OUTER HOUSE, COURT OF SESSION

[2024] CSOH 104

A26/23

OPINION OF LORD BRAID

In the cause

ELIZABETH MARY ROSE

Pursuer

against

(FIRST) RICHARD HUW BASTON; (SECOND) SHONA MACGREGOR BASTON; (THIRD) THE KEEPER OF THE REGISTERS OF SCOTLAND; (FOURTH) RUSSELL MCKEAND; AND (FIFTH) JENNIFER HAMILTON

Defenders

Pursuer: Dean of Faculty KC, Oliver; T C Young LLP
Defenders: Garrity; Aberdein Considine and Company

19 November 2024

Introduction

[1] This action concerns a boundary dispute between the pursuer, and the first and second defenders, who are the proprietors of neighbouring properties in Aberfoyle. (The other defenders are called for such interest as they may have but have not entered the process, and so, for ease of reading, I shall refer to the first and second defenders simply as "the defenders".) The pursuer is the owner of Creag Mhor House, Lochard Road, by virtue of a disposition in favour of her and her late husband recorded in the General Register of Sasines on 20 October 1987 (the 1987 disposition). The defenders are the registered owners

of adjacent land (referred to in the pleadings as Orchard, but on which they have built a house) by virtue of a disposition in their favour registered in the Land Register under the Land Registration (Scotland) Act 2012 on 30 August 2022 with Title Number PTH35956. That land previously formed part of a larger area of land which included Creag Mhor Cottage, owned by Russell McKeand by virtue of a disposition in his favour registered in the Land Register under the Land Registration (Scotland) Act 1979 on 24 April 2009 (the 2009 disposition), with the said title number. A difference has arisen between the pursuer and the defenders as to the location of the boundary between their properties, resulting in the ownership of a portion of ground, which lies between the parties' respective undisputed titles, being in dispute. Stated shortly, the pursuer avers that part of her garden, which she maintains was included in the ground conveyed to her and her husband by the 1987 disposition, was, as the Dean of Faculty put it, annexed by the defenders in 2022 when they are said to have removed the boundary fence as well as trees and other greenery from the pursuer's garden. While there is no agreement as to the extent to which a fence was removed, the defenders accept that they entered the disputed portion and removed trees and greenery, which they say they were entitled to do because the land in question (a) forms part of the land in their title sheet, and, moreover, (b) never formed part of the pursuer's title.

[2] Against that brief summary, the pursuer seeks various remedies including: declarator that the title sheet and cadastral map relative to Title Number PTH35956 are manifestly inaccurate in terms of section 80(1) of the 2012 Act, since they include land owned by the pursuer; declarator that it is manifest in terms of section 80(2) of the 2012 Act that the steps needed to rectify the inaccuracy are adjusting the boundaries so as to remove the land owned by the pursuer; an order ordaining the Keeper of the Register to rectify the

title sheet and the cadastral map; interdict against the defenders from future trespass on the pursuer's land; an order for reinstatement by the defenders of the boundary fence; and damages of £175,000 for past trespass and harassment.

[3] The action called before me on the procedure roll for discussion of the defenders' plea to the relevancy and specification of the pursuer's pleadings. The principal issue between the parties is whether the court can, as the defenders submit, decide the dispute in their favour purely on the basis of the deeds, and dismiss the action; or whether, as the pursuer has offered, a proof before answer ought to be fixed so that the court may hear evidence before deciding where the boundary between the parties' respective properties properly lies, and what remedies, if any, flow therefrom. There is also a subsidiary issue as to the relevancy and specification of the pursuer's pleadings in support of her trespass and harassment cases.

The statutory framework

Land Registration (Scotland) Act 1979

[4] The 1979 Act introduced land registration to Scotland. Much of it was replaced by the 2012 Act, but two provisions remain relevant for present purposes. Section 3(1) provided that registration had the effect of vesting in the person registered as entitled to the registered interest in land a real right in and to that interest: the Keeper's "Midas touch"[1], so called because once the Keeper issued a registered title the extent of the property as registered became the extent owned by the registered owner regardless of the underlying title deeds (Stair Memorial Encyclopaedia, Conveyancing (2nd Reissue), paragraph 256).

