SHERIFF APPEAL COURT

[2024] SAC (Civ) 4
EDI-A662-21

Sheriff Principal N A Ross
Sheriff Principal C Dowdalls KC
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by Appeal Sheriff Thomas McCartney

in appeal by

(FIRST) JACQUELINE WALLACE-MARTINEZ AND (SECOND) JOSEPH LUIZ MARTINEZ

Pursuers and Appellants

against

(FIRST) JANICE FERGUSSON NISBET; (SECOND) BRIAN DOUGLAS YATES; (THIRD) ROBERT CYRIL ASGILL; (FOURTH) BRIAN KEANE CARMICHAEL; (FIFTH) MORNA ELIZABETH CARMICHAEL; (SIXTH) PAUL ANDREW TAYLOR; (SEVENTH) ARABELLA MARY SUSAN GRAHAM; (EIGHTH) SUSAN RICHARDSON; (NINTH) EDITH HUTCHESON; (TENTH) JOAN BURGESS; (ELEVENTH) FIONA PITT; (TWELFTH) STEWART PITT; (THIRTEENTH) KENNETH RICHARDSON; (FOURTEENTH) RT. HON DOROTHY BAIN KC, THE LORD ADVOCATE

Defenders and Respondents

Pursuers and Appellants: McClelland, advocate; BTO Solicitors LLP
Defenders and Respondents: Conn; Mitchells Roberton

31 January 2024

[1] The appellants (the "pursuers") own two flats, which have been joined by the installation of an internal staircase to form a single family home, in a tenement building in Edinburgh. The tenement is known as 25, 27, 29 and 31 Barony Street and 2 Albany Lane, Edinburgh. The first pursuer owns 2 Albany Lane. The second pursuer owns the southwest

flat, first floor, 29 Barony Street. The tenement building is on a corner plot, and has a back green to the rear to which there is doorway access through the side wall of the garden area. There was formerly a second doorway in the rear wall allowing access from the rear lane, but the pursuers removed it and blocked the gap with masonry in 2014. The first pursuer has doorway access from her flat, through a small conservatory which has been built on the back green, to the back green area. There is no other direct doorway access from the tenement, although there is a second ground floor flat to the rear of the tenement, and it is possible for that proprietor to enter the back green through a window.

[2] The first pursuer purchased the ground floor flat at 2 Albany Lane in 1990. The disposition in her favour (the "1990 Disposition") also granted an exclusive title to the back green, but that part of the disposition was *a non domino.* The disposition in her favour was recorded in the Register of Sasines on 5 December 1990. The first pursuer knew at the time of purchase that there were problems with the title.

[3] The second pursuer owned the flat immediately above the first pursuer's flat. An internal staircase was constructed joining the two flats. In 1994 the pursuers purported to convey to themselves both properties as well as exclusive title to the back green. The pursuers purported to consolidate the titles to their respective flats under a single title. The disposition by them, in their own favour was recorded in the Register of Sasines on 25 February 1994 (the "1994 Disposition").

[4] The titles of the heritable proprietors of the other flats in the remainder of the tenement grant those proprietors common ownership of the back green.

[5] In 2021 a proprietor of one of the other flats within the tenement intimated an intention to reinstate the doorway in the rear wall. The pursuers opposed that proposal. They claim that they have a right of exclusive ownership of the back green and rear wall.

The proprietors of the other flats assert that the pursuers' title confers no more than a right of ownership in common, along with the other proprietors, of the back green and garden wall. They deny that the pursuers have exclusive title to that area.

[6] The pursuers raised the present action to seek, firstly, declarator that they have a real right of exclusive ownership of the back green and the wall separating that ground from Albany Street Lane and, secondly, interdict preventing the defenders carrying out any works on any part of the rear wall. The pursuers assert that having possessed the back green and the wall for a continuous period of 10 years openly, peaceably and without judicial interruption, and possession having been founded upon and having followed the recording of a deed sufficient in its terms to constitute in the pursuers' favour a real right in the back green and wall, they have a real right of exclusive ownership thereto in terms of section 1 of the Prescription and Limitation (Scotland) Act 1973 (the "1973 Act"), notwithstanding the competing title of the various defenders.

