SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS

[2024] SC INV 17

INV-A110-18

JUDGMENT OF SHERIFF SARA MATHESON

in the cause

EH1 PROPERTIES LIMITED

Pursuer

against

ALEXANDRA MARY MACLEAN or ROBBERTS; JOANNA MORAG MACLEAN; ALEXANDRA MARY MACLEAN; ANGUS DONALD WAUGH MACLEAN

Defenders

Pursuer: Middleton, Advocate instructed by McWilliams; Trainor Alston Solicitors
Defenders: Garrity, Advocate instructed by Sandison; Stronachs Solicitors

INVERNESS, 23 January 2023

The sheriff, having resumed consideration of the cause, finds in fact:

1. The pursuer is EH1 Properties Limited, based at the address in the instance. Angus MacLeod is the sole director of the company and formed it.

2. The defenders are Alexandra Mary MacLean or Robberts, Joanna Morag MacLean, Alexandra Mary MacLean (Snr) and Angus MacLean (Jnr) as partners of and trustees for the firm of Angus MacLean. Alexandra Maclean (Snr) is the mother of Alexandra MacLean or Robberts, Joanna MacLean and Angus Maclean (Jnr). She is the wife of the late Angus MacLean (Snr). They farmed land at Barevan, Muir of Ord, together, which continues to be farmed by Angus MacLean (Jnr).

3. Angus MacLean (Snr), formerly of Barevan, Muir of Ord, died in September 2015.

4. This action was warranted on 6 August 2018. At that time, the defenders called were Alexandra Mary MacLean or Robberts and Joanna Morag MacLean, *qua* individuals. Production 6/14 is a true and accurate copy form of citation by Walker Love, Sheriff Officers, dated 16 August 2018.

5. Production 6/15 is a true and accurate copy letter from Trainor Alston, solicitors, to Stronachs, solicitors, dated 29 November 2018 with enclosures (i) Form of Intimation of Motion and Motion, and (ii) Minute of Amendment for the pursuers.

6. Said Minute of Amendment sought to alter the details of the defenders in the instance. It was formally allowed to be received in process on 12 December 2018. The amendment was allowed and the instance was subsequently amended on or around 15 January 2020, by replacing the original defenders with the names of the current defenders.

7. The pursuer limited company is heritable proprietor of land at Easter Balloan, Marybank, Muir of Ord, IV6 7UW registered in the Land Register of Scotland under title number ROS7017 (which land I shall refer to as "the proposed site"). The proposed site extends to an area of approximately 0.93 hectares. Production 5/2 is a true copy of the title sheet ROS7017.

8. The northern boundary of the proposed site adjoins land now owned by the defenders (which land I shall refer to as "the defender's 1998 land").

9. Production 6/16 is a true and accurate copy of disposition by Roderick Stirling in favour of Alexander MacLeod and Rachel MacLeod recorded GRS Ross and Cromarty on 12 December 1977 ("the 1977 Disposition"). The 1977 Disposition placed ownership of the proposed site, the defender's 1998 land and other pieces of land with Alexander and Rachel MacLeod.

10. Production 5/3 is a true and accurate copy of Disposition by Alexander MacLeod and Rachel MacLeod, with consent, in favour of Alexandra Mary Maclean (Jnr)(later Robberts) and Joanna Morag Maclean recorded GRS Ross and Cromarty on 29 September 1998 ("hereinafter the 1998 Disposition"). This placed ownership of the defender's 1998 land with Alexandra Robberts and Joanna Maclean.

11. The 1998 Disposition was of the northernmost of the two areas of land delineated and edged red on the plan annexed to the 1977 Disposition, under exception of (a) nine separate areas of land previously split-off from that title, and (b) subjects reserved (Ten) to the granters, namely Alexander and Rachel MacLeod (namely the proposed site). The disponers of the property, Alexander and Rachael MacLeod, are the grandparents of Angus MacLeod, the sole director of the pursuer.

12. At the time of the grant of the 1998 Disposition Alexander MacLeod and Rachel MacLeod were elderly and living together in a caravan on the proposed site.

