FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 81
XA29/18

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal by

COMBINED CORPORATION (BVI) LTD

Interested Party and Appellants

against

GEORGE LAWRENCE SOUTER

Applicant and Respondent

Interested Party and Appellants: Logan; Campbell Smith LLP (for Lindsay and Kirk, Aberdeen)
Applicant and Respondent: Upton; Burness Paul LLP

19 December 2018

Introduction

[1] This is an appeal against a decision of the Lands Tribunal dated 15 February 2018 finding that there is an inaccuracy in the Land Register which should be rectified in favour of the respondent. The issue is whether the appellants were "proprietors in possession" of land in terms of section 9(3) of the Land Registration (Scotland) Act 1979, thus preventing any rectification in the absence of their consent.

[2] The dispute relates to an area of land extending to 0.53 ha, which lies adjacent to Malcolm Road, Peterculter. Both parties wish to build houses on the land. The disputed land was acquired by the respondent, as part of larger subjects measuring 1.36 ha and forming part of the Estate of Culter, by disposition recorded in the General Register of Sasines in 1979. The appellants are owned by Eric Stamper. The disputed land came to be part of the appellants' title also when, in 1990, it was disponed to the Cordiner Pension Trust from the Culter Estate. The land in the 1990 disposition overlapped with the land in the 1979 disposition. The Cordiner Pension Trust sold a part of their land, including the disputed land, to Scott Stamper, who is Mr Stamper's son; title being recorded in the GRS in 1994. In 2003, Scott Stamper sold this land to a Stamper family company, namely ECAS Ltd. This triggered the first registration of the land in the Land Register. On 5 February 2006, ECAS disponed the land, including the disputed land, to the appellants. It was only in March 2010 that the overlap was noticed. In 2015, when the respondent attempted to dispone part of his subjects to Casa Developments SCO Limited, a company owned by him, the Keeper discovered that the disputed land was already registered to the appellants.

Legislation

[3] The Land Registration (Scotland) Act 1979 provided:

> "9 Rectification of the register
>
> (1) Subject to subsection (3) ... the Keeper may ... and shall, on being so ordered by the court or the Lands Tribunal ... rectify any inaccuracy in the register by inserting, amending or cancelling anything therein.
>
> ...
>
> (3) … If rectification ... would prejudice a proprietor in possession—
>
> (a) the Keeper may exercise his power to rectify only where—
>
> ...

> (ii) all persons whose interests in land are likely to be affected by the rectification ... have consented in writing; [or]
>
> ...
>
> (iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; ...
>
> (b) the court or the Lands Tribunal for Scotland may order the Keeper to rectify only where sub-paragraph ... (iii) ... of paragraph (a) above applies ..."

Thus, since the appellants had not consented and the provisions of subsection 9(3)(b) did not apply, if the appellants were a "proprietor in possession", rectification of an inaccuracy under section 9(1) would not be competent.

[4] The Land Registration etc (Scotland) Act 2012 replaced the 1979 Act. Schedule 4 contains transitional provisions relating to the continuing power of the Keeper to rectify inaccuracies, which she had the power to rectify under the 1979 Act. Paragraph 18 introduces a presumption, for the purposes of section 9(3) of the 1979 Act, that a registered proprietor (ie in this case, the appellants) is in possession of the relevant land "unless the contrary is shown". Paragraph 22 provides that, if the Keeper had no power to rectify an inaccuracy under section 9 of the 1979 Act, then it is no longer to be considered an inaccuracy.

The Lands Tribunal

Background

[5] On 22 February 2016, the respondent lodged an application with the Lands Tribunal, under section 82 of the 2012 Act, for the determination of the accuracy of the Land Register. The Keeper of the Registers was the respondent in the application. She took no part in the proceedings, except to lodge answers in which she averred that it appeared that the disputed land had been disponed twice. The Tribunal identified the sole issue as being

whether the appellants were proprietors in possession of the disputed land in terms of section 9 of the 1979 Act. Whether the inaccuracy could be rectified depended on whether the appellants were proprietors in possession. Accordingly, the Tribunal made findings-in-fact concerning, respectively, the respondent's and the appellants' involvement with the disputed land.

