SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY AT AIRDRIE

[2024] SC AIR 45

AIR-A54-22

JUDGMENT OF SHERIFF F C M THOMSON

in the cause

GJ

Pursuer

against

SD

First Defender

and

ED

Second Defender

Pursuer: Campbell, Advocate; Clarity Simplicity Limited
First and Second Defender: Upton; Harper MacLeod LLP

AIRDRIE, 20 MARCH 2023

The Sheriff, having resumed consideration of the cause:

Finds the following facts admitted or proved:

1. The pursuer is the heritable proprietor of the subjects known as 18 [AA] Avenue, Kilsyth, Glasgow (Title Number STG[12345]) (the "Subjects"). He is erroneously referred to in the titles to the property as "[ ]";

2. The defenders are the joint heritable proprietors of the subjects known as 20 [AA] Avenue, Kilsyth, Glasgow (Title Number STG[56789]) (the "the Neighbouring Subjects");

3. This court has jurisdiction. There are no proceedings pending before any other court involving the present cause of the action and between the parties hereto. There is no agreement prorogating jurisdiction over the subject's matter of the present cause to any other court;

4. The Subjects include inter alia the rights specified in the disposition at the property description and the Schedule of Exceptions entry 1 of the burdens section of the land certificate. The said description and the Schedule of Exceptions entry 1 provides:

> "Disposition by Feu Charter by [JK] to [LM] and his heirs and assignees recorded G.R.S. (Stirling) 24 November 1893 of twenty six poles and twenty six yards of ground comprising the subjects 18 [AA] Avenue, Kilysth comprising the subjects edged red on the Title plan under exception of those parts specified in the Schedule of Exceptions below. Together with the right of access over the adjoining subjects 20 [AA] Avenue, aforesaid for the purpose of carrying out repair or maintenance to the subjects in this Title subject to exercising said right in a reasonable manner and restoring or making good any damage caused in the exercise of said right. The Schedule of Exceptions refers to the dwellinghouse 20 [AA] Avenue, tinted blue on the Title plan; the front garden, store, coal cellar and rear garden all tinted pink on the said plan; one-half pro indivisio right to garden ground tinted mauve on the said plan; a right of access along access road tinted yellow on the said plan and over the subjects in this Title for carrying out said repairs to dwellinghouse 20 [AA] Place, or any common parts.";

5. The Neighbouring Subjects include inter alia the rights to specified in the disposition at the property description of the land certificate. The said description provides:

> "Disposition by Feu Charter by [JK] to [LM] and his heirs and assignees recorded G.R.S. (Stirling) 24 November 1893 of twenty six poles and twenty six yards of ground comprising the subjects 18 [AA] Avenue, Kilysth comprising the subjects 20 [AA] AVENUE, KILSYTH, GLASGOW tinted blue on the Title Plan with the front garden, store, coal cellar and rear garden tinted pink on the said Plan; Together with a one half pro indiviso right to the garden ground at the rear of the dwellinghouse known as 18 and 20 [AA] Avenue, aforesaid tinted mauve on the said Plan; Together also with (One) a servitude right of access along the access road tinted yellow on the said Plan, and (Two) a right of access over the adjoining subjects 18 [AA] Avenue, aforesaid for the purpose of carrying out repairs to the subjects in this Title or any common parts of the combined dwelling house at 18 and 20 [AA] Avenue, aforesaid subject to the proprietor of the subjects in this Title exercising the same in a reasonable manner and restoring or making good any damage caused by them in the exercise of such right of access.";

6. The Subjects and the Neighbouring Subjects were previously in the same ownership. The properties were severed in or around 1971 by virtue of a Disposition by AB in favour of CD and another recorded in the General Register of Sasines for the County of Stirling on 18 January 1972;

7. The 1972 deed is the break-off deed separating the parties' respective properties. The disposition shows the white area nearest to 18 [AA] Avenue as marked "EXCLUSIVE TO NO 18 [AA] AVENUE" (hereinafter referred to as the "Disputed Area"). The 1972 deed created new conditions: (i) a real burden imposing equal liability on the disponees for the maintenance of the common parts of the properties; (ii) a reserved servitude right of access to the owners of the Subjects over the Neighbouring Subjects for the purpose of carrying out repairs to their property or the common parts; (iii) a real burden requiring that the Neighbouring Subjects are insured; and (iv) a real burden restricting use of the Neighbouring Subjects to residential purposes. The 1972 deed creates two express servitudes of access in favour of Neighbouring Subjects: (i) an unrestricted right over the access road to the east of the Subjects and the Neighbouring Subjects (hereinafter referred to as the "Access Road"); and (ii) a more limited right over the Subjects for repair purposes;

8. The 1972 deed specifies the areas of rear garden which are solely owned and the area which is common to both properties;