[1] A term first coined by the Scottish Law Commission in *Discussion Paper on Land Registration: Void and Voidable Papers* (SLC Discussion Paper no 125, para. 5.34).

The Act provided for rectification of the register by the Keeper to cure an inaccuracy, but only if to do so would not prejudice a proprietor in possession: section 9(1) and (3). That Act did not define what was meant by an inaccuracy.

Land Registration (Scotland) Act 2012

[5] The 2012 Act removed the Keeper's Midas touch, and it does provide a definition of inaccuracy. Section 65 of the 2012 Act, so far as material, provides:

> "(1) A title sheet is inaccurate in so far as it –
> (a) misstates what the position is in law or in fact
> ...
> (2) The cadastral map is inaccurate in so far as it
> (a) wrongly depicts or shows what the position is in law or in fact
> ...
> (3) The cadastral map is not inaccurate in so far as it does not depict something correctly by reason only of an inexactness in the base map which is within the published accuracy tolerances relevant to the scale of map involved."

[6] Section 80, so far as material, provides for rectification as follows:

> "(1) This section applies where the Keeper becomes aware of a manifest inaccuracy in a title sheet or in the cadastral map.
> (2) The Keeper must rectify the inaccuracy if what is needed to do so is manifest.
> (3) Where what is so needed is not manifest, the Keeper must enter a note identifying the inaccuracy in the title sheet or, as the case may be, in the cadastral map."

[7] The 2012 Act also contained transitional provisions, preserving, to an extent, the Keeper's Midas touch with respect to titles registered under the 1979 Act. Thus, paragraph 17 of schedule 4 provides:

> "If there is in the register, immediately before the designated day, an inaccuracy which the Keeper has power to rectify under section 9 of the 1979 Act...then, as from that day –
> (a) any person whose rights in land would have been affected by such rectification has such rights (if any) in the land as that person would have if the power had been exercised, and
> (b) the register is inaccurate in so far as it does not show those rights as so affected."

And paragraph 18:

> "For the purpose of determining whether the Keeper has the power mentioned in [paragraph 17], the person registered as proprietor of the land is to be presumed to be in possession unless the contrary is shown."

The effect of these provisions, taken together, is that there is continued Midas touch protection for a 1979 registered title if (but only if) the title could not, immediately before the "designated day" (8 December 2014) have been rectified against the registered owner. The rebuttable statutory presumption that the registered owner was in possession means that, to achieve rectification of such a title, the person seeking rectification will require to overcome that presumption by leading evidence that there was in fact no such possession.

The Prescription and Limitation (Scotland) Act 1973

[8] It is convenient to note, at this point, section 1 of the Prescription and Limitation (Scotland) Act 1973 which provides, reading short, that if land has been openly and peaceably possessed by any person for a continuous period of 10 years and the possession was founded on the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in land of a description habile to include that land, then that real right shall be exempt from challenge. Whether or not land has been openly and peaceably possessed for the requisite period is a question of fact.

The pursuer's title

[9] The description of the pursuer's title in the 1987 disposition is as follows (retaining the punctuation and capitalisation of the original):

> "ALL and WHOLE that plot or area of ground lying on the North North East side of the public road leading from Aberfoyle to Inversnaid in the Parish of Aberfoyle and

