 663 at 668. By reference to Reid and Gretton *Conveyancing 2017* page 180, senior counsel submitted that there is no hierarchy of descriptors in matters of prescription (*Nisbet* v *Hogg* 1950 SLT 289). In relation to interpreting or construing the deed evidence as to the background may be taken into account; in a case of whether a title is habile to found prescription it is irrelevant (Reid and Gretton, *Conveyancing 2015* page 65). If a bounding description fails because a boundary is not sufficiently described, recourse may then be made to possession (*Royal and Sun Alliance*). Senior counsel referred to *Suttie* v *Baird* 1992 SLT 133 in detail as being a decision particularly relevant to this case. Applying *Suttie* to the present case, the defender's title is not well defined or capable or arithmetical calculation; it is a bounding description which has failed. Possession is a very important measure of the defender's title. Miss Cook took no account of possession. Her view of the extent of the pursuers' title was thus based on partial information. The sheriff should neither have relied upon it nor accepted it as his own. The sheriff failed to take into account evidence of possession. This court should do so and form its own view.

Submissions for the pursuers and respondents

[14] Counsel for the pursuers also lodged detailed written submissions, amplified by oral submissions which we summarise as follows.

[15] The issue raised by the pursuers was not to decide the correct position of the boundary between the subjects owned by the parties or the full extent of the subjects owned by the pursuers. All of the disputed areas fall within the north eastern most parcel of the subjects contained in the 1954 disposition. The pursuers own all of that land under exception of the five areas which have been sold off. The only split off title habile to include the disputed areas was the 1965 deed. The pursuers say it is not habile. If that position were accepted, given the disputed areas formed part of the 1954 disposition, the pursuers' title to the disputed areas would be established. The sheriff was not required to determine the extent of the pursuers' ownership, only that the disputed areas were within the ownership of the pursuers and that he did.

[16] The sheriff concluded that the 1964 and 1965 deeds were bounding titles. The 1965 deed was a bounding title because it had a common boundary with the 1964 deed. If it was not a bounding title, the sheriff concluded that the 1965 deed was not habile to include the disputed areas because it is not capable of a reasonable interpretation which would include the disputed areas. These were conclusions which the sheriff was entitled to reach and were consistent with the authorities to which he was referred.

[17] A verbal description is generally the controlling descriptor (*Royal and Sun Alliance* and Gordon and Wortley). In following that approach the sheriff did not err.

[18] The 1964 deed has a clear verbal description, as does the 1965 deed. By having two boundaries (north and west) which can be plotted, the remaining boundaries can be plotted by triangulation. Using the verbal descriptors, Miss Cook and Mr Crichton had plotted the 1964 deed. When Mr Crichton came to plot the 1965 deed it did not include any part of the disputed areas. The sheriff identified a controlling descriptor and was not in error in doing so. The plans are the source of the errors and they should be ignored.

[19] The defender's position was that if the 1964 and 1965 deeds are ambiguous the action should fail. That supposed that the alternative explanation was reasonable. Alternative explanations must have some basis in the evidence; the sheriff found otherwise. He did not err. In particular the defender argued: (a) there was a gap between the 1964 and 1965 deeds; (b) that the western and northern boundaries could not be plotted by reference to the public roads notwithstanding the clear description in that regard; (c) there was a legal relevance to the depiction of the north point on the plan on the 1964 deeds. The defender failed in these arguments. Mr Crichton accepted that some of the explanations he proffered for the inconsistencies were speculative. As the pursuers accepted, it is generally accepted that where there is a reference to a public road as a boundary, the boundary would be to the *medium filum* of the road (Reid and Gretton *Conveyancing* paragraph 12-17). If that were the case it would move the western boundary and the subjects further west.

[20] The sheriff did not err in his consideration of *Suttie* v *Baird* and *Cosh* v *Potts* 1950 SLT (Sh Ct) 14. The pursuers' title is not a split off title but the transfer of the entirety of the part of the subjects disponed by the 1954 disposition, subject to exclusions. In the defender's submission, the relevance of the split off title relates only to determining if the 1965 title was habile to include the areas in dispute. In the present case if the defender does not own the disputed areas the pursuers do. *Suttie* and *Cosh* involved neighbouring split off titles. Here the Munro title is a split off from the Finlayson title. There is no need to determine the precise location of the boundary. The title of the defender is not habile to include the disputed areas. The sheriff rejected the alternative explanations given by the defender of how the 1964 and 1965 titles could be interpreted to include the disputed areas and he was entitled to do so.