[7] The action is defended by the proprietors of the other flats within the tenement building. The defenders counterclaim, craving declarator that the back green, including the solum of the conservatory to the rear of 2 Albany Lane, forms part of the common property of the whole proprietors of the tenement which includes the pursuers and the first to thirteenth defenders, and that the pursuers have no exclusive right of property in the back green.

[8] Following a proof before answer the sheriff assoilzied the defenders from the craves in the principal action and granted the declarator craved in the counterclaim. The pursuers appeal that decision. The issues arising in this appeal are whether the sheriff erred in finding that:

a. the 1994 Disposition is *ex facie* invalid and thus not a deed upon which prescription can run;

b. the character of the pursuers' possession was insufficient for prescription to operate;

c. prescription did not operate to establish exclusive title to the conservatory;

d. prescription was interrupted by the later registration or recording of titles to individual defender's properties;

e. the defenders have stand-alone access rights to the back green which exist independently of ownership rights.

***Ex facie* validity of the 1994 Disposition**

[9] The 1994 Disposition was granted by the first and second pursuers in favour of themselves. It bore to convey the first pursuer's title to the ground flat, and the second pursuer's title to the first floor flat, to give them both a one-half pro-indiviso share of the combined property. The sheriff found that the 1994 Disposition was an "A to A" disposition and thus *ex facie* invalid for the purposes of section 1 of the 1973 Act. Furthermore the sheriff found that the narrative clause of the 1994 Disposition showed that the first pursuer was not the heritable proprietor of 29 Barony Street which she purported to transfer, and the second pursuer was not the heritable proprietor of 2 Albany Lane or the back green which he purported to transfer.

Submission for pursuers

[10] Counsel for the pursuers submitted that the sheriff erred in focusing narrowly on the dispositive clause of the disposition and ignoring the wider context as set out in the

narrative clause. The disposition should be read as a whole and an interpretation which gives validity to what was the clear intention of the parties should be preferred. On that approach the deed made clear that it was performing a title transfer to convert two separately-owned constituent properties into a commonly owned whole. That was sufficient to take it outside the category of *ex facie* invalid deeds.

Submission for defenders

[11] The solicitor for the defenders submitted that the sheriff correctly found that the 1994 Disposition was *ex facie* invalid being an "A to A" disposition. The dispositive clause was clear. It took the form that "A and B" dispone to "A and B" the combined ground and first floor flats and back green. The same parties' disponed the same property to themselves. There were several ways that the pursuers could have effected the transfer of one half of their respective properties to the other but the 1994 Disposition did not adopt any of those methods. The pursuers' submission, which invited the court to look beyond the clear wording of the disposition, should be rejected.

Decision

[12] In our view the 1994 Disposition was not effective to transfer title in the manner it appeared to intend. The sheriff was correct to conclude that in the 1994 Disposition the pursuers purported to transfer the unified property at 2 Albany Street to themselves. That is the effect of the dispositive clause which provides:

> "we the said Mrs. Jacqueline Muriel Wallace or Martinez and Joseph Luis Martinez … do hereby dispone to and in favour of us the said Mrs. Jacqueline Muriel Wallace or Martinez and Joseph Luis Martinez … heritably and irredeemably ALL and WHOLE….".

The disponers and disponees are the same individuals. This amounts to *ex facie* invalidity (*Aberdeen College Board of Management* v *Youngson* 2005 1 SC 335*).* In *Ardmnamurchan Estates Limited* v *MacGregor* 2020 SC (SAC) 1 it was held that a disposition was invalid *ex facie* as it purported to dispone the land from the respondents to themselves in exactly the same capacity. The respondents could not at the same time intend to be divested of property and also be invested in the same property and there was no transfer of ownership in such circumstances. That is the position in the 1994 Disposition. Whether intended or not it purports to be a disposition by themselves in favour of themselves. We do not accept the submission for the pursuers that there can be latitude in construing the 1994 Disposition. We would require to be persuaded by clear authority that the canons of construction applicable to commercial contracts are available to be applied to conveyancing documents. No authority was tendered which would justify such an approach. Further and in any event, in our view the 1994 Disposition is inept to convey a joint title, as neither proprietor had a joint title to convey. Each could only convey their own title. That is not what the 1994 Disposition purports to do. For present purposes it is unnecessary to discuss this further.