9. The area owned in common is broadly in three sections. First, there is a pathway leading from the defender' property. Secondly, there is a larger area to the east of buildings marked on the plan as "COMMON WASH-HOUSE" and "BIRD HOUSE" and, thirdly, a small section, next to the north-west corner of the area marked as marked "EXCLUSIVE TO NO 18 [AA] AVENUE", connecting the first and third which is marked "ACCESS";

10. The 1972 deed includes a store, coal cellar and an area of garden ground to the rear which are owned solely by the proprietors of the Neighbouring Subjects;

11. The areas of the rear garden which are neither owned solely by the defenders nor are common property are owned solely by the pursuer;

12. The pursuer is the sole owner of the areas marked as "COMMON WASH-HOUSE" and "BIRDHOUSE" on the plan attached to the 1972 deed;

13. The terms of the 1972 deed have been replicated in the current registered title plans for the Subjects and the Neighbouring Subjects;

14. Those title plans show the areas of common garden ground coloured mauve, the areas of garden ground solely owned by defenders as coloured pink and the areas of garden ground solely owned by the pursuer as uncoloured, or white;

15. The Disputed Area is the area tinted light green in the plan produced by the defenders at production number 6/1;

16. The servitude right over the Access Road was created by express grant in a Disposition by [EF] to [GH] and his heirs and successors recorded in the General Register of Sasines for the County of Stirling on 10 July 1899; The terms of the grant are repeated at Burden 2 of Title Sheet STG[56789] as follows:

> "the heritable and irredeemable servitude right and tolerance over my subjects of ingress and egress to and from the said [GH]'s property by the existing roadway extending from the public street called [AA] Avenue to the north boundary of my said subjects and running along or near to the east boundary of the same ..."

17. The Access Road is the area tinted yellow on the title plans of the Subjects and the Neighbouring Subjects. It is owned by the pursuer;

18. There is no express right of servitude right of way in favour of the proprietors of the Neighbouring Subjects over the Disputed Area;

19. The pursuer has lived at the Subjects since December 1997;

20. The defenders moved into the Neighbouring Subjects in June 2004. At that time, the defenders sat their one black bin in the area shaded pink and rectangular in the title plan to their property, being an area owned by them. North Lanarkshire Council subsequently provided blue bins to the parties and the defenders stored those bins in the same area. The defenders have a servitude right of access along the Access Road and a right of access over the subjects for the purpose of carrying out repairs to their property or any common parts to the properties. No application to Registers of Scotland relating to prescription has been made by the defenders;

21. On or around the date that the defenders moved into the Neighbouring Subjects, the pursuer approached the second defender with a view to discussing the rear garden area and access arrangements;

22. The second defender advised the pursuer that he should discuss these matters with the first defender;

23. Shortly thereafter the first defender and the pursuer had a conversation;

24. During that conversation, the pursuer and first defender discussed which areas of the back garden were owned exclusively and which areas were owned in common; that the existing shed in the back garden was erected on land belonging to the pursuer; and that the defenders were not entitled to park on the Access Road;

25. The defenders' predecessors in title were Mr and Mrs [RS]. They purchased the Neighbouring Subjects in 1988;

26. The defenders have, since their acquisition of their property in 2004, taken pedestrian access and egress over the Disputed Area for various purposes, including (i) to take out bins kept at the rear of the property, (ii) to take gardening tools from the shed in the rear garden

to the front garden for use, (iii) to take bicycles from their shed to the public road, and (iv) for general pedestrian access between the public road and the rear garden;

27. The period over which they did so prior to the raising of the current proceedings is less than 20 years;

28. Since June 2004 the pursuer has regularly requested that the defenders refrain from taking access over the Disputed Area;

29. There is a gate leading from the Access Road into the garden area to the rear of the parties' properties; the gate enters onto the Disputed Area;

30. The defenders' front garden is elevated from the public pavement;

31. The defenders' predecessors in title parked their car on the Access Road in 2002. That was with the permission of the pursuer for a time-limited period of 6 months;

32. The defenders' predecessors in title continued to park there after September 2002;

33. During their ownership of the Neighbouring Subjects, the defenders' predecessors in title were in dispute with the pursuer regarding whether their right of access over the access road adjacent to the properties included a right of parking;

34. The pursuer instructed Marshall Wilson, solicitors, to investigate the extent of the titles. On 9 June 2004 Marshall Wilson wrote to Fyfe Ireland, the solicitors for the defenders' predecessors in title advising that (a) the only right of access from the rear garden ground was through the back door of their clients' property leading to [AA] Avenue and (b) that their clients did not have any right of access over the pursuer's ground leading to the Access Road;