[21] In relation to possession, given the sheriff's conclusions as to the 1965 deed the defender's averments and evidence of possession were irrelevant. The sheriff did not find any evidence that the area referred to for parking was within the disputed areas. The evidence as to possession was imprecise. That covered the southern area; the defender offered no evidence as to possession of the eastern disputed area.

[22] The sheriff did not simply adopt the erroneous view of Miss Cook. He accepted her evidence in preference to the alternative and contradictory evidence of the two expert witnesses for the defender. Miss Cook's evidence assisted the sheriff in reaching his conclusion.

[23] In relation to the law, reference was made to *Drumalbyn Development Trust* v *Page* 1987 SC 128; Reid and Gretton, *Conveyancing 2017* pages 177 to 180 and the authorities reviewed therein; *Royal and Sun Alliance* and *Suttie*. In short, a verbal description prevails over other descriptors; from the verbal description the boundaries could be determined. Whatever the problems with the plans the verbal descriptions in the 1964 and 1965 deeds are clear. There was no direct evidence of the farmer possessing the triangle of land. The defender was aged 9 when this fence was said to have been moved. The sheriff made findings based upon the evidence. Having regard to the principles set out in *AW* v *Greater Glasgow Health Board* this court should not interfere with his conclusions.

[24] In his oral submission senior counsel submitted that the 1964 and 1965 deeds were bounding descriptions and were clear. The 1964 deed follows the road. There is no gap between the 1964 and 1965 deed. There was a common boundary between the 1964 and 1965 deed. That said, Mr Crichton accepted that meant that the defender could not have title to the disputed areas. It followed the possession was irrelevant but even if it was it was insufficient.

Reply by the defender and appellant

[25] The real issue is whether the 1964 and 1965 deeds are bounding titles. The surveyors did not agree as to how to plot the titles and there was more than one version. Taking the dimensions is not enough. Furthermore there was considerable evidence of possession. By reference to the pleadings ownership was the issue between the parties. The authorities referred to dealt with boundaries. The issue did involve a split off. The issue of the *medium filum* was irrelevant; no one proceeded upon that basis. As to the authorities, *Suttie* was particularly important. In the present case the court had to construe the whole document. The 1964 title was habile to include the disputed areas. The "gap" theory was devised by Mr MacDonald to explain what had gone wrong; it was not suggested that there actually was a gap in the titles between the 1964 and the 1965 subjects. The 1996 deed shows what the parties thought they owned; the western boundary is not in a straight line and the location plan shows the fence line. The sheriff was in error in saying that on no reasonable construction of the deeds could include the various triangles referred to. Senior counsel referred to various plans prepared by the surveyors as each showing a plan habile to include the disputed areas. All of the surveyors accepted that there was a problem with the 1964 and 1965 deeds. The defender's experts were trying to come up with explanations as to why there was a problem, some of which were more persuasive than others.

[26] As to possession there was sufficient evidence. In relation to the southern end of the subjects it was very small. It was unrealistic to expect a lot of evidence as to its use.

Decision

[27] It is appropriate at the outset to recall the function of this court when reviewing the sheriff's decision. We were referred to lengthy passages in *AW* v *Greater Glasgow Health*