[13] The 1994 Disposition being *ex facie* invalid, it cannot form a foundation writ for prescription. The consequence is that the second pursuer, whose claim to a prescriptive title founds solely on the 1994 Disposition, has no title to the back green on which to base any real right. The 1990 Disposition, on the other hand, an *a non domino* disposition in favour of the first pursuer, was not challenged by the defenders. It can be accepted as *ex facie* valid and so capable of creating a real right exempt from challenge if followed by possession for a continuous period of 10 years of the nature set out in section 1 of the 1973 Act. It then

becomes necessary to consider whether there has been sufficient possession, founding on that title, to create a real right for the first pursuer.

Sufficiency of the pursuers' possession for prescription

[14] For the first pursuer to have obtained valid exclusive title to the back green, she would require to possess that interest "for a continuous period of ten years openly, peaceably and without any judicial interruption" (1973 Act, section 1(1)(a)). The sheriff found on the evidence that the pursuers did not openly possess as exclusive owners. She found that the pursuers had the onus of proving their possession was as exclusive owners, and not as common proprietors. She considered that the use made of the back green by at least some of the defenders amounted to assertions of their right of common ownership. She considered on the evidence that there was regular and frequent access taken by or on behalf of one or more of the defenders. There were also numerous occasions where the defenders took access to, and possession of, parts of the back green as of right, in order to work on their own properties. These actions constituted adverse possession to the pursuers' claim to exclusive ownership. The sheriff found that all of those actions interrupted the prescriptive period and the pursuers did not possess the back green as exclusive owners for a continuous period of 10 years, openly peaceably and without judicial interruption.

Submission for pursuers

[15] For the pursuers it was submitted that the sheriff's findings in fact did not adequately reflect the evidence. They did not reflect the extent to which the pursuers used the back green as their own private garden, and their control of access to the back green. That was highly material to the quality of their possession for the purposes of prescription.

Counsel identified particular pieces of evidence and submitted that these confirmed the pursuers' occupation of the back green as their own private garden. It confirmed their control of doorway access. It confirmed also that any access taken to the back green by the defenders and their predecessors was only with the express consent of the pursuers. In the light of the evidence as a whole the sheriff's conclusion was plainly wrong and should not stand. The sheriff's error was demonstrated by the fact that she had not expressly discussed the adminicles of evidence which counsel founded upon.

Submission for defenders

[16] The defenders submitted that there was no basis to review the sheriff's findings in fact. The sheriff has not demonstrably failed to take account of material evidence. The pursuers make no specific challenge to the findings in fact made by the sheriff.

Decision

[17] The pursuers' criticisms of the sheriff's assessment of the evidence, inferences drawn and conclusions reached therefrom are without merit. This ground of appeal is based on a process of selecting parts of the evidence to which, in the submission of the pursuers, the sheriff has given too much weight, too little weight or has failed to take into consideration. This exercise is said to support a conclusion that the sheriff was plainly wrong.

[18] The pursuers' submission on this point is no more than a subjective view of the evidence which places alternative emphasis on certain evidence which the pursuers consider supports their case. It falls well short of demonstrating that the sheriff's decision was plainly wrong. There is a clear and recent line of authoritative decisions, to which this court is frequently referred, as to the grounds on which an appeal court may interfere with the

decision on facts made by the fact-finding court. The principles have been expounded at the highest level in cases such as *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203, *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and *RBS* v *Carlyle* 2015 SC (UKSC) 93. An appeal court will not interfere with findings of fact unless satisfied that the decision cannot reasonably be explained or justified. That formula does not invite submissions that the sheriff might, on the evidence, have come to different conclusions. Counsel's submissions focused on what the sheriff had allegedly failed to take into account, and that the findings "did not adequately reflect" some evidence, or "underplayed the extent" of other evidence. That was to approach the question from the wrong direction. The starting point is "whether the decision cannot reasonably be explained or justified" (*Henderson*, above). That can only be decided on examination of the sheriff's decision. Counsel did not do so. No analysis of the basis of sheriff's decision was attempted. The appeal founded on inference, based on an incomplete discussion of selected evidence, that the decision must have been wrong. In the absence of analysis of what evidence the sheriff founded upon, as opposed to what she did not found upon, we are unable to embark on any consideration of whether the sheriff was wrong to prefer the evidence she did, or whether it supported her conclusions.