35. When the defenders purchased their property in 2004, there was a shed sited on the area marked "COMMON WASH-HOUSE" on the 1972 deed. That shed had been erected by

the defenders' immediate predecessors in title, without the pursuer's permission, and then used exclusively by them;

36. From the date of the defenders' acquisition of their property until around 2010 the defenders made exclusive use of the shed, using it to store gardening tools, bikes and other miscellaneous domestic items;

37. The defenders were aware that the shed was located on ground which belonged solely to the pursuer;

38. The pursuer agreed that the shed could remain there for an unspecified interim period;

39. In or around November 2010, the defenders, at their expense, ordered and purchased a new shed. This was larger than the previous shed;

40. The defenders' contractors dismantled and took away the previous shed and erected the new shed on the area of land tinted mauve and tinted white in the title plans to, and at the north west of, the Subjects and the Neighbouring Subjects;

41. The area tinted white on the plan is owned solely by the pursuer. The defenders do not have any right, title or interest to that area of land;

42. The pursuer had arranged, at his expense, for his son to lay slabs on the area on which the new shed was erected;

43. The pursuer did not request or consent to the erection of the new shed. On the day of its erection he asked the contractors to stop. They refused;

44. The defenders were not induced by the pursuer to act in the belief that the pursuer had so consented. The pursuer did not at any time abandon his right to insist on removal of the new shed. The pursuer raised concerns regarding the new shed having been built on his

land with the first defender's uncle and father and, subsequently, the first defender on the day it was erected. He has since requested regularly that the new shed be removed;

45. The new shed remains in existence despite those requests;

46. On or around 26 October 2021, on instruction by the pursuer, his agents, Messrs Clarity Simplicity Limited, issued a letter to the defenders requesting, inter alia, the removal of the bins, outbuildings and other obstructions. The defenders responded with a letter received to the offices of Clarity Simplicity Limited on or around 5 November 2021. Within said letter, the defenders reference the access road tinted yellow on the plan as "the main issue";

Finds in fact and law as follows:

[01] The defenders have owned their property for less than 20 years. The defenders have not possessed the Disputed Area for the requisite period to establish a servitude right by means of positive prescription;

[02] The raising of the instant proceedings by the pursuer constitutes judicial interruption;

[03] The defenders have not established possession of the Disputed Area by their immediate predecessors in title sufficient to demonstrate 20 years' continuous possession;

[04] The servitude claimed by the defenders was not reasonably necessary for the comfortable enjoyment of the defenders' property at the time of division of the parties' respective properties.

[05] The new shed erected by the defenders encroaches on land solely owned by the pursuer;

Therefore:

1. Finds and declares that the defenders do not benefit from an unrestricted servitude right of way for pedestrians for any purpose over that area of land at 18 [AA] Avenue, Kilsyth, Glasgow, title to which is registered in the Land Register of Scotland under Title [25] Number STG[12345], tinted light green in the plan produced by the defenders at production number 6/1;

2. Interdicts the defenders from entering on the pursuer's heritable property at that area of land at 18 [AA] Avenue, Kilsyth, Glasgow, title to which is registered in the Land Register of Scotland under Title Number STG[12345], tinted light green in the plan produced by the defenders at production number 6/1, in particular by entering that area or by transporting their wheelie bins or bikes across the property, except insofar as exercising their servitude rights of access for the purpose of repairing 20 [AA] Avenue, Kilsyth, Glasgow or any common parts of 18 and 20 [AA] Avenue, Kilsyth, Glasgow;

3. Finds and declares that the defenders have, by building an outbuilding at land at 18 [AA] Avenue, Kilsyth, Glasgow, title to which is registered in the Land Register of Scotland under Title Number STG[12345], encroached upon the pursuer's property to the extent that said outbuilding is on the area which is white adjacent to the area tinted mauve on the title plan;

4. Ordains the defenders within seven days of intimation of this interlocutor to remove the said outbuilding situated at 18 [AA] Avenue, Kilsyth, Glasgow, title to which is registered in the Land Register of Scotland under Title Number STG[12345], to the extent that said outbuilding is on the area which is white adjacent to the area tinted mauve on the title plan;

5. Sustains the pursuer's first, second, fourth and fifth pleas-in-law and repels the defenders' pleas-in-law in the principal action to that extent;

6. Sustains the pursuer's second and third pleas-in-law and repels the defenders first and second pleas-in-law in the counterclaim (the defender's second crave not being insisted upon); and

7. Appoints a hearing on liability for expenses.

NOTE

Introduction

[1] The parties are neighbours. Their respective properties are the result of a subdivision of a previous dwelling.

[2] The parties are in dispute in relation to, first, whether the defenders have a servitude right of way for pedestrians over certain garden ground owned by the pursuer and, secondly, an alleged encroachment by the defenders on a separate area of the pursuer's property.

