SHERIFF APPEAL COURT

[2022] SAC (Civ) 20
INV-A103-18

Sheriff Principal M W Lewis
Sheriff Principal N A Ross
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by Sheriff Principal N A Ross

in appeal by

MARGARET DOUGHERTY

Pursuer and Appellant

against

LINDA TAYLOR

Defender and Respondent

Pursuer and Appellant: Logan, advocate; The MacKenzie Law Practice
Defender and Respondent: Thomson, solicitor; Harper MacLeod LLP

29 June 2022

[1] The parties are adjoining neighbours of houses with long rear gardens. This dispute is about where the boundary between the gardens is situated. The area in dispute is a long, thin strip of ground which has been measured at 0.95m at its widest point. The strip of land is so narrow that there is a question whether a Land Certificate plan is too imprecise to resolve the dispute. On site there are few reliable physical markers or other visual clues as to where the boundary lies. The appellant's property is number 110 Old Edinburgh Road. The respondent's property lies to the north, and is number 108 Old Edinburgh Road.

[2] The appellant's property was subject to voluntary registration in 2015. The respondent's property is not registered and is a sasine title. The appellant's Land Certificate plan was of central importance in this action, but ultimately did not resolve matters. The sheriff held that the appellant had proved encroachment for part of the boundary only, but not in relation to a lengthy strip of the boundary approximately ninety feet long. The respondent did not appeal that finding.

[3] The appellant's submission at proof and at appeal was simple - the matter was determined by the Land Certificate plan, which must be given effect. That plan, in relation to the length of boundary still in dispute, showed a dotted line which had in turn been mapped on a detailed plan by the appellant's surveyor. The surveyor's plotting of the Land Certificate plan boundary showed clear encroachment by the respondent, had not been contradicted in evidence, and should be accepted as correct. The respondent submitted that the Land Certificate plan did not resolve matters, because it could not operate to transfer land which was owned by the respondent, who had obtained ownership by prescriptive possession. In any event, it was submitted that the strip of land was too narrow for the Land Certificate plan to accurately determine ownership.

The nature of the action

[4] The appellant elected to raise the matter by way of sheriff court proceedings, rather than before the Lands Tribunal, and advanced eight craves. In the event, only craves 1 and 6 were moved at first instance. Crave 1, reading short, was a crave for declarator that the respondent as owner of number 108 is legally obliged to refrain from encroaching on the appellant's property at 110 Old Edinburgh Road "and the pursuer's title to which is registered in the Land Register of Scotland under Title Number INV34272". It is unclear

why this crave was sought because it established nothing more than a bare statement of the law. Crave 6 sought to ordain the respondent to remove certain items from the ground of 110 Old Edinburgh Road, namely a shed, a metal frame, a motor cycle and some fencing erected by the defender. Notably, no declarator was craved to establish measurements or location of any boundary, geographical feature or other physical feature. The sheriff was not asked to pronounce declarator in relation to any title feature or measurement. The only attempt to define the area in dispute was indirect: crave 2 sought declarator that the respondent has encroached on the appellant's land by the placing of certain items, without stating where the boundaries of that land lie.

Evidence relating to title

[5] Notwithstanding the appellant's reliance on the Land Certificate plan, evidence was led from the appellant herself, and her son. The respondent also gave evidence and led evidence from both former and current partners. Both parties produced scale drawings prepared by their respective surveyors. The appellant's surveyor, Mr McWilliam, plotted the line of the Land Certificate plan, together with the boundaries shown in sketch plans attached to two earlier writs, namely a 1918 disposition and a 1950 disposition. The respondent's surveyor, Mr Noble, plotted the latter but not the Land Certificate plan position.

[6] The history of the titles can be briefly summarised. The appellant has lived at number 110 since 1970. Title was voluntarily registered in February 2015. The respondent has lived at number 108 since 1990. Title has been in her sole name since 2007 and is a sasine title. Originally, the appellant's family purchased a large plot of ground in 1890 on which

her grandfather built the properties numbers 110 (a villa), and 108 and 106 (two semi-detached houses), Old Edinburgh Road.

[7] Number 110 was disponed in 1918 under a first break-off disposition. The 1918 disposition of number 110 described the northern boundary with number 108 as "on the north by other subjects belonging to me…along which they extend, including the breadth of the said roadway, two hundred and twenty three feet four inches or thereby", as delineated on a sketch plan. It was not until 1950 that number 108 was disponed, and again the description gave no physical boundary, simply naming the neighbour and describing the length of boundary, again as delineated on a sketch plan. Neither disposition sketch plan is taxative.