13. On 4 May 2010, Alexandra MacLean or Robberts and Joanna MacLean disponed the defender's 1998 land, bordering the northern boundary of the proposed site to, and in favour of themselves and their parents and their brother, Angus MacLean (Jnr), as the then partners of and trustees for the firm of Angus MacLean. That disposition was registered in the General Register of Sasines for the County of Ross and Cromarty on 10 June 2010. Production 6/1 is a true and accurate copy (hereinafter "the 2010 Disposition") in respect of the defender's 1998 land.

14. Production 6/7 is a true and accurate copy of Planning Permission in Principle in respect of the erection of six houses on the proposed site, dated 27 October 2015; and Production 6/8 is a true and accurate copy of the Drawing Plan Number 14.14.06 referred to in said Planning Permission in Principle.

15. Production 6/9 is a true and accurate copy of Full Planning Permission in respect of the erection of six houses on the proposed site, dated 19 July 2017.

16. Production 5/5 (first page) is a true and accurate copy of the "Drainage Plan" referred to in the pursuers' crave 1. The Drainage Plan indicates a proposal by the pursuer to install within the defender's 1998 land pipework serving the six houses which the pursuer proposes to develop in terms of the Full Planning Permission dated 19 July 2017.

17. Production 5/4 is a true and accurate copy of a series of emails dated 4, 9 and 10 January 2018 between Ian Wills, the pursuer's civil engineer, and Highland Council and SEPA.

18. Production 5/7 is a true and accurate copy letter from Trainer Alston, solicitors, to "Joanna & Alexandria Maclean" *sic* dated 11 April 2018. In the letter the pursuer's solicitors express their understanding that they are writing to the owners of the defender's 1998 land.

19. The river Conon lies to the north of the defenders' 1998 property, which is itself to the north of the pursuers' property. It flooded in 1984 and in 1989 and all parties knew this.

Finds in fact and in law

1. These proceedings have as their object rights *in rem* in property situated within the jurisdiction of this court. This court has jurisdiction.

2. The 1998 Disposition created in favour of the owners of the proposed site a servitude in the following terms:

> "a heritable and irredeemable servitude right to instal, if necessary, any part of a private drainage system which may be required for any building which may be erected on the said subjects retained by us…but that subject to an obligation of us and our successors in ownership to…(E) ensure that the route of such apparatus shall be first agreed with our said disponees and their foresaids (which agreement will not be unreasonably withheld).", (hereinafter, "the servitude").

3. The purpose of the reservation of the servitude was to allow Mr and Mrs MacLeod to drain their waste water across the defender's 1998 land in the event that they left their caravan and moved into a house built on the site.

4. The right of servitude upon which the pursuers found this action was created upon recording of the 1998 Disposition, namely on 29 September 1998, and became exercisable/enforceable on that date.

5. In or around March 2015, the pursuer applied to Highland Council for planning permission to erect six houses on the proposed site. The pursuer proposed that water from the development be drained to an existing watercourse on the defender's land, via pipework to be installed under the defender's land. This proposal required exercise of rights under the servitude.

6. The right of servitude was not exercised or enforced by the benefitted proprietor against the burdened proprietor for a period in excess of twenty years following the date of creation, namely prior to 29 September 2018, and so prescribed on that date in terms of s 8 of the Prescription and Limitation (Scotland) Act 1973.

7. Alexandra MacLean (Jnr) or Robberts and Joanna MacLean did not hold themselves out as the correct owners of the defender's 1998 land.

8. The pursuer *qua* owners of ROS7017 did not and have not sought agreement from all defenders *qua* owners of the defender's 1998 property to the route of any private drainage system proposed to be installed in the Disponed Subjects.

9. The installation of the private drainage system sought by the pursuer is not "necessary".

10. No valid application for consent or agreement to a route for drainage has been made to the infeft proprietors of the defender's 1998 land and so they have not unreasonably withheld their agreement to such a route.

Finds in law

1. This action does not constitute a "relevant claim" in terms of section 9 of the Prescription and Limitation (S) Act 1973.