[3] In relation to the servitude issue, the pursuer seeks:

a. declarator that the defenders have no servitude right of way for pedestrians over certain garden ground to the rear of his property; and

b. interdict in relation thereto.

[4] The defenders seek declarator that they do have the said servitude. A second crave, in respect of a servitude over the roadway beside the parties' properties, is no longer insisted upon.

[5] In relation to encroachment, the pursuer seeks:

a. declarator that the defenders have sought wrongfully to alter common property by erecting an outbuilding and in so doing have encroached on a separate area of the pursuer's property;

b. decree ordaining the defenders to remove that outbuilding from that area.

[6] In relation to encroachment only, the defenders argue: (a) personal bar; (b) waiver and; (c) mora, taciturnity and acquiescence.

[7] The matter called for proof on 28-30 September 2022, 22 November 2022 and 19 January 2023, when I made avizandum. The defenders led at proof.

Servitude right – garden ground

[8] The defenders argue that they have a servitude right of way for pedestrians over garden ground which is owned by the pursuer and situated directly to the rear of his property (the "Disputed Area"). They argue this arises by implied grant and/or by the operation of positive prescription.

Implied grant

[9] A positive servitude can arise by implication on the division of a property. It is admitted that the parties' respective properties were previously a single property which was subdivided by a disposition recorded in the General Register of Sasines on 18 January 1972.

[10] Both parties referred to the criteria for implication as detailed in Cusine and Paisley, *Servitudes and Rights of Way* (1998) at paragraph 8.09. The pursuer also referred to the criteria as differently stated in Gordon and Wortley, *Scottish Land Law* (2020) at paragraphs 25-41. In any event, it was accepted by the pursuer that all criteria had been met by the defenders, other than that of reasonable necessity for comfortable enjoyment of the

dominant property. Parties were also in agreement that any assessment of that matter required to be by reference to the situation existing when the property was subdivided, in 1972.

[11] As such, the single question to be decided by the court is this: was the right claimed by the defenders over the Disputed Area reasonably necessary for the comfortable enjoyment of their property, by reference to the situation as it existed in 1972?

[12] In support of their argument, the defenders argue:

a. that without the servitude claimed, there is no means by which they make take access to and egress from the rear garden without going through their house;

b. they have an unrestricted servitude right of way over the access road at the side of the property which would be rendered largely redundant without an unrestricted right to access the rear garden through the existing gate;

c. historically, the disposition plans show coal cellars for both properties located in the rear garden, just inside the gate. It would have been neither convenient nor comfortable if the coal delivery for the defenders' property had to be taken through the house;

d. the defenders are responsible, together with the pursuer, for the maintenance and upkeep of the common garden ground. They would similarly be unable to dispose of clippings without taking them through the house;

e. on the hypothesis that the bins for the property have always been kept at the rear of the property, then the bins could not be taken out for collection without taking them through the house; and

f. insofar as the pursuer asserts that the bins could be kept at the front of the property, that would require the defenders to navigate a set of five paved steps on a weekly basis with a heavy, full wheelie bin; which would not be physically possible for the second defender, would be neither comfortable nor convenient for the first defender, and could not generally be considered comfortable or convenient for a proprietor of the defenders' property generally.

[13] In response, the pursuer placed emphasis on the recent Inner House analysis of implied grant in *ASA International* v *Kashmiri Properties (Ireland) Ltd* 2017 SC 107 and, in particular, the policy considerations mentioned at paragraph 17 militating against the implication of servitude rights.

[14] Further, it was argued:

a. that it was clear from the terms of the 1972 deed, and particularly the detail on the plan, that specific thought had been given to (i) the areas of garden ground exclusive to each property and (ii) what the access arrangements were to be;

b. given the level of detail included on the plan, if it had been reasonably necessary for the convenient and comfortable enjoyment of the defenders' property for there to be access onto the driveway that would have been reflected in the deed or the plan;

c. instead, the 1972 deed specifically granted two express servitudes, one allowing access over the driveway and the second allowing access over the pursuer's property specifically for repairs to the defenders' property and the common parts of both houses;

d. the plan attached to the 1972 deed included a right of access from one section of common ground (the area at the back door to the defenders' property) to another (the drying area) over a small section of the area specifically reserved to the pursuer's property. Given this level of detail, when the deed was drafted, it had been recognised that in order for the proprietor of the defenders' property to reach the cellar area, access had to be given over the area marked as "exclusive to number 18 [AA] Avenue". Had a right of access from the common drying area to the driveway been intended, that would also have been included on the plan. There was no such access. What was noted on the plan was indicative of an intention that the owners of the defenders' property should be able to access the common drying area of the back garden and their cellar area via the back door, and nothing more;

e. while it was accepted that second access routes could on occasion be implied, it had been noted by Cusine and Paisley at paragraphs 8-26 that:

> "the express grant of a servitude in one deed is a factor tending, by the application of the maxim *expresso unius est exclusion alterius*, to exclude the implication of the grant or reservation of another servitude in respect of the same conveyance. The weight of the factor will vary from case to case. It will be stronger where the claim relates to a servitude of the same type expressly created in the deed. Thus it is difficult to imply the grant or reservation of a servitude of access over one route from the facts and circumstances surrounding a conveyance where the deed in question expressly grants a servitude of access over another access route."

f. given that care had been taken to ensure that the owners of the defenders' property had access to the common drying area and the cellar area, it was strange that something like access for refuse collection had been overlooked. It was a matter of judicial knowledge that there were no "wheelie" bins

in 1972. Access for taking "wheelie" bins to the street cannot have been something which was within the contemplation of the granter or the drafter of the 1972 deed. In the circumstances, it could be inferred from the fact that there was no specific mention of bins or a bin store on the plan attached to the 1972 deed that the issue of bins was not considered to be either relevant or necessary for the convenient or comfortable enjoyment of the defenders' property;

g. what the defenders were seeking was a convenient route from the driveway to the back of their property. However, that route was not necessary for their comfortable or convenient enjoyment of the property. A convenient route was not the same as convenient use of the property (*Fraser* v *Cox* 1938 SC 506);

h. it was possible for the defenders to keep their bins at the front of their property. That had always been possible, for the defenders and their predecessors in title. Applying the reasoning in *ASA International* v *Kashmiri Properties (Ireland) Ltd*, keeping bins at the back of the defenders' property was not a necessity. It was a preference. On that basis, even if the legal test was the comfortable and convenient use of the property at the current time, the defenders would not be able to satisfy the reasonable necessity test;

i. similarly, whilst it might be awkward to have to transport gardening equipment and bikes etc from the back of the property to the front without using the driveway, it was simply more convenient to be able to use the driveway. The inability to use the driveway put the defenders in no worse a position than occupiers of some terraced properties;

j. the defenders had therefore failed to demonstrate that the existence of the servitude sought satisfied the reasonable necessity test as set out in *Ewart* v *Cochranes*, as reinforced by the Inner House in *Fraser* v *Cox* and, more recently *ASA International* v *Kashmiri Properties (Ireland) Ltd*.

Implied grant - decision

[15] It would undoubtedly be more agreeable to the defenders if they had an alternative means of accessing the ground to the rear of their property. However, I do not consider that the legal test for implication has been met.

[16] I prefer the arguments advanced by the pursuer. It is clear that the question of access was considered at the time of the 1972 deed. The break-off deed does not, formally, create a right of access *over* the Disputed Area (which is marked on the plan as "EXCLUSIVE TO NO 18 [AA] AVE" and hatched in red) as the pursuer contended. Rather, what was conveyed to the defender's predecessors in title was a one-half *pro indiviso* right to certain garden ground *adjoining* the Disputed Area (and outlined in red on the plan). That area is broadly in three sections. First, there is a pathway leading from the defender' property. Secondly, there is a larger area to the east of buildings marked on the plan as "COMMON WASH-HOUSE" and "BIRD HOUSE" and, thirdly, a small section, next to the north-west corner of the property owned by the pursuer, connecting the first and second which is marked "ACCESS". Clearly there would be no need to create a formal servitude right of access over property already owned *pro indiviso* and that is doubtless why the 1972 deed contains no such formal provision. However, the reference to "ACCESS" does make it clear, if perhaps only out of an abundance of caution, that there was indeed to be access over that third section for the purpose of connecting the first and second.

[17] In addition, it is to be noted that the 1972 deed contained two formal servitude rights of access, one over the road to the east and the other over the remaining parts of the property for the purpose of carrying out repairs.

[18] Given the express provision in the 1972 deed for these rights of access, it is not easy to see why some should be expressly constituted, but another left to be inferred by implication. I consider that the maxim *expressio unius est exclusio alterius* applies, as the pursuer argues.

[19] In any event, I do not consider that the tests for implication, as set out in *ASA International* v *Kashmiri Properties (Ireland) Ltd* are met. A number of points can be taken from that decision. First, the requirements of (i) prior use and (ii) reasonable necessity for convenient and comfortable enjoyment of the dominant tenement are cumulative (and in this case the parties are agreed as to the former). Secondly, each case will turn on its particular facts. Thirdly, it is important to be mindful of the various policy considerations (set out at para 17) which militate against the creation of servitude rights by implication.