[8] The sheriff made findings in fact relating to physical features, past and present. At the far end of both gardens, the western boundary of both properties is formed by a long stone wall known as the Poorhouse Wall. There is also a brick wall constructed towards the east end of the disputed boundary, which has been in position since before 1970. It does not define any boundary, is of limited length, and is not straight, veering slightly into the garden of number 108. To the south boundary of number 110 there is an old byre constructed in limecrete, shown on the 1918 plan. There was a former garage on the appellant's side of the disputed boundary, the east end of which was on the disputed boundary. There was also a wooden boundary fence, erected at some point between the 1930s and 1950s. It stretched from the Poorhouse Wall to an undefined point. That fence was dilapidated by the 1970s. It was attached then to a sycamore tree close to the Poorhouse Wall. That fence was replaced in the 1980s but was dilapidated by the 1990s, and the boundary was then marked by bushes. Finally there is reference to a wooden shed in the garden of number 108, close to the

appellant's garage. The shed was moved in 1995 to abut the boundary where the respondent understood the boundary to be. The shed was moved again in 2015.

[9] By the 2000s, the boundary was overgrown with a dense hedge between the Poorhouse Wall and the garage (no measurement given, but apparently ninety feet or thereabouts). The appellant's son then cleared the hedge in order to identify the boundary. No original features of the boundary remained, to any material degree. Various works by the appellant's son followed, such as wire netting to contain dogs, marking with ropes, erection of some fence panels in 2010 and construction of a replacement garage in 2012. The respondent commissioned a report from Mr Noble in 2014, and thereafter erected a wooden fence in 2015, extending ninety feet or thereby to the west of the new garage. The respondent in 2016 erected a further line of fence between the garage and the red brick wall towards the front. Thereafter the appellant commissioned a report from Mr McWilliam.

[10] The sheriff also made findings in relation to prescriptive possession of the land by each party. In relation to the Land Certificate plan, the sheriff found that the disputed boundary is depicted by a dotted line, stretching from the Poorhouse Wall in the west, to the east end of the appellant's garage, and onwards across the road.

Parties' submissions

[11] The appellant submitted that the sheriff had not made findings in fact about the Land Certificate plan, and that he had not given effect to the uncontested evidence of Mr McWilliam about where those boundaries had been plotted on Mr McWilliam's drawing. Further, in accepting the evidence of Mr Noble, the sheriff had erred in finding that the scope of the appellant's title differed from what the Land Certificate plan showed. It was not competent to look behind a Land Certificate. The sheriff had erred in finding that

prescriptive possession could override a Land Certificate plan. Only the Lands Tribunal had jurisdiction for that. The sheriff had in effect rectified the entry, which he had no jurisdiction to do. Because no contrary evidence had been led to challenge Mr McWilliam's evidence as to the lines on his plan, the sheriff ought to have accepted Mr McWilliam's evidence as to the position of the disputed boundary. This court could examine the transcript of that evidence and come to its own conclusions. The sheriff was not entitled to look at prescriptive possession, as he had not been fully addressed on prescription, and ought to have respected the Land Certificate plan as final. To the extent that there was any inaccuracy in that plan, the evidence of Mr McWilliam was that the margin of error for absolute accuracy was +/- 0.5m, and the strip of land varied between 0.7m and 0.95 wide, so the width of the disputed strip was outside this margin of error. Mr McWilliam's plotting should have been preferred as evidence. Counsel submitted that findings in fact and law five and six, which related to lack of encroachment and to prescriptive possession, should be quashed. He did not seek to quash any finding in fact.

[12] The respondent submitted that it was not clear what findings in fact were being challenged, and no changes were suggested by the appellant. The findings in fact about prescriptive possession were not challenged. It was wrong to say the sheriff had amended the Land Certificate plan, whether by implication or otherwise. The respondent had better title to the disputed land. The sheriff had jurisdiction and was entitled to make findings relating to property boundaries, short of rectifying the plan. *BAM TCP Atlantic Square Ltd* v *British Telecommunications plc* [2021] CSIH 44 was an example of the Inner House carrying out just such an exercise, and had involved a claim based on prescriptive possession being allowed to proceed. Prescriptive possession based on a registered title had been expressly introduced by amendment of section 1 of the Prescription and Limitation (Scotland)

Act 1973 (see Land Registration etc. (Scotland) Act 2012, schedule 5). The appellant had not engaged with this claim. The appellant simply disregarded the ownership claim of the respondent. It was incorrect to assert that there was no basis to prefer the evidence of Mr Noble over that of Mr McWilliam. In relation to looking behind a Land Certificate plan, the evidence was that this was not only prudent but necessary. The action had established that the respondent had title to the area in dispute, and the accuracy of the plan was now a secondary issue. As for tolerances, the sheriff noted that the area in dispute is so narrow as to be partially, if not exclusively, covered by those tolerances. The sheriff was entitled not to accept Mr McWilliam's evidence in this regard. The sheriff had found that the respondent's title was exempt from challenge, and had correctly refused interdict and removing based on that finding.