The respondent's involvement

[6] In April 1979, the respondent had his land clear-felled. He erected marker posts along the boundary. The cleared area of the respondent's land could be distinguished from the land in the continued possession of the Culter Estate. From 1980, the respondent spent 11 years building a house on his land. The disputed land was used as a dumping ground for material dug out from the house site. The respondent and his family lived a few minutes' walk from the construction site. His wife, often accompanied by the children, was an almost daily visitor to the site, walking her dog on the disputed land and the afforested area beyond it. The children had the freedom of, and played all over, the whole cleared area, including the disputed land. In July 1991, the family moved into their new home. The family regarded the whole of the respondent's land as their back garden. This included the disputed land, over which they had constructed scramble bike and go-cart tracks.

[7] In about 1992, the developer of a nearby housing estate, at the invitation of the respondent, deposited 400-600 tons of spoil over the respondent's land, including the disputed land, in order to level out undulations. The disputed land was used to store building equipment from 1995 to 2005. By September 1995, the cleared land had regrown. It would have been impossible for the children to continue to play on the disputed land. Between 2006 and 2007, the respondent cleared much of the regrowth; including that on the

disputed land. In 2009, during the construction of a house for the respondent's elder daughter and her partner on a site next to the respondent's land, boundary markers were again erected. During this construction, several hundred tons of material were dumped on the land, including the disputed land, as was material produced by the re-profiling of land in the vicinity of the respondent's own house. A vehicular track over the respondent's land, and reaching into the disputed land, was created through digging by the respondent and its use by construction traffic. The respondent's entitlement to use the disputed land was not challenged until March 2010. Until then, neither the respondent nor members of his family had seen anyone else using it.

The appellants' involvement

[8] In 1990, eight separate areas of ground were disponed by the Culter Estate to the Cordiner Pension Trust, including a parcel bounding the respondent's land. This included the disputed land. The Trust sold that parcel to Scott Stamper in 1994, who disponed it to ECAS in 2003, when it was first registered. In 1991, the Forestry Commission had granted the Cordiner Pension Trust a licence to fell trees on the land. A Woodland Grant application had been accepted by the Commission in 1995. The land specified by both the licence and the grant included not only the disputed land, but also part of the respondent's other land. In the first two years of Scott Stamper's ownership, his parents had made recreational visits to the site fairly frequently, but the Tribunal did not accept that this had been as regular as two or three times a week. During some of these visits, Mr Stamper would do some weeding and cut away bracken around young trees. The Tribunal rejected evidence that he planted trees.

[9] The Stampers' visits became less frequent. In the spring and summer of 1996, they tried to sell the land. Intending purchasers probably crossed the disputed land both to see where the boundary was and to access the rest of the land. No acceptable offer was received. A decision to develop the land for housing was made. An option to purchase with a developer was concluded in 1996. The disputed land was included in the attempts to sell the intended development and in the option agreement. The option came to nothing and was replaced with a similar agreement with Churchill Homes. This was not formally concluded until June 2007. Kenneth Clubb, a Technical and Design Manager with Churchill, had been engaged from an earlier stage in an attempt to zone the land for residential development in the local development plan. Mr Clubb made many visits to the site; sometimes accompanied by Mr Stamper and sometimes by a variety of consultants. They would walk over the disputed land. The site that they wanted re-zoned included not only the disputed land but the whole of the respondent's land. Excluding it would have left a pocket of Green Belt in what would otherwise be re-zoned for development. As the disputed land formed only a small part of the appellants' land, visitors to the site would have spent by far the greater part of their time outwith the disputed land. Its only particular significance was as a possible access route. At no time did Mr Stamper, ECAS or the appellants do anything to mark boundaries.

[10] On 24 January 2010, while driving past, Mr Stamper noticed that the respondent was engaged in a tree felling operation, which may have encroached on the disputed land. A survey, which he instructed, showed an area of overlap between the two titles. After March 2010, Mr and Mrs Stamper avoided going on to the disputed land, for fear of confrontation with the respondent. The appellants made no attempt to possess it, or to challenge the respondent's possession of it, until these proceedings. At no point before March 2010 did

the Stampers or Mr Clubb see any of the Souters on the disputed land, nor was their right to be on it challenged. In February 2015, the land was re-zoned for residential development. An application for planning permission has been deferred pending the outcome of these proceedings.