Board. The Lord Justice Clerk set out four categories of a first instance decision which may come before an appellate court (paragraph [39]). Briefly, the four categories of decisions are: (1) decisions as to credibility and reliability and the primary facts; (2) decisions on inferences to be drawn from primary facts; (3) decisions on the application of the law to primary facts (mixed questions of fact and law); (4) decisions on questions of law. For present purposes it is sufficient for us to say this is not a case which falls within the first category. It did not turn on the credibility and reliability of the witnesses. With the exception of Miss Cook, the sheriff made no comment on the credibility and reliability of the witnesses. The only disputed matters of fact related to possession on which, in any event, by reason of dates, the pursuers' witnesses to fact would have very limited information. The defender's father took occupation in 1965; the pursuers did not arrive until 1996. This was not a case in which there was an advantage enjoyed by the trial judge through having seen the witnesses. One of the difficulties in this case is that, despite having heard the evidence as to possession, with one small exception, the sheriff has not dealt with it. He simply made a finding in fact ([36]) that no part of the disputed areas have been possessed by the defender and his father. So far as the expert evidence is concerned, as the Lord Justice Clerk said in *AW*, expert evidence is not evidence of primary fact and an appellate court is entitled to come to a contrary view (see paragraph [55]). Most importantly, the evidence in this case came primarily from the deeds as to which there is no dispute. It follows that it is open to this court to take a different view of the evidence if so advised. In circumstances in which the sheriff has made no findings at all it is open to this court to review the evidence and to make its own findings. Most of what the sheriff decided was either a question of law or a mixed question of fact and law. If the sheriff has erred in law this court can interfere (see paragraph [52] of *AW* above).

[28] The parties do not agree as to the precise nature of the dispute which falls to be resolved. The pursuers says that the matter is limited to ownership of the disputed areas. The defender says this is a boundary dispute and that resolution requires examination of the titles of the respective parties. We agree that, insofar as the pleadings go, the dispute is one of what land was owned by the respective parties; that is made clear in the opening sentences of articles 4 and answers 4 of the record. In our opinion the matter is a boundary dispute. In the course of his submission, senior counsel for the appellant made the point that, on the face of it, the 1996 disposition in favour of the first named pursuer was a "land grab" and that the boundary with Smithy Croft to the south east corner is shown to follow the line of a fence. It appears to be inconsistent with the boundary line shown in the 1965 deed. We say this as it emphasises that the dispute cannot be seen as relating solely to the disputed areas. The end result may be limited to the disputed areas but in order to reach that destination it is necessary to examine the relevant deeds.

[29] Beginning with his father, the defender's family have lived and worked at Smithy Croft and the environs since 1965. The first pursuers did not take title until 1996. It is common ground that both parties derive title from the 1954 disposition. Reduced to its essentials the dispute concerns the eastern and south eastern boundaries of the defender's property at Smithy Croft in as much as it adjoins the corresponding boundary of the first and second pursuers at Contin Mains and the adjoining field respectively. It is necessary to examine the 1965 deed. That is the deed by which the defender's father first acquired what became Smithy Croft. One cannot look at the 1965 deed without also considering the 1964 deed. The two are linked in that they share a common boundary and the extent of one affects the extent of the other. In *Royal and Sun Alliance* Lord Eassie held that it is competent to create a bounding title by reference to the title of a neighbouring property where that title

contains such a bounding description (paragraph [24]). However, merely defining the boundary of one property by reference to another is not sufficient (paragraph [21] citing Lord Salvesen in *Troup* v *Aberdeen Heritable Securities and Investment Company Limited* 1916 SC 918 at 927). If one applies that principle here then it would follow that the western boundary of the 1965 deed is in itself not a good bounding title because the boundaries are defined by reference to each other. However, although it may be pertinent, we did not understand the defender to advance this particular point and, in any event, there may be an answer. The 1964 and 1965 deeds both constitute exceptions (A and C in the 1996 deed) to the amplitude of that part of the 1954 subjects. The 1996 deed in favour of the first named pursuer conveyed to him his interest in Contin Mains. We accept that, given the 1954 and 1996 deeds, any land contained within the piece of land sold to the first named pursuer in the 1996 deed, not excepted therefrom in the five deeds referred to, must belong to the pursuer. However, it begs the question as to the extent of the 1964 and 1965 subjects and where their boundaries were set.