2. Properly construed, the servitude right created by recording of the 1998 Disposition permitted the owner of the proposed site to run a private drainage apparatus over the defender's 1998 land to drain from only one building.

THEREFORE: repels pleas in law 1, 2 and 3 for the pursuer and pleas in law 2 and 3 for the defenders; Sustains pleas in law 1, 4 and 5 for the defenders and dismisses the action; and reserves all question of expenses meantime; and appoints the sheriff clerk to fix a hearing on the question of expenses.

NOTE

Introduction

[1] This case concerns a dispute concerning a purported right of servitude which the pursuer wishes to exercise over land belonging to the defenders at Easter Balloan, Muir of Ord, Ross-shire. The pursuer limited company has planning permission for the erection of six houses at the proposed site, which borders land belonging to the defenders. The drainage system designed for the new properties would run through land owned by the defenders.

[2] The pursuer's case is, firstly, that they benefit from a servitude, the terms of which allow the installation of the drainage works that they seek and that declarator should be granted to confirm that. Secondly, they seek a declarator that the defenders have unreasonably withheld their agreement to the route of the drainage proposed and, thirdly, they seek an order ordaining the defenders to agree the route of drainage apparatus within 14 days of the court granting such an order.

[3] The defenders' case is that the servitude right has prescribed. If the servitude right does still exist then they say:

a. The drainage system which the pursuers propose to install is not necessary;

b. It is not a permitted exercise of any servitude right, which servitude was intended for a single building only; and

c. No application for consent was made to the defenders *qua* infeft proprietors (in other words the correspondence that was sent to Alexandra Robberts and Joanna MacLean was insufficient to be considered as such an application).

Procedural history

[4] The action was warranted on 6 August 2018. A notice of intention to defend was lodged on 6 September 2018. There then followed sundry procedure which does not seem relevant to this final determination. However, on 15 January 2020 the Sheriff issued a judgment following a contested rule 18.3 hearing on 26 March 2019. That was in respect of a Minute of Amendment allowed to be received on 12 December 2018. By virtue of the Minute of Amendment the pursuer sought to amend the defenders' designation in the instance.

[5] It had come to the pursuers' attention that their action had been incorrectly raised against Alexandra MacLean (Jnr) or Robberts and Joanna MacLean *qua* individuals; rather than against both of them with the addition of their mother, Alexandra MacLean (Snr) and their brother Angus MacLean (Jnr). They were the partners and trustees of the firm of Angus MacLean when the action was raised. In turn the firm of Angus Maclean was the correct owner of the property to the north of the proposed site by virtue of a disposition granted by Alexandra MacLean or Robberts and Joanna MacLean in favour of the firm, dated 10 May 2010 and recorded in the General Register of Sasines on 10 June 2010, "the 2010 Disposition". The defenders opposed the amendment being allowed on the basis of prescription. The Sheriff exercised his discretion by allowing amendment of the record to change the defenders designation. In so doing he indicated (paragraph 29) "… I consider that it is not possible to determine the issue of prescription on the pleadings alone and enquiry at proof will be necessary."

[6] There then followed further sundry procedure until a diet of debate on the pleadings before a different Sheriff on 1 June 2021. This again involved the defenders seeking to persuade the court to grant *absolvitor* on the basis of prescription of the servitude. Nevertheless the Sheriff issued a judgment on 26 August 2021 in which he reserved the defenders' first, second and fifth pleas-in-law and appointed the cause to a proof before answer.

[7] I heard the proof before answer on 6 October and 24 November 2022, when evidence was concluded. Parties agreed that they wished to submit written submissions and these were to be lodged by close of business on 23 December 2022. A hearing on submissions took place on 13 January 2023 at which point I made *avizandum*.

[8] The proof took place in person. Both parties submitted affidavits for each of their witnesses, which generally took the place of evidence-in-chief. All witnesses appeared in person and adopted their affidavits; most were cross-examined.