> County of Perth bounded on or towards the South South West by the said public road along which it extends Three hundred and seventy nine feet or thereby; on or towards the East South East by the subjects known as and forming Creag Mhor Lodge along which it extends, along the centre line of a mutual fence Two hundred and five feet or thereby, on or towards the North North East by unfeued ground belong to the Duke of Montrose along which it extends Three hundred and eighty nine feet or thereby on the line of an existing fence and on or towards the West North West by subjects known as and forming Creag Mhor Cottage along which it extends, measuring along the centre line of a mutual fence, One hundred and ninety six feet or thereby; all as the said plot or area of ground is delineated and shown within red boundary lines on the plan annexed and subscribed as relative hereto; Which subjects comprise ALL and WHOLE that plot or area of ground extending to Three acres or thereby Imperial Measure in the said Parish and County described in, disponed by and delineated within red boundaries on the plan annexed and subscribed as relative to Feu Charter granted by Douglas Beresford Malise Ronald, Duke of Montrose, in favour of Patrick Thorp Dickson dated Sixth April and recorded in the Division of the General Register of Sasines applicable to the County of Perth for publication and also in the Books of Council and Session for preservation on Second June, both in the year Eighteen Hundred and Eighty Six under exception therefrom of (First) ... and (Second) ALL and WHOLE the plot or area of ground delineated and coloured red on the plan annexed and subscribed as relative to Disposition by me the said John McLellan and Mrs. Shona Dalglish McLellan in favour of Robert Marshall Scarth dated Fourth May and Eighteenth June and recorded in the said Division of the General Register of Sasines on Eleventh August, all in the year Nineteen Hundred and eighty Six..."

The measurements in that descriptive clause are replicated in the plan annexed to the disposition.

[10] To ascertain the extent of the ground second excepted, one must turn to the disposition by John McLellan and Shona Dalglish McLellan in favour of Robert Scarth dated 14 May and 8 June and recorded 11 August 1986. It describes that ground as follows:

> "ALL and WHOLE that plot or area of ground lying on the North North East side of the public road leading from Aberfoyle to Inversnaid lying within the Parish of Aberfoyle and County of Perth all as the said plot or area of ground is delineated and coloured red on the plan annexed and subscribed as relative hereto; Which plan is demonstrative only and not taxative..."

The plan referred to appears to show the relevant boundary line in more or less the same position as in the plan annexed to the 1987 disposition, but whether it is exactly the same is a question of fact. The plan also shows that the subjects disponed form an approximate

rectangle, in which Creag Mhor Cottage lies in the bottom left hand quadrant. For completeness, and, at this stage, *quantum valeat*, the disposition also contains a burdens clause in the following terms:

> "(Five) ... the fence erected along the south south west boundary between the subjects hereby disponed and the subjects owned by us known as Creag Mhor, Aberfoyle shall be maintained at the joint expense of our said disponees and the proprietors from time to time of Creag Mhor aforesaid."

(The parties agreed that the reference in that clause to the south south west boundary was an error, and that the reference should have been to the south south east boundary.)

The defenders' title

The 2009 disposition

[11] As already noted, the defenders' title derives from Russell McKeand, who obtained title to Creag Mhor Cottage through the 2009 disposition, in which Creag Mhor Cottage was described as:

> "ALL and WHOLE the subjects known as and forming Creag Mhor Cottage, Lochard Road, Aberfoyle..., which subjects form PART and PORTION of the subjects more particularly described, and delineated and coloured red on the plan annexed and subscribed as relative to the Disposition by John McLellan and Mrs Shona Dalglish McLellan in favour of Robert Marshall Scarth and dated the Fourteenth day of May and the Eighth day of June, both months in the year Nineteen Hundred and Eighty Six and recorded in the Division of the General Register of Sasines for the County of Perth on the Eleventh day of August Nineteen Hundred and Eighty Six; WHICH subjects hereby disponed are delineated in red on the plan and subscribed as relative hereto..."

[12] Although that description narrates that the subjects being disponed form part only of the subjects disponed by the McLellans to Robert Scarth in the 1986 disposition, the plan appears to show that it was the whole of the subjects shown in the plan which was annexed to that disposition which were disponed; certainly, counsel for the defenders conceded that he was unable to point to any difference and could not explain why the 2009 disposition was

worded in the way it was. So, again, the south south east boundary line in the 2009 disposition appears to coincide more or less with the north north west boundary in the plan annexed to the pursuer's 1987 disposition. Whether it exactly coincides is a question of fact.

[13] The title certificate issued to Russell McKeand appears to show broadly the same subjects as shown in the plan annexed to the 2009 disposition. The pursuer accepts that the title certificate includes the disputed portion; but crucially, she does not accept that the boundary line correctly matches that in the plan annexed to the disposition. That, too, is a question of fact.