[30] The starting point in answering that question is to examine the relevant dispositive clauses narrated above. The legal position as to dispositive clauses is clear. A description may be either general or particular, the latter being referred to as a bounding description. A particular description may be done (a) verbally or (b) purely by a plan or (c) by both (Gretton and Reid *Conveyancing*, 5th edition paragraph 12-20). The description may include the area, particular measurements or reference to a physical boundary such as a wall or a road. The description usually, as here, contains the words "or thereby" acknowledging the difficulty in securing absolute accuracy. As we have said, a bounding title might be created by express reference to a neighbouring property where that title contains a bounding description. In our opinion both the 1964 and 1965 deeds purport to contain bounding

descriptions. Both have superficial area measurements, both contain measurements for all boundaries and both have plans. In the 1965 deed the boundary between the two properties is shown as comprising land belonging to the defender. In neither deed (or for that matter in any of the relevant deeds) is the plan described as taxative or demonstrative. As the cases of *Royal and Sun Alliance* and *Suttie* show, having a bounding title is not the end of the matter. The description must be stated with sufficient precision (*Suttie* page 136E; *Royal and Sun Alliance* paragraph [23]). If it is not then, as a bounding description, it fails. In *Cosh* v *Potts*, in a pithy observation, the sheriff put the question as being whether, at the time of the grant, a person standing on the ground with the document in his hands would be able to identify the boundary (page 15). If a bounding description is suitably precise proof of possession is otiose for possession cannot go beyond extent of the boundary; if not, evidence will be admissible if not actually required (Rankine, page 192).

[31] *Suttie* is relevant to the issues before us. The case concerned residential accommodation on a housing estate. The dispute concerned ownership of a strip of land between two properties. The pursuers raised an action of declarator claiming ownership of the strip in question. The pursuers' case was based upon a habile title with possession for the prescriptive period: the defence was based upon a bounding title, therefore excluding evidence of possession. The issue concerned the western boundary of the subjects. There was a description involving four elements including a fence, the wall of a garage never built and a boundary stated by reference to an adjoining property. The court held that only one of these elements was sufficiently precise. It analysed the description in detail. One of the descriptors concerned a wall and whether the line of the wall was straight or curved. One of the objections of the defender to the pursuers' action was that, if the pursuers were correct, then it would distort the shape of the plan in order to allow inclusion of the strip of land.

The court concluded that, notwithstanding the distortion, the disposition could accommodate the strip of land. As a consequence, in the words of the Lord President, "possession was the best guide" (page 137H). The pursuers led evidence as to possession and succeeded. In *Royal and Sun Alliance* Lord Eassie followed *Suttie* in holding that a bounding description may not be sufficiently precise to prevent recourse to possession as a determinant (paragraph [20]).

[32] We were referred to several text books as to the approach to inconsistencies in elements of a description, principally to Halliday paragraph 33-13 and Gordon and Wortley at paragraph 3-08. In the event of a disputed inconsistency, Halliday describes the function of the court as ascertaining the intention of the parties to the deed and that it is competent to admit both evidence as to possession and circumstances surrounding the transaction. The authors go on to say that "absolute rules cannot be formulated" but, from decisions of the courts, certain "broad presumptions" may be deduced. Having considered the presumptions set out, for reasons which will become apparent, we do not think that it is necessary on the facts of this case to record them. It is also not clear to us exactly what is meant by a presumption in this context. Gordon and Wortley describe the matter of resolution of any inconsistencies as being a matter of construction as to which of the specifications is meant to be the controlling one. They go on to state "two rules" one of which is that "in general a verbal description prevails unless so drawn as to be subordinate to something else such as a plan" (the other rule is not relevant). The authors say that, apart from these rules, it is not possible to state any definite rules to assist in the construction of a deed. Matters are more complicated if one considers whether one is looking at the conduct of the original parties to a deed or those presently in right of a deed.

[33] Senior counsel for the appellant was correct when he submitted that all of the expert witnesses had difficulties with the 1964 and 1965 deed plans. When they came to overlay it on to ordnance survey data the deed plan was not a good match. Miss Cook concluded in her report that "there are … issues with the measurements of the southern and eastern boundaries". If the measurements in the deed are adhered to the area of the site is 0.5568 acres as opposed to 0.623 acres. She concluded that was "not the intention of the deed". The opinions of Mr Crichton and Mr MacDonald also cast doubt on the accuracy of the deeds (including the plans). When attempting a title comparison Mr Crichton concluded that with both the 1964 and 1965 deeds it was "not possible to create a plan if both areas and dimensions are correct". A title comparison by area and title comparison by shape led to similar problems: "there is an error somewhere within the process of drawing up these titles". Mr MacDonald did not lodge a report but his evidence was recorded. Mr Crichton and Mr MacDonald both offered explanations for why the errors may have arisen, some of which they accepted amounted to speculation. It is not a criticism of the experts to say that they were speculating: they were doing their best to assist the court in giving an explanation as to how the problem may have come about.