[9] The pursuer lodged affidavits by Angus Donald MacLeod, Director of the pursuer; Thomas Quinn, Architectural Designer; Ian Will, Civil Engineer; and each of these witnesses gave evidence. The defenders lodged affidavits by Alexandra MacLean (Snr), Alexandra MacLean (Jnr) or Robberts, Joanna MacLean and Angus MacLean (Jnr), the partners and trustees of the defender firm. Each of these witnesses gave evidence and was cross-examined. I do not propose to rehearse each witnesses' evidence at length. The broad tenure of their evidence can be seen in the affidavits which are lodged in process. However, I shall comment on any necessary disputed areas of evidence and highlight it at the appropriate place, later in this judgment.

Submissions

[10] I mean no disrespect to counsel in not repeating their submissions at length. Again, these were lodged in written format and are available in process. They had the opportunity to respond to the other party at the hearing on submissions on 13 January 2023. I shall seek to summarise their respective positions in the context of each matter that requires to be decided by me. Both parties also lodged a list of authorities in advance of 13 January 2023. I do wish to record my thanks to parties for the written submissions and authorities, which have assisted me in the task with which I am faced.

Prescription

[11] The defender's fifth plea-in-law is directed towards prescription. In particular it suggests that the pursuers' servitude right has prescribed in terms of section 8 of the Prescription and Limitation (Scotland) Act 1973; and as a result the action should be dismissed.

[12] Parties were agreed that the purported servitude was constituted by virtue of the disposition dated 10 and 14 September 1998 and recorded in the Division of the General Register of Sasines for the County of Ross and Cromarty on 29 September 1998. This action was raised by virtue of being warranted on 6 August and served on 16 August 2018. It was a matter of agreement that the pursuers had not exercised their right of servitude prior to raising the action, or since. Thus, it was a matter of agreement that the servitude right would have prescribed on 29 September 2018, unless the raising of this action interrupts the prescriptive period.

[13] As I have already indicated, the action was initially raised against two defenders; Alexandra MacLean or Robberts and Joanna MacLean *qua* individuals. They were the two persons to whom the land bordering the north of the proposed site had been disponed by the MacLeods *qua* individuals by virtue of the 1998 Disposition. However, as previously indicated, they had gone on to dispone the land to themselves and to the other partners and trustees of the firm of Angus MacLean by virtue of the 2010 Disposition. The pursuers agree that they raised their action to preserve the case against prescription (see paragraph 2 of the Sheriff's Note after the opposed motion hearing). On 28 November 2018, the Minute of Amendment bringing in the new defenders and stating the correct legal persona of the defenders was lodged. That was out with the 20 year prescriptive period.

[14] I require to consider the following questions:

i.) Is this a "relevant claim" in terms of section 9(2) of the Prescription and Limitation (Scotland) Act 1973?

- Is the fact that an action was commenced, albeit that it did not call as defenders all of the partners in the firm of Angus MacLean, sufficient?
- Does this action seek to establish the servitude right or contest any claim to a right inconsistent therewith?

ii.) Did Alexandra Mary MacLean or Robberts and Joanna MacLean hold themselves out as the correct owners; and if they did, does that matter?

Is this a "relevant claim"?

[15] In submissions the pursuer puts the position thus:

> "The key question is whether, when these proceedings were raised on 16 August 2018, they amounted to a 'relevant claim' within the meaning of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act')? If they didn't, then it is accepted that the Servitude will have prescribed. If, however, the raising of these proceedings did amount to a 'relevant claim' within the meaning of the 1973 Act, then the Servitude will not have prescribed."

A definition of "relevant claim" is provided for in section 9(2) of the 1973 Act, which is in the following terms:

> *"(2) In section 8 of this Act the expression 'relevant claim', in relation to a right, means* ***a claim made in appropriate proceedings by or on behalf of the creditor to establish the right*** *or to contest any claim to a right inconsistent therewith.*
>
> *(3) […]*
>
> *(4) In this section the expression 'appropriate proceedings' and, in relation to arbitration, the expression 'the date when the arbitration begins' have the same meaning as in section 4 of this Act."* [emphasis supplied]

Section 4 of the 1973 Act provides as follows:

> *"(2) In this section 'appropriate proceedings' means-*
>
> > *(a) Any proceedings in a court of competent jurisdiction in Scotland or elsewhere, except proceedings in the Court of Session initiated by a summons which is not subsequently called*
> > *(b) […]*
> > *(c) […]*
>
> *(3) The date of a judicial interruption shall be taken to be-*
>
> > (a) […]
> > *(b) in any other case**, the date when the claim was made**."*[emphasis supplied]

The pursuer submits:

> "The language of the statute is very simple. Provided a claim is made to establish the right in appropriate proceedings that will be sufficient to interrupt prescription. "

The pursuer submits that:

> "The question of whether any particular proceedings amount to a relevant claim within the meaning of section 9(2) of the 1973 Act does not depend upon whether the form of those proceedings complies with the procedural rules of the forum within which they are brought. Authority for that proposition can be found in *Royal Insurance UK v Amec Construction (Scotland) (No.2*) 2008 S.L.T. 825 ".

[16] The defender's position is the correct defenders could have been established easily by undertaking a search in the Registers of Scotland against the property. They submit that the servitude right was extinguished on 29 September 2018 and this action is irrelevant.

[17] I have carefully read the opinion of Lord Emslie in *Royal Insurance UK*. In my opinion it may fall to be distinguished from the present circumstances in the following respects:

i) In *Royal Insurance* the court was concerned with an error of designation on the part of the pursuers (not the defenders, which is the case here). The pursuers ostensibly raised the action as an individual corporate entity. It later became apparent that they

should have stated the special capacity in which they acted (as trustees).

Lord Emslie allowed the instance to be amended, stating (paragraph 21):

> "No doubt there is an established rule whereby any special capacity in which a party sues must be stated in the instance, but in my view that requirement arises independently as a matter of procedure, and for practical reasons which are unconnected with the law of prescription".

In my opinion it may be noteworthy that *Royal Insurance* deals with an error in the designation of the pursuers, rather than the defenders. The pursuer makes a choice to raise a court action; which the defender does not. The pursuer designs the parties in the instance, not the defender. As is said in Macphail*: Sheriff Court Practice*, 3rd ed paragraph 9.78:

> "immaterial errors in the instance may be disregarded by the court, but while the court will not be swayed by technical or immaterial mistakes, it must be kept in view that accuracy is the foundation of procedure, and practitioners must realise that laxity which springs from carelessness will not necessarily be condoned."

ii) Lord Emslie notes in *Royal Insurance* that the pursuers held title and interest to sue, albeit in a different special capacity than the manner in which the summons was drafted at the outset. That is not the case here. The case raised here at the outset completely omitted Alexandra MacLean (Snr) and Angus MacLean (Jnr), who were two of the partners in the firm of Angus MacLean (and any reference to the firm itself). If the action had initially been raised against Alexandra Robberts, Joanna MacLean, Alexandra MacLean and Angus MacLean, with no reference to their capacity as partners of and trustees for the firm of Angus Maclean, then that would be akin to the situation faced in *Royal Insurance* (albeit by the pursuers not the defenders), but it is not. I do consider it to be significant that two defenders were completely omitted from the original writ in any capacity. Lord Emslie had viewed

it as important earlier in the *Royal Insurance* case paragraph 7, that "no relevant capacity, title or interest had ever been held by any third party". At an earlier stage of the case he said this:

> "Even if the pursuers' title is in their capacity qua trustees, and not in their own right qua 'individual corporate entity', the inescapable point is surely this: that at all material times the pursuers, as a single and indivisible legal persona, have held all requisite capacities for the purposes of the present claim…. the defenders' pleas of no title to sue cannot sensibly be sustained against pursuers who have at all material times been invested in the relevant right of action, and who have all along held the character or capacity necessary for that purpose."

That cannot be said to be the case here; the four defenders were not "a single and indivisible legal persona"; on one view the first Alexandra MacLean (Snr) and Angus MacLean knew of the court action was when the 28 November 2018 Minute of Amendment was lodged, out with the prescriptive period.

iii) The special capacity of the pursuers in *Royal Insurance* was the result of a corporate restructuring and the entering into of an Agreement. In this case the defender's title is a matter of public record, which record would have been readily available to the pursuer in advance of the raising of this action. No proper explanation has been provided to me as to why a search of the Registers of Scotland was not carried out.