The rectification case

The pursuer's averments

[14] The defenders' counsel described the pursuer's averments as prolix, and there is some force in that criticism inasmuch as the pursuer's pleadings include an unnecessary degree of repetition and an over-reliance on definitions as well as occasionally straying into the realm of submission. However, stripped back to its essentials, the pursuer's case on record with regard to rectification is that both the defenders' registered title and the cadastral map erroneously include the disputed portion to which the pursuer claims title (article 1(b) of condescendence); that the disputed portion was included in the subjects disponed to the pursuer and her husband in the 1987 disposition (articles 2(a) and 5), forming part of the garden (article 2(b)); that the pursuer has been in possession of the disputed area since 1987, having used it as her garden, cultivated it and sat in it (article 4); that a fence ran along and coincided with the boundary between the parties' respective properties until at least August 2021 when the defenders removed it (articles 4 and 5); that,

before then, the defenders and their predecessors had not possessed the disputed portion; that the land disponed by the 1986 disposition, properly construed, did not include the disputed portion (article 5); that the 1987 disposition disponed land of a description habile to include all land within the then-existing boundary fences and that the pursuer had in any event acquired a title through possession, pursuant to section 1 of the 1973 Act (article 6); that the title sheet produced by the Keeper when registering the 2009 disposition erroneously included the disputed portion and as such the Land Register contained a bijural inaccuracy, in particular, that its effect was to reduce the length of the pursuer's southern boundary from 379 or 380 feet to 357 feet (article 8); that Mr McKeand never possessed the disputed portion (article 8); that the bijural inaccuracy was capable of rectification in terms of section 9(1) of the 1979 Act, which continued to be the case until immediately before the designated day (articles 9 and 10); that the title sheet and the cadastral map relative to Title Number PTH35956 are (and have since the designated day) been inaccurate, and that the inaccuracy is manifest (or in any event will become manifest upon judicial determination to that effect) (article 11); that the steps needed to rectify the inaccuracy are manifest (article 12); that in any event, the pursuer and her husband acquired a valid title to the disputed area through the operation of prescription (article 14); and that Mr McKeand had no title to dispone the disputed portion to the defenders, as he purported to do in the disposition of 22 August 2022, so that the disposition was *a non domino* insofar as it concerned the disputed portion (article 16).

Submissions

Defenders

[15] Counsel for the defenders submitted that there could be no inaccuracy in the defenders' title because Mr McKeand, from whom the defenders had derived their title, had benefitted from the Keeper's Midas touch, which had the effect of conferring title to the disputed portion on him, even if it had previously formed part of the pursuer's land, which it did not. All the titles in question were bounding titles which meant (a) that no evidence was required, or even admissible, to demonstrate the extent of the title (Gordon and Wortley, *Scottish Land Law*, 3-10); and (b) possession of any area beyond the boundaries could not confer a title through the operation of prescription (Johnston, *Prescription and Limitation* (2nd Ed), 17.45). If there was a discrepancy between a verbal description and a plan, there was no rigid rule of law as to which was the more reliable description; rather, it was a matter of circumstances, and habile for inquiry, as to which prevailed (*Langskaill* v *Black* 2023 SLT (SAC) 51 at [30] to [33] and [39]). Since the 1987 disposition expressly excluded the land disponed by the 1986 disposition (which included the disputed portion, as the plan annexed to the 1986 disposition showed) the pursuer could not have acquired title to that land either through the 1987 disposition, or by prescription thereafter (*North British Railway Co* v *Hutton* (1896) 23R 522). It could be seen from a comparison of the plans in the 1986 and 1987 dispositions that the pursuer's boundary excluded the disputed portion; and Mr McLellan and spouse could not have disponed the same land to both Mr Scarth and to the pursuer and her husband. Further, the pursuer had not relevantly averred an inaccuracy, let alone a manifest inaccuracy, in either the title sheet or the cadastral map. Evidence about the location of the fence would not advance matters, because the fence may

not have been on the boundary. No regard could be had to the burdens clause in construing the descriptive clause: *Munro* v *Keeper of the Registers of Scotland* LTS/LR/2016/05 at [33].