[34] In resolving the matter of inconsistency we cannot say we are greatly assisted by the sheriff's judgment. His reasoning is not easy to follow. As a matter of construction or presumed intention we have difficulty in seeing how, looking at the verbal description of the plans attached to the 1964 and 1965 plans, one can resolve conclusively the boundaries to the east and the south and hence resolve ownership of the disputed areas. The deeds purport to contain bounding descriptions but all of the experts agreed that the descriptions are not satisfactory, they do not accord with the ordnance survey mapping and do not appear to accord with possession. Various reasons were given for the inconsistencies and indeed

various explanations were given. We do not consider that, on the facts of this case, resort to presumptions or rules as to the primacy of descriptors is helpful in resolving this matter. The evidence is that there was something wrong with the dispositive provisions of the 1964 and 1965 deeds, leading to uncertainty as to the extent of the relative subjects. If a bounding description lacks sufficient precision then, paraphrasing the Lord President in *Suttie* (page 137H), possession is the best guide. The difficulty in this case is whether evidence of possession is relevant where, as the pursuers say, however adjusted, the titles do not extend to the disputed areas. The sheriff appears to have concluded that the 1964 and 1965 deeds were bounding titles. He appears to have accepted that the 1964 title is a bounding one "from the evidence of Miss Cook". Whether a title is a bounding title is a matter of law (in effect construction of the deed) and was a matter for the sheriff and not for the witness. Whether the deed is sufficiently precise is a mixed question of fact and law; it was a matter for the sheriff. The sheriff accepted that "in general terms… a high degree of precision might be required" but that applied "only… to the starting point of the conveyancing description". It is not clear what he meant by that. In our opinion the authorities are clear; a valid bounding description does require to be precise as it is defining a boundary. For the reasons given above we are not persuaded that there was the necessary degree of precision in the deeds. The inaccuracies of the 1964 and 1965 deeds affect the pursuers' ownership and are relevant to the extent of their boundaries. Either a title contains a valid bounding description or it does not and if it does not then evidence of possession is both admissible and appropriate. Lastly on this point, whether the line of a boundary which abuts a road is the *medium filum* does not seem to us to be relevant in this case. Accordingly, on the issue of a bounding title we disagree with the sheriff.

[35] In relation to prescription, section 1 of the Prescription and Limitation (Scotland) Act 1973 provides:-

> "1(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;…
>
> then as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge".

[36] The defender offers to prove a habile title – with the requisite period of possession. The sheriff held that there was no habile title. When one examines the authorities to which we were referred the formulae for determining what constitutes a habile title differ. The classic formulation is still regarded as being that of Lord Justice Clerk Moncrieff in *Auld* in which he described the foundation writ as being "consistent with and susceptible of a construction which would embrace such a conveyance"(page 668). In *Suttie* (at page 136B and 137F) the Lord President described a habile title as "whether to the extent possessed the title is on a reasonable construction capable of accommodating it". Although later, at page 137G, he asked whether the pursuers' title was "incapable of accommodating it". Reid and Gretton (*Conveyancing 2017*at page 180) put the matter thus: "whether, on *any possible* interpretation of the words used, the words can be read as including the targeted area". Although direct questions as to the foundation writ may be possible, it is not possible to go back in time beyond that as it would defeat the purpose of the exercise; prescription is based upon a foundation writ, not what went before it. Another way to look at the matters is set out in the opinion of Lord Gifford in *Auld* where his Lordship observed that if sasine and possession are inconsistent and irreconcilable, then to that extent, possession cannot be held

to be in virtue of the sasine and thus the prescription legislation does not apply (at page 680).