Conclusions and reasoning

[11] On the basis of its findings-in-fact relative to each parties' involvement, the Tribunal reached five conclusions. First, there was "a very obvious act of possession, use and control of the land" by the respondent in 1979 when the disputed land was clear-felled. Secondly, from 1979 "until some point in the early 1990s the [respondent's] family made use of the disputed area, with the rest of their land, as their back garden for a variety of recreational purposes and no one else used it." Separately, the housing estate developer's spoil was deposited "on part of it in or around 1992." Thirdly, from 1995 until 2009 the disputed land was used by the respondent's family for dog walking only. Fourthly, between January 2004 and March 2010, the Stampers made numerous "recreational visits to it and it was visited by people from the Forestry Commission, forestry contractors, intending purchasers, developers, planning consultants and planning officials". It was impossible to quantify, even roughly, the actual number of visits and how often the disputed land was included in those visits. It was "likely that parts of it would be walked over on most of those occasions." Fifthly, in late 2009 or early 2010, the respondent's process of clearing his land of secondary growth reached the disputed land. From then until the lodging of the application with the Tribunal, he had been "in unchallenged, active and exclusive occupation of [the disputed land]".

[12] In light of the findings-in-fact and the conclusions derived from them, the Tribunal considered whether the appellants could be a proprietor in possession by two possible routes. The first was a "positive case" of possession. The Tribunal required to look at the position over "an appropriate tract of time" (*Safeway Stores* v *Tesco Stores* 2004 SC 29 at para [80]). That was the whole period of the appellants' proprietorship, from April 2006, but not further back. Their proprietorship, and not that of their predecessors in title, was relevant to the question of their possession. "Possession" was not defined in the legislation. In *Kaur* v *Singh* 1999 SC 180 (p 191), it meant possession of the land rather than a legal interest in it. The clearest meaning of possession had been given in *Safeway Stores* (*supra*, at paras [77] and [82]) as involving "some significant element of physical control, combined with the relevant intent; it suggests actual use or enjoyment, to a more than minimal extent". It required "both a mental and a physical element". The making, in offices remote from the site, of plans and the enquiries could not constitute physical acts of possession of the site, nor could the carrying out of survey operations which involved no physical presence or activity on the site.

[13] The findings-in-fact were not sufficient to support possession by the appellants. Although a number of people visited and walked over the disputed land for the purpose of showing it to potential developers, and those developers worked up a planning proposal, there was no element of physical control. The boundaries of the appellants' property had never been marked out. The Tribunal, having rejected Mr Stamper's evidence of tree-planting, concluded that the disputed land had not been used by the appellants. Any "enjoyment" of it by Mr and Mrs Stamper was recreational and could not be attributed to the appellants. Negotiations with the planning department did not constitute acts of possession. The positive case for the appellants' possession failed.

[14] The second route was to rely on the presumption in paragraph 18 of Schedule 4 to the 2012 Act. In this context, the Tribunal considered that evidence of possession prior to April 2006, when the appellants acquired the land, was relevant. It was beyond dispute that the respondent acquired possession in 1979 and retained it at least into the early 1990s. The question was whether the cessation of acts of possession, apart from dog walking, from then until 2009, meant a loss of possession. Extant possession continued until there were acts contrary to that possession (*Tesco Stores* v *Keeper of the Registers* 2001 SLT (Lands Tr) 23). Here, both counsel before the Tribunal relied on passages from Stair (Institutions, II.1.13), cited in *Safeway Stores* (*supra*), whereby possession of part of a field constituted possession the whole "unless there were contrary possessory acts." Possession was lost by a contrary possession and was interrupted by contrary acts or attempts of possession. Entry to possess, that which was already possessed, must expel the prior possession (*ibid* II.1.20).