Pursuer

[16] The Dean, for the pursuer, submitted that the Midas touch was nothing to the point, since the pursuer was offering to prove that the Keeper had the power to rectify the register immediately before the designated day. The pursuer's position was that there was no inconsistency between the 1986 and 1987 dispositions. The parties were at one in saying that the disputed portion was not disponed twice, but the issue was where the boundary (in both dispositions) lay and evidence was required to establish that. The case was indistinguishable on its facts from *Drumalbyn Development Trust* v *Page* 1987 SC 128, where the Inner House, allowing an appeal from the sheriff, held that proof was required to resolve the issue between the parties, which was whether a fence had conformed to a plan, or whether the plan was wrong. The defenders' argument conflated what was conveyed in 1986 with what was in the 2009 registered title, but the pursuer's position, on averment, was that the latter did not conform to the former. Further, the defenders' argument was entirely predicated on the fact that the pursuer's title contained a clause excluding that which was disponed in 1986, but that could be established only after proof; or, adopting an arithmetical analogy, if A = X + Y, and we do not know what Y is without proof, then we cannot know what A is without proof. The pursuer would succeed, either, if she established that the 1987 disposition transferred the disputed portion to her; or that she had acquired an unchallengeable title through the operation of prescription. Her possession of the disputed portion was not irrelevant since the pursuer's title was habile to include the disputed portion, inasmuch as the possessed area lay within the verbal description of the subjects.

Decision on the rectification case

The need for evidence

[17] I have already identified a number of questions of fact, which, by definition, can be resolved only by the leading of evidence. That is the short answer to the defenders' contention that the case can be resolved by an examination of the material deeds and plans. It also perhaps begs the question to say, as counsel for the defenders did, that Mr McLellan and spouse "could not" have disponed the same land twice. One issue may be whether, on a proper construction of the dispositions granted by them, they did in fact do just that and, if so, what are the consequences. However in deference to the submissions made, I will also give a somewhat longer answer.

[18] The defenders' argument that proof is not required is predicated on the fact that each of the 1986 and the 1987 dispositions conferred a bounding title on the disponee, that is, a title where the subjects are limited by boundaries, either in whole or in part, expressly or by implication. As the defender's counsel submitted, a bounding title may be created by any combination of boundaries, measurements, and plan sufficient to identify the actual land (Halliday, *Conveyancing Law and Practice in Scotland* (2nd Ed), 33.09). It may also be created by expressly excepting an area of land from the subjects disponed (*North British Railway Co* v *Hutton*, above).

[19] A signal feature of the 1987 disposition is that it described the boundaries using a variety of those methods: first, by a verbal description of the boundaries, which included measurements and references to mutual fences; second, by reference to the plan annexed to the disposition, which replicated the measurements in the verbal description and which delineated the subjects disponed in red; and third, by reference to the subjects disponed in

the 1986 disposition, which was excluded. This presents a problem for the defenders' argument in a number of respects.

[20] First, the pursuer offers to prove that the boundaries described by the measurements take in the disputed portion. That will require the leading of evidence, most probably from a surveyor.

[21] Second, where the description describes the boundary as the centre line of a mutual fence, as this one does, it is difficult to see that inquiry into the existence and location of the fence is not required. True it is that a fence might not necessarily follow the line of a boundary, but whether or not it does is a question of fact. One matter bearing upon that fact is whether the fence was already *in situ* at the time of the 1987 disposition. Counsel for the defenders submitted, under reference to *Munro* v *Keeper of the Registers of Scotland*, above, at [33], that where a disposition contains a bounding description *from which it is possible to identify the boundaries clearly on the ground* (emphasis added), it is not permissible to qualify or contradict that description by reference to a fence maintenance burden. That may be correct insofar as it goes, but whether or not the boundaries can be clearly identified on the ground in this case is a question of fact which can be decided only after hearing evidence; and in any event, a distinction may fall to be drawn between evidence the purpose of which is to contradict a clear bounding description, which is impermissible, and evidence which is part of the general factual matrix relevant to construction of the deed, which is generally allowed. If there is an issue as to whether a fence existed on the boundary in 1987, as there appears to be, it is hard to see that a prior disposition, which referred to an existing fence, could not be referred to as shedding light on that issue, but that question, relating as it does to the admissibility of evidence, is not one I need resolve for present purposes.