[37] The sheriff held that the 1965 deed was not habile to include any areas to the south of the 2012 fence (being the southern end of Smithy Croft) and therefore could not be used to found prescriptive possession of any of the disputed areas. He also found that "the western boundary of the 1965 disposition is still shared with the 1964 Disposition and is not habile to include any of the land in dispute". The sheriff's reasoning on these points is not clear. It seems to us that on any view the evidence of the disputed areas possession by the defender and his father could only have been attributable to the 1964 and 1965 deeds. No other foundation is apparent. We appreciate the force of the pursuers' argument that several of the hypothesis proffered by the defender's experts as to inclusion of the disputed areas amounted to speculation but there were several scenarios put forward in support of the extent of the title (see para [25] above). Nonetheless, however one formulates the test as to a title being habile, it might be said that the matter is one of degree. If a habile title has to match exactly the extent of possession there would be no need for the rule – there will inevitably be a degree of discontinuity between the deed and possession. In *Suttie o*ne of the major objections of the defenders to the habile nature of the deed was the distortion to the plan which the pursuers' argument entailed (page 137C). Nonetheless the court found in the pursuers' favour. Although we accept the matter is not free from difficulty, in relation to these small pieces of land, in our opinion the 1965 deed is a habile title.

[38] On the issue of prescription, as we have said, one of the difficulties in this case is the paucity of findings and analysis as to possession. The sheriff has recorded the evidence of the witnesses and the submissions in detail but said very little, if anything, as to his

conclusions. Given our conclusions so far it is necessary for us to consider the matter for ourselves.

[39] The evidence as to possession can be divided into two elements: the eastern triangle shown hatched in red on 5/1/1 and the southern triangle shown hatched blue on 5/5/21. The defender's evidence was all that was bounded blue and also hatched pink on a specific plan belonged to him, either directly or as executor of his late father's estate . Although helpful in understanding his position it is largely a matter of assertion.

[40] In relation to possession of the eastern triangle, the evidence on that issue was sparse. In essence, the defender said his father possessed the area himself from 1965 to 1967. It was fenced and within the area he grew raspberries. In 1967 the farmer occupying the adjoining field asked the defender's father to move the boundary fence in order to make the boundary field easier to plough. The defender's father agreed and so it remained and was carried on with the farmer's successor until 2015 at which point the defender adjusted the fence line to accord with his understanding of the title position so as to include the area hatched in red. In essence that is the sum total of the evidence: there is no documentary evidence nor was there any other evidence from witnesses (including the farmer's family) to support the defender's evidence on this issue. There is nothing in the topography of the land which might suggest an obvious boundary along the line suggested. Overall, it seems to us that there is insufficient evidence of the necessary quality to support the defender's case on this point.

[41] The issue to the southern boundary of Smithy Croft is more difficult. There is a significant volume of evidence, both by way of ordnance survey maps and photographs taken over a number of decades, together with the evidence of the defender, in relation to this matter. To summarise some of the more salient features, it seems to us, looking at the

evidence in the round, that there was a considerable degree of fluidity as to the activities conducted on the land separating the relevant properties. The defender's father owned and operated a garage from premises across the road until they burned down in 1992. The garage generated traffic. There was a filling station constructed in front of Smithy Croft. An embankment separated the two properties. To the south there was a ramp. The ramp was shown on the ordnance survey map 1967. The 1996 disposition purports to cut through the ramp area. There is ample evidence in the photographs over the years showing cars being parked in the area generally. The defender's evidence as to the car parking was (to a certain extent) supported by Andrew Finlayson when he acknowledged the use for parking. The car parking included an overspill from the defender's garage and cars relating to the business of the defender's father. Photographic evidence showed occupation by the defender stretching to a large tree near a corrugated shed well to the south. The defender gave evidence as to the existence of a vegetable garden to the south of Smithy Croft which was surrounded by a rabbit proof fence. There was also a septic tank to which access was taken for it to be emptied. The defender's father planted trees which were removed by the pursuers in 2013. These trees were planted in the south eastern corner of the Smithy Croft land. There was also an oil tank. As to fences, there was a measure of agreement that the pursuers erected a fence in 2011 to demarcate what they considered to be the boundaries and did so without reference to the defender. The defender erected a fence in 2015 for a similar purpose particularly in relation to the eastern triangle. The defender gave evidence as to a fence running east to west at the southern end of Smithy Croft. Reference was made to various photographs. We have to say we have found the evidence as to the precise line of this fence to be unsatisfactory and find ourselves unable to reach a conclusion as to the line of any such fence. We are satisfied that there was a fence at some point but not as to its line.