[20] On the facts of *ASA International* v *Kashmiri Properties (Ireland) Ltd* it was decided that the reasonable necessity test was not met. That case involved access to a lane at the rear of a property, and whether there was a servitude right over the car park at the rear of the neighbouring property to reach that lane. It was held that convenient alternatives were available, including access via a garage already owned by the property. It was said that:

> "[it] may be that, with a vehicle parked in the garage, it is somewhat difficult to make use of that route, but the route is there."

[21] The present case is similar: it may be difficult for the defenders to access the rear ground by going through their property but "the route is there". I do not consider that in referring to convenient alternatives (in the plural) the Inner House in *ASA International* v

Kashmiri Properties (Ireland) Ltd intended to create any kind of rule that there should be more than one. Rather this was narrative of why, on the facts of that case, the reasonable necessity test was not met.

[22] As the pursuer argues, the defenders here are in no worse position than the owners of many tenement properties. The test of reasonable necessity for convenient and comfortable enjoyment of the dominant tenement is not met.

Positive Prescription

[23] The defenders also argue that the servitude right of pedestrian access over the Disputed Area has arisen by operation of positive prescription.

[24] There was no dispute as to the legal requirements to be satisfied. These are set out in section 3(2) of the Prescription and Limitation (Scotland) Act 1973: 20 years' continuous possession, being open, peaceable and without judicial interruption. Nor was it in dispute that any such possession had to be as of right.

[25] Of these, the pursuer contends that the defenders have failed to demonstrate 20 years' continuous possession as of right.

[26] The defenders purchased their property in 2004. The current proceedings were raised in January 2022. Judicial interruption occurred at that time. The defenders have regularly asserted a right to, and have taken access over, the Disputed Area during the period of their ownership. However, that is a period of around 17.5 years. More is needed.

[27] Any period of 20 years' continuous possession would potentially suffice, but the only evidence brought before the court was in relation to the defenders' possession and that of their immediate predecessors in title, Mr and Mrs [RS]. They lived in the property from

1987 until 2004. Accordingly, the possession by Mr and Mrs [RS] of the Disputed Area is central to the defenders' case on prescription.

[28] Evidence on this was heard on this from Mr [RS], the pursuer and the pursuer's son, [IJ].

[29] The evidence of Mr [RS] was that, throughout the period of his ownership, he used to cross the Disputed Area to the gate between it and the access road. He had done so for various reasons, such as taking out the bins and to park on the access road. He had kept his bins at the rear of the property since the early 1990s. His children would also take their bikes over the ground.

[30] The pursuer's evidence was that Mr [RS] did *not* access his land when he first moved in in 1997. Mr and Mrs [RS] started only parking on the access road around March 2002 and thereafter, around 2003, they erected a shed on the area owned by him (marked "COMMON WASH-HOUSE" on the 1972 deed). Mr and Mrs [RS] had kept their bins at the front of their property until around April 2004 when additional blue "wheelie" bins were introduced. At that stage Mr and Mrs [RS] started to access the Disputed Area for taking the bins out.

[31] [IJ]'s evidence was supportive of the pursuer's account in that he said Mr and Mrs [RS] had kept their bin at the front of their property, with that changing only shortly prior to their moving out in 2004.

[32] There were differences in the accounts given. In my view those can be put down to the passage of time and faulty recollection, rather than any effort to mislead. I do not doubt that Mr [RS] was trying his best to assist the court, but I have concerns regarding the reliability of his evidence. For example in cross examination, he departed from his evidence in chief as regards ownership of the rear ground. In contrast, the pursuer and [IJ] adhered to

their version of events under robust cross examination. On balance I prefer the evidence led for the pursuer.

Positive Prescription - Decision

[33] The onus of proof in respect of possession lies with the defenders. I do not consider that it has been overcome. I am not persuaded that the defenders' predecessors in title possessed the Disputed Area continuously in the period immediately prior to the defenders' ownership. There has not been 20 years' continuous possession.

[34] As such, it is not strictly necessary to consider whether that possession was also as of right. For completeness, however, I do consider that the defenders have demonstrated substantial possession, during their period of ownership, which would reasonably have been taken as assertion of a servitude right. Equally, the pursuer has not led sufficient evidence of tolerance, or that the pursuers were doing so having been given express or implied permission, to displace the conclusion that the defenders' possession was as of right.

[35] At its highest, the pursuer's evidence and that of [IJ] was that the defenders were repeatedly told by the pursuer that they should not be going over his ground. In addition, when the defenders first purchased, he discussed with the first defender the areas of sole and common ownership of the rear ground, that the previous shed had been erected on his property and would need to be removed (albeit it could remain in place for an interim period) and that there was no right of parking on the access road. In contrast, the first defender's evidence was that only parking was mentioned. I am satisfied that the first defender in his evidence endeavoured honestly to assist the court. However, it is events from almost 20 years ago that are under consideration and recollections can be unreliable. A neighbour, [ES], spoke of her having become aware from Mr and Mrs [RS], around 2003, of a

dispute between them and the pursuer in relation to ownership of the garden ground. That was when she was considering a purchase of Mr and Mrs [RS]' property. On balance, her evidence, as a neutral third party, leads me to conclude that it is more likely than not that the pursuer did indeed mention the various matters to the first defender.