[22] Third, the boundary lines on the plan are imprecise in that they are thickly drawn, although they are accompanied by measurements. Again, the evidence of a surveyor is likely to be required in order to ascertain where, on the ground, the boundary lines lie.

[23] Fourth, to the extent that the subjects disponed by the 1986 disposition are excluded, those are described solely by reference to the plan annexed to that disposition. Again, the boundary lines are thickly drawn; again the evidence of a surveyor will be required to inform the court precisely where on the ground the boundaries lay; or, to adopt the Dean's arithmetical example, evidence of the extent of Y (the excluded ground) will be required before the extent of A (the pursuer's title) can be determined.

[24] Fifth, until evidence has been led, it is impossible for the court to determine whether or not there is any conflict or inconsistency between the three descriptions of the boundaries in the 1987 disposition (verbal, plan and by exception), let alone decide, if there is an inconsistency, which one should prevail: *cf Langskaill* v *Black*, above, where the Sheriff Appeal Court held that if there was a discrepancy between a verbal description and a plan, it was a matter of circumstances and habile for inquiry as to which prevailed.

[25] Sixth, an argument which the defenders' counsel failed to grapple with, the pursuer's position is that the title sheet and cadastral map do not accurately reflect the plan annexed to the 1986 disposition: that, too, is a dispute of fact which cannot be resolved at this stage simply by a comparison of the two plans. In particular, it cannot be assumed that the former do accurately reflect the latter; again, to do so would be to beg the question as to whether the land register contains an inaccuracy.

Adequacy of the pursuer's averments

[26] As adverted to above, the defenders' counsel was critical of the prolixity of the summons. If that were a ground for dismissing an action, few cases would ever reach proof. Despite counsel's protestations, it is possible to see the wood for the trees, as it were, as I have attempted to summarise above at para [14]. Further, counsel submitted that it was not possible to determine from the conclusions or the pleadings precisely what is the area of the disputed portion. That is a specification point rather than one of relevancy, but I consider that fair notice has been given of where the pursuer maintains the true boundary lies, which is simply one way of defining the disputed portion (in layman's terms, it's the bit between that boundary and the defenders' new fence). Fair notice has also been given of the manner in which the pursuer wishes the register to be rectified (in substance, by returning the boundary to what the pursuer maintains is its true position). Any imprecision in the conclusions can be addressed if and when the court reaches the stage of granting decree in favour of the pursuer after proof.

Prescription

[27] One consequence which flows from a bounding description is that it is not habile to include an interest in land beyond the boundaries: Johnston, *Prescription and Limitation* (2nd Ed), 17.45; and so it is not possible to prescribe title to an area of land beyond the boundaries (including, by definition, an area of land which is expressly excluded from a grant: *North British Railway Co* v *Hutton*, above). The Dean submitted, under reference to *Suttie* v *Baird* 1992 SLT 133, that if the disputed portion fell within the area delineated by the verbal description, then the 1987 disposition must be habile to include it, even if on a proper construction of the deed, it was ultimately held that that area lay outwith the boundary.

I need not express a concluded view on that submission, on which I did not hear full argument, at this stage, since it is, I think, a question best decided after the leading of evidence; suffice to say that on any view the evidence of possession by the pursuer (and the possession or non-possession of it by the defenders) may be relevant in deciding whether rectification of the register on the designated day was possible. Further, for aught yet seen it may turn out to be the case that the 1986 and 1987 dispositions did dispone the disputed portion twice, in which event possession will determine which proprietor prevails over the other. However, ultimately, as I understood him, counsel for the defenders did not invite me to exclude any averments from probation (insofar as directed towards the rectification case) in the event that I was not with him in dismissing the action.