[18] Having considered each of these matters I have come to the conclusion that the defender's submissions fall to be preferred and this case is irrelevant as the servitude right prescribed on 29 September 2018, no "relevant claim" having been raised by that date. This action cannot be a "relevant claim" as it did not initially seek to "establish the right" against all of the correct defenders. Even if it established a right against Alexandra Robberts and Joanna MacLean (having been raised in an incorrect capacity) that is not, in my judgment, sufficient; as whilst the issue of capacity could perhaps be overlooked in respect of

Alexandra and Joanna *per Royal Insurance,* the lack of any call of Angus MacLean Jnr or Alexandra MacLean Snr as defenders is in my judgement fatal.

[19] That decision is sufficient to dispose of this action, but in case I am incorrect about this, I shall go on to deal with other aspects of the case.

Did the defenders hold themselves out as the correct owners?

[20] The evidence demonstrated that Angus MacLeod discovered the 1998 Disposition in his grandmother's papers. This was "in 2014" (paragraph 5 of his affidavit). The 1998 Disposition led him to understand that Alexandra Robberts and Joanna MacLean were the owners of the defender's 1998 land. This is slightly curious, as in 2014 and 2015 Angus MacLeod had been in correspondence with, and had set up a meeting with Angus MacLean Snr, believing him to the owner of the land. He was also aware that Angus MacLean Jnr farmed the land after his father's death. Production 6/2/6 is a letter from building and planning consultants on behalf of Angus MacLean Snr, dated 5 February 2015 to Highland Council Planning Department, where they advise they act for him as "the owner of land adjoining the application site."

[21] In Joanna MacLean's affidavit (paragraph 17) she puts the position thus:

> "We did not say anything to Mr MacLeod or his solicitors to suggest that we owned the land as individuals, that there were no other owners or anything of that nature. It is not something which occurred to me at all. It appears they assumed this as Alix and I were the two who corresponded with Mr MacLeod."

[22] The pursuer's position appears to be that communication to Alexandra Robberts and Joanna MacLean was ongoing and they had never replied telling the pursuer that it was the firm of Angus MacLean that owned the land, rather than them. The pursuer assumed, from

the fact that Alexandra Robberts and Joanna MacLean were replying, that they were the correct owners of the property. They were not entitled to make that assumption.

[23] There was nothing in the evidence that would allow me to come to the conclusion that Alexandra Robberts or Joanna MacLean sought to deliberately deceive or confuse Angus MacLeod about ownership of the 1998 land. It seemed to me that Mr MacLeod was proceeding on the basis of what he thought he knew. The MacLeans generally viewed the farming land as being owned by the whole family, notwithstanding particular legal title. I have some sympathy with the pursuer's agent; who was presented with information by her client as to ownership of the 1998 land, and who did not get any pushback upon an assertion of that position in a letter to Alexandra and Joanna. Nevertheless, this was a matter that should and could have been quickly laid to rest by a simple search in the Registers.

Does this action seek to establish the right or contest any claim?

[24] The defenders also argue that this is not a "relevant claim" as it does not seek to "establish the servitude right" or "contest any claim to a right inconsistent therewith". These are the terms used in section 9(2), quoted above.

[25] In my judgement the seeking of a declarator, as the pursuer does here, is clearly an action seeking to establish his right; accordingly I would have viewed it as a "relevant claim" in this respect.

What is the true construction of the servitude?

[26] Parties do not agree what the servitude potentially allows the pursuers to do.

[27] Parties were agreed that when construing the words of a servitude, the words are to be given a "reasonable and fair" construction: they are to be construed "in the context of the relevant deed, read as a whole, in light of surrounding circumstances" (Cusine and Paisley 1998 *Servitudes and Rights of Way* at paragraph 15.15). The courts should take a "purposive approach" and that purpose may be identified from the surrounding circumstances (same text paragraph 15.17). Parties were also agreed that "where there is ambiguity in a deed constituting a servitude, this does not render the deed invalid but the court will favour the construction which is least burdensome to the [burdened property] (same text paragraph 15.14).