Decision

[13] We will refuse the appeal.

[14] There were two principal considerations in this action. The first was the specific content of the craves. The second was the peculiarity of the strip of garden ground in dispute, having indistinct boundaries and being of extremely narrow width.

[15] The craves in this action were limited in scope. The action was not an exercise of finding and declaring what the boundaries of the neighbouring subjects might be. It was not an action based on prescriptive possession. It was not an action which expressly sought resolution of competing claims under registered title and sasine title. The reference to the appellant's registered title in the first crave was for identification, not adjudication. The appellant proceeded on a bare assertion that the respondent was encroaching on her land, without seeking decree of declarator as to where the boundary lay. That absence of focus

may explain the nature of the wide-ranging discussion embarked upon by parties and the sheriff.

[16] In the event, and possibly as a result, the issues of prescription, and of competing registered and sasine titles, were not fully focused at the appeal, and were mentioned only as background to the appellant's central submission, namely that the Land Certificate plan showed the appellant to own the area of land. That approach appeared to mirror the proceedings before the sheriff, and the appellant's counsel complained that the sheriff, in considering prescription, had gone beyond the submissions of the parties. The law of prescription, and the law relating to competing registered and sasine titles were not discussed in any detail before this court and we were not invited by either party to embark on any detailed consideration of the law. Authorities were mentioned but not examined. We therefore forbear from making any findings or comment relating to either prescriptive possession or the effect of competition between registered and sasine titles. In any event, as presented by the appellant, this action does not turn on either of those issues, but on the burden of proof.

[17] This action was drafted, and proceeded, on the basis that the appellant offered to prove that she owned the disputed strip of ground. The sheriff preferred the evidence of the respondent's surveyor, Mr Noble, over that of Mr McWilliam. As the appellant's case depended entirely on the plan prepared by Mr McWilliam (which in turn was said to reflect the Land Certificate plan boundary), the appellant failed to prove her case. In our view, the sheriff was entitled to prefer the evidence in the manner he did, for reasons discussed below. There was no error by the sheriff in accepting, at least in this context, that the court could look behind the Land Certificate plan, not because it was not authoritative, but because it was not sufficiently accurate with regard to the tiny measurements and vague boundaries.

Having done so, the sheriff's findings that the appellant had failed to prove her case was, in our view, a conclusion which was supported by the evidence. The sheriff did not, contrary to the appellant's submission, rectify or alter the registered title of the appellant, whether by implication or otherwise.

[18] That leads to the second influential consideration. As shown on the Land Certificate plan, the strip of disputed land was long but very narrow. As to length, there is no finding in fact, but Mr McWilliam's evidence was that the length was of the order of ninety feet. The strip was, however, extremely narrow - from Mr McWilliam's plan, it was either 0.93 or 0.95m at its widest point next to the Poorhouse Wall, but approximately 0.75 at the eastern end next to the garage. There was no boundary fence or other defining features which reliably delineated the boundary. In the immediate vicinity of the boundary area there was some fencing, a shed, a red-brick wall, wire netting and other features, some of which had come and gone over the decades. The sheriff examined and explained these with considerable care. None defined the whole boundary. The appellant's case is founded on the notional dotted line which appears on the Land Certificate plan (a dotted line meaning there is no physical boundary partition), and the interpretation of that plan by Mr McWilliam and represented by him on his plan.

[19] The Land Certificate plan is based on the Ordnance Survey map. The combination of lack of defining boundary features, and the extreme narrowness of the disputed strip, means that the mapping tolerances of OS maps are thrown into sharp focus. The width of the area in dispute is so small that parties agreed it would not provide a basis to establish that the Land Certificate plan was inaccurate, because a cadastral map is not inaccurate if it is incorrect "by reason only of an inexactness in the base map which is within the published

accuracy tolerances relevant to the scale of map involved" (Land Registration etc. (Scotland) Act 2012, section 65).