Manifest inaccuracy

[28] The defenders' counsel submitted that there was a difference between an accuracy and a manifest inaccuracy, the latter being one which was obvious and did not require extensive investigation. The pursuer's pleadings did not aver any such inaccuracy and so were irrelevant. Any inaccuracy, to be rectifiable, must be manifest not only to the Keeper but to the court. The Dean of Faculty under reference to Reid and Gretton, *Land Registration*, 11.14 submitted that if an inaccuracy was judicially determined, then it acquired the status of being manifest to the Keeper such as then to require rectification. The court did not itself require expressly to find that the inaccuracy was manifest.

[29] While I think the latter approach is probably correct, again I need not reach a concluded view on the point at this stage. However, if the defenders' submission were correct in its entirety, no inaccuracy which could be proved only after extensive investigation could ever be corrected, no matter the magnitude of the inaccuracy, which

seems unlikely to have been the intention of the legislature. Reid and Gretton, *ibid*, suggests that "manifest" means "virtually certain", "perfectly clear" or "not reasonably disputable" and that the issue is not about substance but about evidential standard. The pursuer's averments do advance a case that there is an inaccuracy in both the cadastral map and the title sheet. Even if the defenders are correct in submitting that the pursuer must establish a manifest inaccuracy in the sense contended for, that can be determined only after hearing evidence.

Conclusion

[30] For all of the above reasons, I find that the pursuer's averments are sufficiently relevant and specific to justify a proof before answer.

The trespass and harassment cases

[31] I will deal with the trespass and harassment cases together, as there is a degree of overlap insofar as some of the defenders' acts are said to amount to both, and the pursuer's conclusion for damages, and averments of loss, combine both alleged wrongs as if they were one.

The pursuer's averments

[32] The pursuer avers (in articles 17 to 21) that the defenders have trespassed on the disputed portion. Having asked the pursuer for, and been refused, permission to remove the mutual fence and a large, established Douglas fir tree, the defenders proceeded to remove both anyway. They installed a fence within the disputed portion. They had no right to carry out any of such acts, which were malicious and deliberate, and they could have had

no reasonable belief that they owned the disputed portion; failing which, they were negligent.

[33] The pursuer next avers, in article 22, that the defenders' acts amounted to harassment of her. She avers, in particular, that on numerous occasions between December 2021 and April 2022, the first defender contacted her to importune her to sell either her house or the disputed portion, and continued to do so despite her telling him that she had no intention of selling either. Most of these incidents occurred after she was bereaved of her husband. The removal of the fence then occurred, which involved a number of men, a digger and a tractor entering her property. When the pursuer challenged the first defender, he shouted at her. The defenders subsequently cut down the Douglas fir and installed the fence. Each of these acts is said to have caused the pursuer alarm and distress and, further, amounted to a course of conduct. The defenders either intended their acts to amount to harassment or the acts occurred in circumstances where it would have appeared to a reasonable person to amount to harassment.

[34] The pursuer's averments of loss caused by the defenders' trespass and harassment are in article 23. She avers that five trees will require to be planted to replace the Douglas fir, at a total cost of £134,850. Further costs will be incurred in reinstating other trees and plants, and reinstating a fence. Additionally she suffered distress.

[35] Those averments are denied but of course must be taken *pro vertitate* (assumed to be true) at this stage.

Submissions

Defenders

[36] As regards trespass, there were no relevant averments that the defenders knew or ought to have known that they were felling trees and removing a fence which lay on the pursuer's land. What else, asked counsel for the defenders rhetorically, could the defenders have done when the trees and fence lay within the land to which they had title by virtue of their title certificate, and in the absence of any manifest error? The pleadings were silent on that matter and as such, were not fit for proof.

[37] As for harassment, the pursuer's averments did not set out a course of conduct amounting to harassment in terms of the Protection from Harassment Act 1987. Even if a relevant case had been averred against the first defender, no such case had been averred against the second defender. It would not appear to the reasonable person that the acts averred by the pursuer would amount to harassment of the pursuer. The 1987 Act was not designed to strike at this type of behaviour. Further, the averment that the first defender had on numerous occasions contacted the pursuer to importune her to sell her house or the disputed portion was wholly lacking in specification.

[38] Finally, the pursuer had combined her trespass and damages claims in the one conclusion and it was not possible easily to tell how much she was seeking for trespass and how much for harassment (that said, counsel appeared to have done the maths himself).