[28] I should repeat the terms of the servitude in full. It states, as follows:

> "(SECOND) there is reserved in favour of us and our successors in ownership of the said subjects retained by us a heritable and irredeemable servitude right to install, **if necessary**, any part of a private drainage system which may be required **for any building** which may be erected on the said subjects retained by us as may require to be situated out with the boundaries of the said subjects retained by us together with a heritable and irredeemable servitude right of access thereto for the maintenance, repair and renewal of the same but that subject to an obligation of us and our successors in ownership to…."(my emphasis).

There were two aspects to this, about which parties had differing views.

[29] Firstly, the defenders highlighted the use of the words: "if necessary". In light of the use of these words, their position was that the exercise of the servitude right is conditional upon being "necessary". Paragraph 5(i) of the defender's submissions: "it is evident from the wording that the right to instal was qualified, rather than being expansive or without limit". I heard evidence about other potential ways of draining surface water from the proposed site, which did not necessitate an implementation of the servitude, albeit both SEPA and Highland Council preferred the pursuer's proposed drainage scheme. I heard evidence from Ian Will that a pumped solution (which would not require use of the

servitude) was feasible. Thus the defenders submitted all that had been shown in evidence was that the proposed use of the servitude was cheaper and more convenient for the pursuer, rather than being "necessary".

[30] The dictionary definition of "necessary" is: a/ "needed in order to achieve a particular result" (Cambridge online dictionary) b/ "needed in order for something else to happen" (Collins online dictionary) c/ "essential or needed in order to do something, provide something, or make something happen" (Macmillan online dictionary).

[31] In my judgement, giving the words of the servitude their reasonable and fair meaning the drainage plan proposed by the pursuer is not "necessary". The pursuer's attempt to suggest that it is, due to it being a condition of the planning permission (paragraph 32 of pursuer's submissions), does not persuade me. What that means is that the drainage plan could be said to be necessary in order to implement the current planning permission; but not that it could be said to be necessary in the sense of it being essential, where there is evidence that a different form of drainage is feasible, but has simply not been explored further.

[32] Secondly, the defenders point to the phrase: "which may be required for **any building** which may be erected on the said subjects". The defenders submitted that the words "any building" made it clear that the condition was restricted to one single building on the subjects as this would be construed as the least burdensome condition. They pointed to the fact that the word "building" is singular, the plural being "buildings".

[33] The pursuers' submission was that emphasis should be on the word "any" and that this was being used to refer to any building on the land. The area of land was a large one and clearly capable of containing several buildings.

[34] I can see merit in both these arguments. I do not think that the use of "building" singular, rather than "buildings" plural provides a definite answer to how the words should be interpreted. If "any" is being used as a determiner in the phrase then whether the word that follows is singular or plural need not be significant as "any" is being used in the sense of "it doesn't matter which". For example: "any building on the land should have a red roof" clearly refers to a red roof being required by one, three or six buildings.

[35] Having thus identified that the wording of the deed is ambiguous I consider that I am then bound by the rule that requires the least burdensome interpretation to be given. However, parties were not agreed on what the least burdensome interpretation would be. Mr Garrity for the defenders submitted that it was:

> "self-evidently less burdensome for the burdened proprietors to be subject to a drainage system in their land which serves only one property, rather than a system intended to serve six properties".

But at the oral hearing on submissions Mr Middleton for the pursuer took issue with that. He pointed to the evidence of Ian Will who, he submitted gave evidence to the effect that the flow of waste water was the same regardless of whether one house or six were involved.

[36] In reviewing Mr Will's evidence I observe that I found this credible and reliable. Mr Will explained that the drainage system was to deal with surface water drainage, that is to say water that fell from the sky; (as opposed to waste water from toilets, sinks and baths.) In response to Mr Garrity's suggestion that there would be more drainage required by six houses than one he disagreed. He pointed out that there would be the same amount of water falling from the sky on to the same area of land albeit the surfaces on which it lands may be different after construction. He gave evidence that some foul water would currently be absorbed by the top soil. He gave evidence that when land is developed there tend to me more hard surfaces, such as roofs and paving and that hard surfaces like these would not

increase the amount of water that fell on the area, but they would increase the flow of it to the water courses as there would be less absorption and more hard surfaces.