[19] The sheriff made detailed findings in fact, none of which is the subject of specific challenge. Those findings in fact included detailed findings as to the pursuers' use of the back green and detailed findings as to possession by the other proprietors. She summarised the evidence of witnesses. The judgment includes findings in fact about possession (numbers 12 to 22) and about the defenders' competing possession (numbers 23 to 38). The sheriff discussed the legal principles surrounding possession (paragraphs 148 to 163) and analysed the facts she accepted as proved against those principles (paragraphs 164 to 184). None of this was analysed in submission by counsel. The findings in fact and the

discussion demonstrate careful consideration of the evidence and the principled application of the law to that evidence. There is no general obligation upon a sheriff to discuss every piece of evidence in every case. The sheriff appropriately applied her findings on the evidence to the legal tests which the pursuers require to meet. It is sufficient that the sheriff has set out a fully-reasoned judgment and no error is evident. There is no basis to say that the sheriff's findings that the pursuers have failed to prove prescriptive possession are wrong. The appeal must be refused.

[20] There is a further reason that the pursuers' submissions on prescriptive possession cannot be successful. To acquire a real right in land exempt from challenge the pursuers require to prove possession for a continuous period of 10 years openly peaceably and without any judicial interruption. Every such decision will turn on the particular facts and circumstances. Whether particular acts constitute possession for the purposes of prescription depends upon the nature of the subjects claimed. It is well established that before possession can instruct a right of property that possession must be unequivocally referable to an assertion of ownership of the land. In *Houston* v *Barr* 1911 SC 134 at page 143 Lord Dundas said: "The possession, to avail the defender, must have been not only continuous, but clearly and unequivocally referable to his title of ownership."

[21] As explained in *Hamilton* v *McIntosh Donald Limited* 1994 SC 304 the question is whether the evidence as a whole disclosed possession of sufficient quantity and quality to indicate that the party was asserting rights of exclusive ownership in the subjects.

[22] Having made substantial findings in fact about the pursuers' use of the back green, the sheriff concluded that all such usage was at least as consistent with common ownership as it was with exclusive ownership. The sheriff noted that the pursuers required to prove that their possession of the back green was as exclusive owners. The evidence of use of the

back green by or on behalf of various defenders is set out in some detail by the sheriff and provides a sound basis on which the sheriff concluded that the pursuers' possession was not unequivocally referable to exclusive ownership, but rather was consistent with common ownership.

[23] The application of the law by the sheriff to the facts is consistent with *Meacher* v *Blair-Oliphant* 1913 SC 417 and *Houston* v *Barr* 1911 SC 134. In the former the pursuer obtained a title to exclusive fishing over the whole of an inland loch. However in a competition with those having a common law right to fish by virtue of being proprietors of land abutting the loch the court held that, even though the pursuer exercised his right of fishing, it was insufficient to establish the exclusive possession necessary. In *Houston* v *Barr* the defender claimed ownership of a strip of ground based on possession for the prescriptive period on an *ex facie* valid title. He had also leased the same land from the pursuer throughout the period founded upon. The court found that the acts of possession founded upon were referable at least as well to the right of tenancy as to that of feu and were not sufficient in law to import a right of property in the defender in the land in dispute.

[24] In addition to finding that the evidence does not support possession of a quality and quantity to indicate an assertion of exclusive ownership, the sheriff concluded that such possession as was exercised by the pursuers was not carried out openly.

[25] In respect of possessing "openly" the sheriff noted that it appeared that the pursuers had waited until 10 years after the 1994 Disposition before carrying out work involving the removal of railings and a fence. The sheriff found in fact that the blocking up of the back door to the back green in 2014, an attempt to assert exclusive ownership, was not done openly. She noted that the failure to provide evidence to support exclusive ownership when challenged by the defenders, and the occasions when the pursuers did not challenge people

using the back green on behalf of the defenders, indicated that they were not openly possessing as exclusive owners. As explained by the sheriff there exists an evidential basis on which she could reasonably conclude that possession was not open. Possessing "openly" requires more than just visibility. When the nature of possession is ambiguous, attributable to either sole title or common title, it is not enough that possession is exercised. The possession must be openly attributable to one or the other. The requirement for openness relates not just to use, but to assertion of a right of ownership, obvious to whoever has a competing right to the land, so they are deemed to be alerted that they need to do something or lose the right.