Pursuer

[39] The Dean submitted that since the defenders admitted that they had intentionally entered on to the disputed area and had done the acts in question, that was sufficient to found a claim for damages for trespass, in the event that the disputed area is found to

belong to the pursuer. Knowledge that one was committing a wrong was not required. The submission that the 1987 Act was not designed for this type of behaviour was misconceived. The alleged behaviour of both defenders was capable of constituting harassment within the meaning of the Act. Taking the pursuer's averments as a whole, they were not lacking in relevancy or specification, and they were eminently suitable for proof.

Decision

[40] Trespass is the temporary or transient intrusion into land which is owned or otherwise lawfully possessed by someone else (Reid, *The Law of Property in Scotland*, 180). The primary remedy is interdict. If the pursuer establishes that the disputed portion belongs to her, it would then be a question of fact, to be decided after having heard evidence, whether, in light of the defenders' having admittedly entered that land in the past, she had a reasonable apprehension that they would do so again in the future.

[41] A separate question is whether the pursuer has relevantly averred a claim for damages arising from the operations carried out on her land by the defenders, and the damage done to her property. The defenders submit that fault is required, and that a prerequisite for liability is that the defenders knew or ought to have known that they were entering on to the pursuer's land without permission. The Dean's riposte was that all that is required is that the defenders deliberately carried out the acts in question; whether they knew that the land was the pursuer's is neither here nor there. I was not referred to the authorities in any detail on this point. The ultimate question may be what liability arises for damage done to land at a time when the defenders not only believed that they owned it, but held a title certificate to that effect, which has since been rectified. However, as the pursuer also submitted, if there is any need for an averment of fault, that is met by the averment that

the defenders acted deliberately without a reasonable belief in an entitlement to act in the manner averred, which is supported by an averment that offers by the defenders to purchase the disputed portion and seeking permission to carry out works to the fence proceeded on the footing that the pursuer was the owner. That is sufficient to entitle the pursuer to inquiry by way of proof before answer, before the legal issues are determined.

[42] As regards harassment, section 8 of the Protection from Harassment Act 1987 provides:

> "(1) Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and –
>
> (a) is intended to amount to harassment of that person: or
>
> (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.
>
> ...
>
> (3) For the purposes of this section –
> 'conduct' includes speech;
> 'harassment of a person includes causing the person alarm or distress;
> and a course of conduct must involve conduct on at least two occasions."

[43] The pursuer offers to prove that on more than two occasions, the first defender contacted her to importune her to sell her land and would not take no for an answer, most of these approaches being made after she was bereaved; removed her fence, and shouted at her when challenged. Both defenders are alleged to have been responsible for the cutting down of the Douglas fir and the installation of the fence, on her land. The pursuer avers that each of those acts caused her alarm and distress; further, that the defenders either had the necessary intention, or the acts occurred in circumstances were it would have appeared to a reasonable person that the conduct amounted to harassment. The submission for the defenders that this is not the sort of conduct struck at by the Act is hard to fathom: any type of conduct can be harassment if it forms part of a course of conduct and if it falls within section 8(1). The conduct alleged by the pursuer is capable of amounting to harassment.

Adequate specification is given, both of the actions which are said to have amounted to harassment and of the times when they are said to have occurred. This branch of the case is suitable for proof before answer.

[44] Turning finally to the pursuer's averments of loss, while it is true that the pursuer might usefully have separated out the trespass claim from the harassment one, and have had separate averments of loss in respect of each, the fact that she has not done so is no reason to dismiss those parts of the action. The pursuer adequately avers her alleged losses in article 23 of condescendence. As regards the measure of damages, that, too, cannot be determined without evidence and will turn on the precise facts and circumstances (*cf Haberstitch* v *McCormick & Nicholson* 1975 SC 1, LP Emslie at 10).

Disposal

[45] I will refuse the defenders' motion to dismiss the action, and I will allow a proof before answer, with all averments and pleas-in-law left standing. Having already heard submissions on expenses, and the pursuer having been entirely successful, I will find her entitled to the expenses occasioned by the procedure roll.