[37] Bearing in mind this evidence I do not accept that construing matters in favour of the defenders would be less burdensome.

[38] Parties were agreed that I could and should look at the surrounding circumstances for assistance in the interpretation of the servitude, that is to say the circumstances in existence when the servitude was created (per Cusine and Paisley paragraph 15.17(3)). They disagreed on the relevant facts and circumstances in this regard.

[39] The pursuer urged me to accept that the surrounding circumstances demonstrated that the MacLeods negotiated the servitude against a background of them having sold various parts of their land for housing and being aware that the site had a history of flooding. They submitted that the purpose of the servitude was to ensure the proposed site could be drained adequately, should the MacLeods decide to build any number of properties on it. The servitude referred to a "drainage system", rather than, for example to "a drain" to make it clear that more than a drain pipe serving a single house may be required. The word "public" was used to distinguish the private drain from a public sewer and nothing more than that.

[40] The defenders pointed to different circumstances, which I accept. In particular I accept evidence from the defenders that their father agreed to the servitude in order that the elderly MacLeods could build themselves a house on the proposed site, and that same would have a drainage method easily available to it. On this point I accept the evidence of Joanna MacLean (paragraph 13 of her affidavit) to the effect that if her father had granted the servitude expecting it to be used by a commercial developer of the proposed site then he would have wanted something in return, or would have refused to grant the servitude.

Alexandra Robberts also gave detailed evidence about this (paragraphs 13 and 14 of her affidavit) and about the fact that her father understood the MacLeods may wish to build a house for themselves on the land. I found this evidence persuasive and accept it.

[41] As a result I consider that the proper construction of the servitude is that it permits drainage across the defender's 1998 land for one building only.

Agreement to the proposed drainage route

[42] Parties were also in dispute in relation to crave two. This is in the following terms:

> "To find and declare that, in respect of condition (E) stipulated in the 1998 Disposition, the defenders have unreasonably withheld their agreement to the route of the drainage apparatus."

[43] It thus relates to condition E of the servitude, which requires the pursuer to "ensure that the route of such apparatus shall be first agreed with our said disponees and their foresaids (which agreement will not be unreasonably withheld)." The pursuer's position is that there is no requirement for the pursuer to reach agreement as to whether they may install drainage apparatus, simply that the defenders may only withhold their agreement to the proposed route of the pipeline over their property. They submit that the defenders have unreasonably withheld their agreement, despite extensive efforts being made by Angus MacLeod to obtain that agreement. Accordingly they submitted crave 2 should be granted.

[44] For the defenders, Mr Garrity's position was that no order of declarator could be made (as it could not be shown that such a declarator was necessary) as there was no extant servitude, and in the absence of the pursuers having applied to the four named defenders as trustees to provide their consent. He submitted that the court should not grant the

declarator sought in crave 2, nor ordain the defenders to agree a drainage route, as sought by crave 3 when they had never in fact been properly asked to do so.

[45] Having earlier decided that this servitude has prescribed it is self-evident that I shall refuse craves two and three for the pursuers, there being, in my judgement, no extant servitude and as I have decided that the drainage system proposed by the pursuer is not "necessary". Had I required to decide this issue I would again have found in favour of the defenders and decided that no proper application for consent had been made, given that the pursuer company (as distinct from the pursuer as an individual) failed to approach all infeft proprietors (whether *qua* individuals or *qua* trustees for the firm) seeking such consent. As such it will be obvious that I cannot agree that the defenders withheld their agreement to the proposed drainage route unreasonably, as I do not agree that their agreement was ever properly sought.

[46] I shall reserve all question of expenses meantime and suggest parties try to agree a finding of expenses. In case that is not possible I shall have a hearing on expenses fixed by Webex.