[26] The sheriff did not err in concluding that the necessary possession of sufficient quantity and quality to indicate that the pursuers were asserting rights of exclusive ownership in the subjects had not been established. The pursuers' use of the back court is consistent with a common right thereto, together with the practical circumstance of easy access compared with the other common owners. The sheriff did not err in concluding that any assertion of exclusive ownership was not openly exercised.

Prescriptive possession of the conservatory

[27] The sheriff found that the action was presented on the basis that the whole of the back green was placed in issue and refused to consider a belated attempt by the pursuers, made for the first time during submissions following proof, to claim a separate and subsidiary right had been established only to that part of the back green on which the conservatory is situated. She did so on the basis that the pursuers would require substantial amendment involving a detailed plan and a proper conveyancing description, which she was not prepared to entertain at the stage of submissions.

Submission for pursuers

[28] The pursuers submitted that the sheriff erred in failing to hold that their possession of parts was sufficient for prescription to operate in their favour over those parts. The evidence established without contradiction that the pursuers possessed the conservatory openly, peaceably and without judicial interruption for more than 30 years. That was sufficient to make the pursuers' exclusive ownership of the part of the back green on which the conservatory stands exempt from challenge. It was further submitted that the defenders' use of the back green area was confined to a path and if that use was sufficient to interrupt the pursuers' possession it had such an effect only on that strip.

Submission for defenders

[29] The defenders submitted that the sheriff was entitled to decline to consider discrete parts of the back court separately. Such a solution would require substantial amendment with practical complications such as a detailed plan or site visit being required. Possession of commonly owned land does not require every co-proprietor to possess every part of it and taking into account access taken over the years to the airspace above the conservatory for repairs it is not correct that the pursuers have had uninterrupted exclusive possession of the land on which the conservatory stands.

Decision

[30] We have considerable sympathy with the sheriff, who was faced with an unheralded position by the pursuers raised only during submission following a hearing which did not identify the area of the conservatory as a separate matter. She was justified in considering

that the matter was introduced too late to allow proper submission by the defenders, and was potentially too complex to address without detailed amendment of the pleadings. We have carefully considered whether this court should deal with the matter at all.

[31] We consider that we have had the benefit of further submissions, written and oral, on the question of the conservatory. The defenders have had an opportunity to consider matters and make submissions. There is no procedural prejudice to the defenders at this stage. Most importantly, we identify that the pursuers have a sound case on this limited point, and therefore that the interests of justice are a primary consideration. We have therefore come to a decision on the question of the conservatory.

[32] We consider that the pursuers' submission in respect of the conservatory is well founded. None of the factors taken into account by the sheriff in relation to the remainder of the back green apply in respect of the land on which the conservatory stands. The conservatory has been there for more than 30 years. It is an integral part of the pursuers' home. The pursuers' possession of the conservatory and the land on which it stands has been continuous, open and peaceable. It is inconsistent with a right of common property. The first pursuer's possession is founded on the recording of a disposition in her favour which is sufficient to constitute a real right in land habile to include the land on which the conservatory stands. The extent of the land on which the conservatory stands is easily identifiable by the parties, and was identified in the evidence. It may be that the Keeper would require a plan for the purposes of registration of title but that is a practical conveyancing matter.

[33] We reject the defenders' submission that access to the airspace above the conservatory for repairs has interrupted continuous possession. Evidence of such access was sparse, but more importantly did not disturb occupation of the conservatory itself,

which is the extent of the area covered by prescriptive possession. In our view this limited possession engages the maxim "*tantum praescriptum quantum possessum*", namely that the amount possessed is the amount prescribed. We shall allow the appeal in respect of the first pursuer to the limited extent of finding that the first pursuer's title to the space encapsulated by the conservatory is exempt from challenge in terms of section 1 of the 1973 Act. We are not persuaded that such considerations apply to any other part of the back green.

Interruption of prescription by registration of titles

Submission for pursuers

[34] The pursuers submitted that the sheriff erred in holding that prescription of the pursuers' title was (or could be) interrupted by the later registration or recording of titles which included a right in common to the back green. The purpose of prescription is to resolve title competitions by reference to possession. Registration of a competing title would simply result in a competition between titles and which title prevailed would depend on which of the holders of the competing titles was able first to prove possession for the prescriptive period. The sheriff erred in accepting that any of the defenders' later registered titles by virtue of the date of registration could prevail.