[20] No evidential assistance is available from the underlying sasine title descriptions. Neither the 1918 nor the 1950 breakoff dispositions provides bounding descriptions for the boundary in dispute, so do not resolve the matter, either by measurement or by identifying physical features. It would not be possible to stand at the boundary and use either disposition to identify the precise line of the boundary. The 1918 disposition measures the boundary at 223 feet 4 inches or thereby. The 1950 disposition measures 223 feet or thereby. Neither provides any more precise placement of the boundary.

[21] A second potential source of information was the evidence of eyewitnesses who spoke to the nature of the boundary over the years. The appellant gave evidence, as did the appellant's son. The respondent gave evidence, and led evidence from her former partner who lived with her until 2007, and her current partner who had regularly visited since 2012. The sheriff had the benefit of affidavits from all these witnesses (but this court did not, as the affidavits were not lodged). Neither party, however, relied on this eyewitness evidence on appeal. We need note only that the sheriff considered all of this eyewitness evidence with considerable care, and was unable to find assistance from any witness in resolving where the precise boundary, running between the west edge of the garage to the Poorhouse Wall at the rear, was situated. He was able to use the evidence to resolve another section in dispute, between the east end of the garage and the front of the properties, but that length of boundary was not contested on appeal.

[22] The third source of evidence was the evidence of the two surveyors, Mr McWilliam for the appellant and Mr Noble for the respondent. Their evidence was of central importance, and the sheriff set out his findings as follows.

Findings as to reliability of the surveyors' evidence

[23] The sheriff described Mr McWilliam's evidence at paragraphs [24] onwards of his judgment. Mr McWilliam explained the methodology and technical systems used to produce his calculations and plan. He gave evidence that it was prudent not to examine Land Certificate plans in isolation. His evidence was that it was important, when determining any boundary, to establish any evidence which still existed of any feature described in a sasine deed or registered title. He concluded that the likelihood of the 1950 disposition dimensions being correct was extremely unlikely, and could not be relied upon. Mr McWilliam concluded that the status quo on the ground for the 108/110 boundary had been for a hundred years the Old Brick Wall at the east end, and the Old Fence at the west end for at least 25 years, and at the very least that was the position to which the boundary should be returned. He was therefore clear that there was a significant disparity, at least in the context of the very small measurements under consideration, between the Land Certificate plan and the underlying sasine titles.

[24] The sheriff recorded the dispute about physical features. The surveyors were in dispute about whether the buildings and fence were accurately depicted on the maps. A limecrete byre either was not (Noble) or was (McWilliam) in the same spot as shown in the 1918 disposition. A new length of boundary fence either was (Noble) or was not (McWilliam) in the same spot as described in the 1950 disposition. Mr McWilliam considered the 1918 disposition to be remarkably accurate but Mr Noble did not. Mr Noble considered the 1950 disposition to be accurate but Mr McWilliam did not.

[25] The sheriff noted the discrepancies in Mr McWilliam's plan of the plotting of the three plans (1918 and 1959 disposition sketch maps, and the Land Certificate plan). The

sheriff noted the potential encroachment into the appellant's registered title measured at most 0.95m. He found Mr McWilliam's plan "very confusing". He stated that, if Mr McWilliam's plan correctly plotted the various boundaries of the 1918 disposition, the 1950 disposition, and the Land Certificate, then:

> "one thing was clear – what was on the ground by way of current boundaries, setting aside the disputed boundary itself, was an incredible mismatch between recorded, registered and occupied extents of not only 108 Old Edinburgh Road but also 110 Old Edinburgh Road…"

[26] The sheriff noted Mr Noble's evidence to the effect that Mr McWilliam had not correctly plotted any of the boundaries, and that Mr McWilliam had been "picking and choosing" what best suited his conclusions. Because of the mismatch, and the competing testimony of Mr Noble, the sheriff was not prepared to accept that Mr McWilliam's plan could be sufficiently relied upon to correctly identify the extent of the appellant's land registered title. It is clear, contrary to the appellant's submission, that the sheriff's starting point was the registered title, not the sasine titles.

[27] We do not accept counsel's proposition that, because Mr McWilliam's evidence was uncontradicted, that the sheriff was bound to accept it. Assessment of fact is always a matter for the court, unless facts are specifically agreed by parties.