[36] Regardless, even if he did, I consider that such action as the pursuer may have taken falls short of what would be required at law to stop the defenders' possession being as of right. To the extent that action might also have been relevant to the separate requirement of peaceable possession, satisfaction of that requirement is not in dispute.

Encroachment

Preliminary arguments: personal bar

[37] The defenders argue that the pursuer is personally barred from obtaining the orders sought in respect of the new shed.

[38] I did not understand there to be any dispute between the parties as to the law of personal bar. In summary, the obligor (in this case, the defenders) must demonstrate, first, conduct by the obligee (in this case, the pursuer) which is inconsistent with the exercise by them of the right claimed and, secondly, unfairness, in light of that conduct, which would result if the right were now to be exercised.

[39] The conduct which is relied upon is an agreement said to have been reached between the parties in relation to the removal the shed previously erected by the Mr and Mrs [RS] in around 2003 (as referred to by the pursuer). It is averred by the defenders that:

> "In or around 2010, the pursuer approached the defenders and asked that the shed be moved to the back corner of the garden, being an area partly owned by the parties in common and partly by the pursuer exclusively. The defenders agreed to the shed being moved to that location. The pursuer arranged for his sons to attend and lay paving slabs in the said area to form an area of hardstanding for the shed. The

> defenders, at their own cost, then demolished the existing shed and built a new shed in that area in accordance with the pursuer's request."

[40] The defenders argue that the clear inference to be taken is that, if the defenders acted on the pursuer's request and moved the existing shed to the new location at their own cost, the pursuer would not object to the shed being sited there.

[41] Further, it is argued that the defenders have acted in reliance on the pursuer's conduct and have incurred costs in paying for the new shed to be delivered and erected. They will be prejudiced if it has to be removed.

[42] The only direct evidence on the agreement said to have been reached came from the pursuer and the first defender. The first defender gave evidence that an agreement was reached, as averred. The second defender gave evidence consistent with that, but it is clear from her affidavit that this was not from her own observation but rather from what she had been told by the first defender. The pursuer, in comparison, gave an entirely different account. His evidence was that no such agreement had been reached in 2010. On the contrary, he had made it clear when the defenders moved into their property that the previous shed was to be removed, as it was not on their land, but had agreed to an interim delay on the basis the defenders had said they were impecunious at the time. He had subsequently mentioned the need to remove the shed to them on various occasions. When the defenders removed the previous shed in 2010 this was after the pursuer had advised he wished to redevelop the area and erect a glasshouse there. The pursuer did not suggest that the existing shed should be moved to the new location, or that a new shed be put up there. He did not consent. If such consent had been sought, it would have been refused. When the pursuer became aware of the new shed being erected, he asked for that to stop.

[43] I found the pursuer and first defender to be broadly similar in terms of credibility and reliability. As such, I am left with two contradictory versions of events. I cannot conclude to the necessary standard that the version put forward by the defenders - and in particular the alleged agreement - is to be preferred. I cannot therefore conclude that the conduct of the pursuer was such as to engage personal bar.

Waiver

[44] The defender's argument in relation to waiver is predicated on the same alleged agreement. For the reasons set out above, I am unable to conclude that such an agreement was reached or, therefore, that the pursuer has waived his rights.

Mora, taciturnity and acquiescence

[45] As a separate plea, the defenders argue that:

a. the pursuer knew that the new shed was being built by the defenders;

b. he took no action to stop the defenders from building the new shed;

c. he did nothing between November 2010 and the raising of this action in January 2022 to seek the removal of the new shed;

d. as such, the pursuer must be taken to have acquiesced.

[46] The pursuer argues that the defenders have failed to establish all three elements, of mora, taciturnity and acquiescence. Alternatively, if the defenders have established mora, it is submitted that they have failed to establish taciturnity and acquiescence.

[47] The requirements for a plea of mora, taciturnity and acquiescence were considered by the Inner House in *Kenman Holdings Ltd* v *Comhairle nan Eilean Siar* 2017 SC 339 at 355:

"(i) In order for the plea to succeed, all three elements must be present.

(ii) Whether delay on the part of the applicant is sufficient to found the mora element will depend upon the whole circumstances of the particular case, but is likely to be considerably shorter in cases of judicial review than the delay required to found the plea in cases concerning private rights.

(iii) Taciturnity connotes a failure to speak out in assertion of one's right or claim.

(iv) Acquiescence is not to be determined subjectively by looking into the mind of the applicant but is to be inferred objectively from the other two elements, ie delay and silence on the applicant's part.