[15] The Tribunal found that nothing done by the appellants, their predecessors in title, Scott Stamper or ECAS were acts contrary to the respondent's possession. These acts did not even put the respondent on notice that his possession was challenged. The Tribunal found that the respondent's possession continued until 2009, when it was "very obviously affirmed again" by: first, the deposit of spoil from the construction of his daughter's house; secondly, the re-profiling of land around his own house; and, thirdly, the continued clearance of trees. It would have been wrong to ignore the respondent's post-2009 involvement with the land on the basis that they had been done once he had realised that his ownership was threatened. It was significant that there was no evidence of him having consulted solicitors at that point or challenging the appellants' intentions. He had simply continued the process which had begun in 2006 of clearing his ground of regrowth. The

evidence from late 2009 to 7 December 2014 was, accordingly, very strong evidence of exclusory possession.

[16] Having established that the appellants were not a proprietor in possession of the disputed land, the Tribunal determined that the Land Register was inaccurate. They ordered the Keeper to rectify this by removing the disputed land from the appellants' title.

Appellants' Title and Interest

Submissions

[17] A new issue arose in the course of the appeal. The appeal was lodged on 28 March 2018. However, two days earlier, the appellants had granted a disposition of land, including the disputed land, in favour of CC & Pumps (BVI) Ltd for value. The disposition includes warrandice. On 29 March 2018, the Keeper registered it, but excluded indemnity in respect of the disputed land (2012 Act, s 75(1)(b)). The respondent argued that the appellants, having relinquished their title, had no title and interest to insist in the present appeal (Tribunals and Inquiries Act 1992, s 11(1)). The appellants, who are a British Virgin Islands company and no longer have any assets in the UK, were no longer a person with an interest to bring the appeal. They had divested themselves of the sole asset against which any orders for expenses could be enforced. It would be "richly paradoxical" to allow them at the same time to insist in this appeal. Although the appellants had entered the process as, in effect, defenders, they needed a title and interest to defend (*Muir* v *Glasgow Corporation* (1917) 2 SLT 106). Accordingly, the appeal should be refused for want of title and interest.

Decision

[18] It was the respondent who made the application to the Lands Tribunal. The Keeper

of the Registers had identified the appellants as persons with an interest in the disputed ground. The appellants were allowed to become a party to the proceedings as such a person (Lands Tribunal for Scotland Rules 2003, r 21). As at the date of the Tribunal decision, they remained a party to the application. The decision would be *res iudicata* in relation to them and potentially any successors in title. The Tribunals and Inquiries Act 1992 provides, in relation to the Tribunal, that:

> "11(1) ... if any party to proceedings before any tribunal ... is dissatisfied in point of law (*sic*) with a decision of the tribunal he may ... appeal from the tribunal to the [Court of Session] ...".

The appellants were parties to the proceedings throughout. They have a statutory right to appeal and are entitled to exercise that right (cf, for cases at first instance, *Donaghy* v *Rollo* 1964 SC 278). In any event, given the existence of the warrandice clause, in the disposition to the new proprietors, the appellants retain both a title and an interest to pursue the appeal. Even if they did not, upholding a plea of this nature at this stage would simply cause a delay until either the new proprietors were sisted as interested parties or a suitable assignation was executed. The objection to the appellants' title and interest is repelled.

Submissions

Appellants

[19] The primary submission was that the Tribunal had erred in its approach to paragraph 18 of Schedule 4 to the 2012 Act, which provided that a registered proprietor is presumed to be in possession of the relevant land. There was a conflict between that and the common law presumption that possession continues once established. The question in the appeal was: which should prevail? The answer was that a proprietor with a registered title was entitled to the statutory presumption unless there was actual possession by another

party. The Tribunal had reasoned that it was necessary for the appellants to be in actual possession of the disputed land in order to benefit from the statutory presumption. The Tribunal had established that, between 2003, when the appellant's title was registered, and 2009, the respondent was not in actual possession. It was not enough for there to be presumed continuing possession under the common law presumption. Therefore, the appellants had an unchallengeable registered title. *Kaur* v *Singh* 1999 SC 180 was analogous. Actual possession was required; possession of a "legal interest" was not enough. The presumption of continuing possession by the respondent was analogous to such a legal interest. If the appellants were in possession between 2006 and 2009, that subsisted and subsequent acts could not extinguish their real right to the disputed land.