[28] The sheriff found Mr Noble to be a credible and reliable witness. He did so by reference to the methodology of measuring boundaries, as he described at paragraph [92]. In our view the appellant misunderstood this to be an exercise in preferring measured boundaries to the exclusion of the Land Certificate plan. Instead, as he was required to do, the sheriff was making a relative assessment of the reliability of the evidence of the two surveyors. The assessment of the different approaches to measurement of boundaries was no more than a useful means of assessing which witness to prefer. The sheriff assessed their

respective opinions on the accuracy of the plans attached to the 1918 and 1950 dispositions. The sheriff then used both Mr Noble's and the respondent's evidence to establish where those historic boundaries were, and considered the boundaries along with evidence of prescriptive possession.

[29] The sheriff did not make any finding in fact which related his findings back to the Land Certificate plan. As it was a significant matter in dispute, he ought to have done so. That omission does not, however, mean the sheriff erred. In our view the craves of the writ were relatively unfocused, and invited exactly the type of wide-ranging exercise which resulted. In the event, the sheriff rejected the evidence of Mr McWilliam as reliably showing where the boundary was plotted. He found that he could not rely on Mr McWilliam's plan. In our view he was justified, on the evidence, in reaching that conclusion. Because that was the base on which the appellant's case was built, the appellant did not prove her case. The appeal must fail for that reason.

Findings as to accuracy of plan

[30] Separately, the sheriff had evidence from Mr McWilliam about the accuracy of the Land Certificate plan. The evidence is set out in finding in fact 13. The Land Registration cadastral map is based on the Ordnance Survey Map which is not warranted to be more accurate than +/- 0.5 metres and +/- relative error. The tolerances of the Ordnance Survey map can vary to a greater degree. At a scale of 1:1250 (the scale of this plan), up to a distance of 60 metres, absolute accuracy with a 99% confidence level is 0.9 metres, 95% confidence level is 0.8 metres and the RMSE is 0.5 metres. On the same scale, up to the same distance, relative accuracy 99% confidence is +/- 1.1 metres, 95% confidence is +/- 0.9 metres and the RMSE is +/- 0.5 metres.

[31] The science behind these observations was not discussed in any detail in submissions, and not fully explained by the sheriff. We understand from Mr McWilliam's report, which was lodged, that the RMSE, or root mean square error, is a means of expressing accuracy. Absolute accuracy was somewhat incoherently explained in evidence by Mr McWilliam (pp106, 107 of the transcript) but appears to be a comparison between any point drawn on the Land Certificate plan and the true position of that point. Relative accuracy appears to be the distance between two physical features as plotted from the plan. RSME is only an average of errors, not a maximum figure. Mr McWilliam described probability error as:

> "It's a probable, it's a probability error at that percentage that's how far out the map will be, but having said that it can be out by considerably more and considerably less".

[32] The appellant's submission to the sheriff accepted that Mr McWilliam's evidence had introduced an element of uncertainty. The sheriff dealt with this at paragraph [140] of his judgment. He stated that, given the tolerances in the OS map, the area in dispute is so small as to be partially, if not exclusively, covered by those tolerances. He referred to the appellant's concession that, because the measurement in dispute is so small, there would be no "manifest error" under the 2012 Act and no basis upon which this dispute could be resolved by either asking the Keeper to rectify the plan, or by posing a question to the Lands Tribunal. The sheriff pointed out that the plotting on the Land Certificate plan, by way of dotted line, was less than clear as to the placement of the boundary. He discussed in detail the physical features, before discussing the effect on the sasine plan. The sheriff omitted to relate his findings back to the Land Certificate plan. It is entirely clear, however, that he did not accept that that plan could be relied upon to show, within the extremely small measurements under consideration, where the boundary actually lay. In the absence of that,

the sheriff proceeded to consider the sasine plans and prescriptive possession. He did so against a background of the appellant having failed to prove her case based on the accuracy of the Land Certificate plan. The margin of error was said to be 0.5 metres. The width of the strip under consideration is between 0.7 metres and 0.95 metres at most. It is evident those measurements are already perilously close to the margins of error. Absolute accuracy at 99% probability means the strip is either within, or slightly over, the margins of error. When Mr McWillliam's evidence that "it can be out by considerably more or considerably less" is also taken into consideration, the sheriff's position of not being persuaded is entirely rational. His finding is reflected in finding in fact 13 that "The tolerances of the Ordnance Survey Map can vary to a greater degree". We were not invited to alter or delete that finding in fact.