All of this evidence taken together discloses that there was possession exercised by the defender and his father on the southern disputed area, being the southernmost part of the subjects. That is sufficient to defeat the pursuers' claim thereto, whether it be upon the basis of evidence of possession following a failed bounding title or evidence of possession based upon a habile title. We appreciate normally these two exercises should be kept separate but on the facts of this particular case it makes little practical difference.

[42] It follows that in the action involving the first pursuers we shall allow the appeal but in the case involving the second pursuers we shall refuse the appeal. In order to give effect to this conclusion it is necessary for us to amend the findings in fact and findings in fact and law. We shall also take the opportunity to correct some of the infelicities in the existing findings to which senior counsel for the appellant has helpfully suggested amendments. We have endeavoured to adjust the findings so as to align with our conclusions. There were aspects of the proposed findings which extended further than we felt was appropriate on the state of the evidence as we understood it. We shall reserve the question of expenses meantime.

Findings in fact

1. Finding in Fact 1, line 3: delete "residing at Oron" and substitute "residing at Oran. These pursuers are referred to respectively to as "WF", "CAF", "AF" and "COF".
2. Finding in Fact 2, line 1: delete "thereafter" and substitute "hereafter".
3. Finding in Fact 3, line 2: delete "Ross and Cromarty on 16 January 1996." and substitute "of Ross and Cromarty on 16 January 1996".
4. Finding in Fact 3, line 3: delete "(thereafter referred to as "WF")".
5. Finding in Fact 4, line 4: insert after "Major" the word "General".

6. Finding in Fact 5, line 3: insert after "any land" the words "in the material area".
7. Finding in Fact 6, line 2: delete "Duncan Ross" and substitute "William Smith".
8. Finding in Fact 6, line 4: delete "RM" and substitute "Roderick Munro ("RM")".
9. Finding in Fact 6, line 6: delete "5/117" and substitute "5/1/7".
10. Finding in Fact 7, line 2: delete "20 February 1964;".
11. Finding in Fact 7, line 2, in "21 December 1966", delete "December" and substitute "November".
12. Finding in Fact 10, line 1: delete "April 1996 and produced at 5/11/1" and substitute "April 1996 and produced at 5/1/11".
13. Finding in Fact 10, line 3: delete "November" and substitute "February".
14. Finding in Fact 15, line 1: delete "Disponed" and substitute "Disposition disponed".
15. Finding in Fact 15, line 2: add after "1965 Disposition" the following: ", under exception of such parts of that title as extended into the field to the east of those subjects. These excepted parts were subsequently acquired by GM by way of conveyance from RM's executry to GM."
16. In Finding in Fact 16 after "2011" insert "disposition" ; delete the word "the" following; and insert after the word "land" insert "partly".
17. Finding in Fact 17, line 2: delete "28" and substitute "24".
18. Finding in Fact 18, line 2: delete "Smithy Croft on its eastern side and Contin Mains on its western side" and substitute "garden ground of Smithy Croft to the west from the open field to the east".
19. Finding in Fact 18, line 3: delete "starling" and substitute "starting".
20. Finding in Fact 20, line 1: delete "is" where it second appears and substitute "was in 2012"

21. Delete Finding in Fact 25.

22. In Finding in Fact 26, line 1: delete "2Q15" and substitute "2015".

23. In Finding in Fact 27, line 1: delete "plan" and substitute "plans".

24. In Finding in Fact 27, line 2, delete "Dispositions" and substitute "Disposition".

25. In Finding in Fact 28, line 2, delete "Disposition" and substitute "Dispositions".

26. Delete Finding in Fact 29.

27. Delete Finding in Fact 32.

28. Delete Finding in Fact 36.

29. Delete Finding in Fact 38 and substitute therefor: "GM continues to occupy part of the areas in dispute in this action without right or title.