Submissions for defenders

[35] The defenders submitted that, given that each defender has a good common title to the back green dating back decades, all that was required was some act of possession relating to the back green as a common proprietor to interrupt prescription applying to an *a non domino* disposition. There is nothing in law that suggests ownership founded upon a good title is lost against an *a non domino* disposition.

Decision

[36] Standing our decisions in respect of the first three grounds of appeal, nothing turns upon this issue. Nonetheless we consider that neither party is correct in their submission.

[37] In *Hamilton* v *McIntosh Donald* the court referred to the dictum of Lord Braxfield that: "It is the great purpose of prescription to support bad titles. Good titles stand in no need of prescription". That may have been said in 1779 but it remains a statement of the obvious. The original true owners of the back green are the various proprietors of each of the properties within the tenement (including the pursuers). Their title to common ownership of the back green is in no need of prescription. On the other hand the pursuers' competing title to exclusive ownership is based upon an *a non domino* disposition. That title depends upon the operation of prescription in the form of possession for a continuous period of 10 years openly, peaceably and without judicial interruption.

[38] Competition between competing titles is not uncommon. Where such a competition arises, all titles are not equal with the first to achieve the relevant prescriptive possession prevailing. Nor is it the case that a so-called good title can never succumb to an *a non domino* disposition followed by the required prescriptive possession. If that were the case that would undermine the doctrine of prescription. However it is for the party relying on an *a non domino* disposition to establish the required prescriptive possession. In the circumstance of a competing good common title the later recording/ registration of rights to that common title followed by any sort of exercise of that right are strong contra-indicators to the exclusive possession required to be established by the pursuers.

[39] We do not accept that the defenders have established that the proposition in law as submitted is correct. They referred to no authority for the proposition that later registration

of a competing title interrupted the running of prescription on an earlier title. Accordingly we do not accept that the finding, that prescription was permanently interrupted by the transfers of titles of other flats after 1990, was correct. However this has no impact on the outcome of this appeal as the sheriff did not err in deciding that the pursuers have not evidenced the required prescriptive possession to establish exclusive ownership, as opposed to common ownership, in respect of the back green, excluding the conservatory.

Stand-alone access rights

[40] The sheriff found that there are stand-alone access rights to the back green in the titles of the majority of the flats and that such access rights are not altered by ownership of the back green.

Submissions for pursuers

[41] The pursuers submitted that the access rights exist solely to allow their rights of common ownership in the back green to be exercised and that if the common ownership rights are lost the access rights are lost with them.

Submissions for defenders

[42] The defenders submitted that such access rights are not dependent upon ownership of the back green and pointed out that in some titles the access rights are an express and separate servitude right of access.

Decision

[43] Standing our decisions in respect of the other grounds of appeal this point becomes academic and can be dealt with briefly. The titles to various flats include rights of access by the back door in the wall to the back green. Accordingly the sheriff correctly found that right of access to be a stand-alone right required for practical access to the back of the tenement for works to be carried out. This ground of appeal is refused.

Conclusion

[44] We have concluded that the sheriff erred in a single respect, namely in relation to the ground on which the conservatory stands, and only in respect to the first pursuer. The sheriff otherwise correctly decided that the remainder of the back green and the wall separating the back green from Albany Street Lane, and Albany Lane, remains common property.

[45] We shall recall the decree insofar as it assoilzies the defenders from crave one and we shall grant decree in favour of the first pursuer in terms of crave one restricted to

> "that portion of the garden ground to the rear of the tenement comprising 25 to 31 Barony Street and 2 Albany Lane, Edinburgh upon which the conservatory forming part of two Albany Lane is built".

We shall recall the decree insofar as it grants the crave in the counterclaim and of new grant decree in terms thereof, but amending "including the solum of the conservatory" to "excluding the solum of the conservatory".

[46] On joint motion we shall sanction the appeal as suitable for junior counsel. Otherwise, as requested we shall reserve all questions of expenses. In the event that these cannot be agreed between the parties, a hearing can be requested.