[33] Accordingly, we find no error in the sheriff's approach or findings in relation to whether the Land Certificate was determinative of the boundary. Owing to the very small tolerances for error in measurement, and the variations in accuracy spoken to in evidence, there was a clear rational basis for finding the appellant had not proved the disputed strip was not swallowed up by the margins of error which were inherent in Mr McWilliam's surveying exercise. This appeal must fail for that reason also. It is not enough that the appellant arrives at a different conclusion.

[34] A number of other points arose from the appellant's submissions. The first is whether the sheriff erred in looking behind the Land Certificate plan. The appellant's counsel submitted that the sheriff had failed to understand the legal effect of land registration. In our opinion there was no such failure, in the context of this action. Although not the subject of an express finding in fact, the sheriff plainly started from the registered title, gave due and careful consideration to the evidence about how accurate the

Ordnance Survey map could be, and rejected the appellant's position that the Land Certificate title proved her claim. Insofar as counsel founded on the effect of registration as conferring a real right to property, and the boundaries being identified by the cadastral map, he is undoubtedly correct. The sheriff's approach was not, however, inconsistent with that.

[35] The defence to the action was to dispute the appellant's underlying right to the property. That exercise is one which is expressly contemplated by the 2012 Act, and the case of BAM TCP Atlantic Square Limited (above) is an example. In our view the sheriff was only considering what the appellant's own surveyor invited him to consider. In relation to the Land Certificate plan, Mr McWilliam accepted that there was not necessarily a defined feature along the boundary, hence the dotted line, and that it was therefore necessary to look behind the Land Certificate plan. He also accepted that the Land Certificate plan was inaccurate, as demonstrated by his plan showing the boundary going through the limecrete byre, and by reference to the south boundary. The sheriff recognised that his starting point was the Land Certificate plan. He did not carry out the wrong exercise.

[36] While a land certificate creates real rights, the underlying facts remain capable of challenge. If the challenge is successful, to the extent of showing manifest error, the Keeper is obliged to rectify the register (2012 Act section 80). Until the Keeper does so, however, the title remains as shown in the cadastral map. Unlike the Lands Tribunal, the sheriff court has no powers to compel rectification of the map. That does not prevent the court from adjudicating on those underlying heritable rights. The sheriff did not err in the exercise which he undertook. The sheriff did not either purport to, or implicitly, rectify the Land Register. We do not agree either with the respondent's submission that the registered title was not a good basis from which to claim infringement of right. The problem for the

appellant in this case was, however, that the area was so narrow and poorly defined that the dispute was beyond the capacity of the Land Certificate plan to resolve.

[37] Secondly, there were submissions related to prescription which the sheriff considered. Those, as we understood matters, were related to the proposition that registration by itself could not create a real right to land which was not owned. We were not addressed in any detail on the law, and the submissions at appeal did not found on prescriptive possession. We note that the 2012 Act amended section 1 of the Prescription and Limitation (Scotland) Act 1973, to provide that prescriptive possession of land included in a Land Certificate can create a real right to that land. Until then, the Land Certificate is vulnerable to an application for rectification. Whether such a challengeable title remains a sound basis for the vindication of property rights, such as interdict, in the face of a claim of competing adjacent title, was not explored in submissions and we therefore do not express a view.

[38] Thirdly, the appellant founded on a purported lack of jurisdiction. That proposition was based on the flawed proposition that the sheriff had in some manner sought to rectify the Land Register. He plainly did not do so. The sheriff had jurisdiction to consider this dispute in terms of section 38(2)(f) of the Courts Reform (Scotland) Act 2014. Beyond that the sheriff did not go. He expressly recognised these points at paragraphs [115] and [116] of his judgment.

[39] Fourthly, both parties made submissions relating to the competition between a registered title and a sasine title, but did not examine the underlying law in any detail. The exercise in this respect which was undertaken by the sheriff was, in our opinion, not required for the purposes of his judgment. The question was whether the appellant had proved her case. The sheriff, somewhat understandably, was diverted by both parties

beyond the actual craves of the initial writ. As the matter was not fully explored in submission we have not commented further.

[40] The appellant's counsel observed the sheriff had gone beyond the evidence and had taken information from the Registers of Scotland website. If so, the sheriff was not entitled to have regard to evidence to which he was not referred in court. However, it has not, in our view, tainted his overall conclusions.

[41] We would only add that, in view of the extremely small area in dispute, we see merit in the sheriff's observation that it was unfortunate that the parties have been unable to reach a sensible and pragmatic solution to their dispute.

Disposal

[42] We therefore dismiss the appeal. Parties wished to be heard on the question of expenses, so should contact the clerk to arrange a date, unless they are able to agree a position.