30. In Finding in Fact 39 add the word "partly" after the word "has".

31. In Finding in Fact 40 delete "declaratory" and substitute "declarator".

Additional findings in fact:

1. The said north east most portion of the six discontiguous areas of ground disponed by the said 1954 Disposition did not bear to include any part of the roads running along the western and north-western sides thereof.

2. The boundaries of the areas of ground disponed by the 20 February 1964 and 3 December 1965 dispositions cannot be easily identified. Errors have been made in preparing the relative deed plans.

3. In the 20 February 1964 Disposition, the purportedly straight line measurements along the A832 and Coul Road cannot be definitively plotted against the actual curved lines of the roads; the junction point between the purportedly straight western and northern boundaries cannot be definitively identified on the curve of the road; the area given does not

match the dimensions given; the shape shown on the plan does not marry up with bounding details found on the ground.

4. In the 3 December 1965 Disposition, the western starting point along the Coul Road for the northern boundary and the distance of the western boundary from the A832 public road cannot be definitively fixed, given the lack of precision in the 20 February 1964 Disposition; there were no fixed points that allow one to identify the eastern and southern boundaries on the ground; the area given does not match the boundary dimensions; and there is no information given to allow one to fix the internal angles at any of the four corners of the quadrilateral shape narrated in the dispositive clause and shown on the plan.

5. The true extent of the subjects conveyed by said Dispositions of 20 February 1964 and 3 December 1965 cannot be plotted with any certainty or precision on the basis of the conveyancing descriptions provided. Multiple attempts to do so by surveying and architectural experts have produced multiple possible alternative understandings.

6. The said Disposition of 3 December 1965 is reasonably capable of being construed so as to include the two areas of land contained to the north and west of the said fence erected by GM in 2015, as shown hatched in blue at the foot of the plan 5/5/21 of Process and as shown hatched in red on the plan 5/1/1 of Process. The land contained to the north and west of said fence erected by GM in 2015, as shown hatched in blue at the foot of the plan 5/5/21 of Process, was possessed (along with land further to the south) by RM and by GM as his successor in title as proprietor of Smithy Croft openly, peaceably and without judicial interruption from 1965 until 2010 or 2011.

7. The land contained to the north and west of said fence erected by GM in 2015, as shown hatched in blue at the foot of the plan 5/5/21 of Process, was possessed (along with

land further to the south) by RM and by GM as his successor in title as proprietor of Smithy Croft openly, peaceably and without judicial interruption from 1965 until 2010 or 2011.

8. The erection of said fence by WF in 2010 or 2011 blocked off said land from Smithy Croft for the first time since 1965.

Findings in Fact and Law:

Delete the findings in Fact and Law in their entirety and substitute the following:-

1. The said Dispositions of 20 February 1964 and 3 December 1965 are ineffective bounding titles as a result of the lack of the requisite precision in their conveyancing descriptions of the land conveyed thereby. They therefore fall to be construed with reference to the possession enjoyed by the relative heritable proprietors of those subjects subsequent to the recording of said Dispositions.

2. The area of ground to the north and west of the fence erected by GM in 2015, shown hatched in blue at the foot of the said plan 5/5/21 of Process, having been possessed by RM as the owner of Smithy Croft directly from 1965 onwards, the 3 December 1965 Disposition falls to be construed by reference to that possession as disponing the area of ground to RM.

3. GM now holds RM's title to the area of ground.

4. The area of ground accordingly falls within the title held by GM and outwith the titles held by the pursuers. GM has sole right, title and interest therein and thereto and the pursuers have no title to it.

5. In any event, the title to Smithy Croft conform to the Disposition of 3 December 1965 being habile to include said area of ground and said area having been so possessed by GM and his predecessor in title (RM) as heritable proprietors of Smithy Croft for a continuous period of more than ten years openly, peaceably and without any judicial interruption

between 1965 and 2010/2011, GM's title thereto is exempt from challenge in terms of the Prescription and Limitation (Scotland) Act 1973, Section 1(1).

6. WF, CAF, AF and COF have failed to prove title to that area of ground.

7. WF, CAF, AF and COF are not entitled to any of the orders they seek in these conjoined actions in respect of the said area of ground.