[20] The Tribunal had held that the Stampers' visitors to the site would have spent most of their time outwith the disputed area. They had erred in disregarding their visits and those by the various professionals involved in the sale and development proposals. In *Safeway Stores* v *Tesco Stores* (*supra*), the court had endorsed the Tribunal's view that, if the nature of subjects was such as to justify an inference of possession of the whole without direct evidence of physical possession of every single part, the necessary possession may be established. If the nature of the physical subjects covered by the title did not invite that inference, other evidence may be required (2001 SLT (Lands Tr) 23, at 35). It was not appropriate to distinguish between the disputed land, which was a small wooded area, and the rest of the site.

Respondent

[21] The respondent contended that, for the statutory presumption to be rebutted, another party did not require to be in possession. It was sufficient that the registered

proprietor was not. This had been established under the first route of the Tribunal's reasoning. The Tribunal did err, but only to the extent that the second route was not open to the appellants, once it had been established that the appellants were not in possession. That was the end of the matter. The respondent's possession was irrelevant. The Tribunal had been right to conclude that the presumption had been rebutted. For several reasons, the bar to be overcome in rebutting the presumption had not been a high one. First, to do so was to prove a negative; that the appellants were not in possession. This was an easier task than proving an affirmative: Dickson: *Evidence*, (Grierson ed) II, paras 25 and 26. Secondly, the presumption was weak and readily rebuttable (Scottish Law Commission, *Report on Land Registration* (No. 222; 2010, para 36.12). It may become stronger over time as evidence going to possession became more distant, but here the Tribunal was considering actings by the appellants only three or four years after the relevant tract of time. Thirdly, the burden of proof became less important once the evidence was out (*Sanderson* v *McManus* 1996 SLT 750 at 765; 1997 SC (HL) 55 at 62). Accordingly, the presumption had been overcome in accordance with the findings-in-fact made by the Tribunal.

Decision

[22] The determinative issue before the Tribunal was whether the appellants were "in possession" of the disputed area. Since paragraph 18 of Schedule 4 to the 2012 Act creates a presumption that the registered proprietor (ie the appellants) are in possession of the relevant land "unless the contrary is shown", the correct approach is to determine, first, whether the contrary has been shown, since, if it has not, the presumption will operate. This primarily involves examining the involvement of the appellants (rather than the respondent) with the land. It does not follow that, just because the respondent is not in possession, the

appellant obtains the benefit of this presumption simply by having a registered title. The exercise is not a legal one of weighing competing presumptions. It is one involving the determination of fact; a matter primarily for the tribunal of first instance having heard the detail of the evidence presented. As the Tribunal correctly noted, possession in this context means "some significant element of physical control ... actual use or enjoyment, to a more than minimal extent (*Safeway Stores* v *Tesco Stores* 2004 SC 29, Lord Hamilton at para [77]).

[23] The appellants' involvement (as distinct from that of the Stampers) with the disputed area has been held by the Tribunal to have been very limited. The Tribunal did not disregard the evidence of the appellants. They did conclude that it demonstrated little more than remote applications for the sale and/or development of the disputed land along with larger adjacent and other areas, coupled with occasional site visits by professionals, which would have seen infrequent crossings of the disputed land to visit other parts of the appellants' land. Even this activity appears to have stopped in 2010. This, in itself, demonstrated that "the contrary" to the appellants' possession had been shown, even without any consideration of the respondent's position and whether his possession prior to the appellants' or the Stampers' involvement had extended indefinitely into the future until such time as a competing possession supervened (*Safeway Stores* v *Tesco Stores* (*supra*), Lord Osborne citing (at para [60]) Stair: *Institutions* II.1.20).

[24] That is sufficient to dispose of the appeal, even if it was nevertheless open to the Tribunal to include in the equation the nature and extent of the respondent's possession of the disputed land. The Tribunal found that such possession undoubtedly existed and, for what it may have been worth, it was presumed to continue until excluded by contrary physical control. However weak that presumption may be, it was not overcome on the facts found by the Tribunal. It is not accurate in this context to say that the Tribunal had

determined that the respondent's possession had ceased in the years 2003 to 2009. Rather, the respondent had cleared the regrowth in this period, marked boundaries, dumped tons of material and constructed and used a vehicular track. This was in addition to the respondent's wife's continued dog walking.

[25] The appeal is refused.