(v) Prejudice to, or reliance by, the person whose actions are challenged is not a necessary element of the plea, nor should prejudice be seen as an alternative requirement to acquiescence. Prejudice or reliance may however form part of the circumstances from which acquiescence may be inferred.

(vi) The concept of detriment to good administration may have a part to play where administrative action has been taken in the belief that the applicant has acquiesced in the actings in question."

[48] As regards the element of delay, the period of time here is between the act of alleged encroachment in 2010 (when the new shed was erected) and the raising of the action in 2022. In assessing whether any delay on the part of the pursuer is unreasonable, it is necessary to look at all of the particular circumstances of the case, including the factual background and the legal context, including the remedy or remedies sought. In all the circumstances, I do not consider the period to be unreasonable.

[49] As regards taciturnity, what is required is a failure to speak out in assertion of one's right or claim. Again the evidence on this differed starkly. For the defenders it was said that any objection voiced by the pursuer on the day the new shed was erected was only in relation to the size of the shed. [SD], the first defender's father spoke to that and said that "after a bit of moaning about it they left". The first defender speaks to a "very pleasant" conversation later in the day with the pursuer when it is said the pursuer confirmed "he had no issue with the size of the shed and that to my mind closed the matter off". He also

speaks to service of the action being the first time that the pursuer has suggested he wanted the new shed to be removed. The second defender speaks to a disagreement about the size of the shed but that the first defender and the pursuer sorted this out between them. Again, however, this seems not to have been something she observed directly but rather was told about. She also gave evidence that removal of the new shed was never demanded prior to raising of the current proceedings.

[50] The pursuer's evidence was that he was called by his son, [IJ], on the day to be told that a shed was being erected and asking if this was his. He replied in the negative. He arrived shortly thereafter and explained to the builders that the defenders did not own the ground and asked them to stop. He also spoke to a confrontation with the first defender's father when again he stated that it was not their ground and no consent to a shed being erected had been given. As regards the conversation with the first defender later that evening, the pursuer's evidence was that he was asked "what the situation was with the hut. I answered that it will be coming down in the morning." He spoke to the first defender threatening "to get you done with malicious damage" were he to do so. [IJ], who was present when the shed was being put up, gave similar evidence and that the pursuer had previously asked him to slab the area for him. He assumed that the shed being erected was one the pursuer had ordered. He contacted his father who told him that was not the case, appeared shortly thereafter and asked that erection of the shed be stopped as the defenders had no right to do so in that area. In cross-examination he maintained that the challenge was not only in relation to the size of the shed. Further he says that after this occasion the pursuer asked the first defender "to take the hut down so many times … countless amounts of times." In evidence he spoke to having overheard the pursuer ask the defenders to remove the shed "quite a few times".

[51] Again I found the relevant witnesses to be broadly similar in terms of credibility and reliability. As such, I am again left with two contradictory versions of events. I cannot conclude to the necessary standard that the version put forward by the defenders - in particular the alleged taciturnity on the part of the pursuer - is to be preferred.

[52] Having been unable to conclude either that the delay was unreasonable or that there was taciturnity on the part of the defender, the question of acquiescence, being a matter of inference from those, does not arise.

Encroachment

[53] The pursuer seeks declarator that:

> "the defenders have wrongfully and illegally sought to alter common property belonging to the parties unilaterally by building an outbuilding at those areas of land at 18 [AA] Avenue, Kilsyth, Glasgow, title to which is registered in the Land Register of Scotland under Title Number STG[12345], tinted mauve on the title plan, and in so doing have encroached upon the pursuer's property at the area which is white adjacent to the area tinted mauve on the said title plan".

[54] The new shed straddles commonly-owned garden ground (tinted mauve on the plan) and ground which is owned solely by the pursuer (white on the plan).

[55] As regards the declarator sought, the defenders deny that the erection of the new shed is an alteration of the commonly-owned ground. Rather, it is an ordinary use of that area. The pursuer argues that it is an alteration: the pursuer has been deprived of use by the erection of an outbuilding that only one party can use. As such, the pursuer's consent would have been needed and it was not given.

[56] In evidence it was accepted by the defenders that the new shed was used by them for the storage of bicycles and gardening equipment. The first defender accepted that the new shed, in point of fact, was only used by the defenders. That however is a different thing

from it being unavailable to the pursuer, in the event he also wished to use it. I heard no evidence on that. I am not persuaded that the new shed was unavailable for use by the pursuer.

[57] Reference was made to *Rafique* v *Amin* 1997 SLT 1385 and *Apps* v *Sinclair*, an unreported decision of Sheriff Principal RA Dunlop QC dated 23 February 2006. From these it can be taken that a co-proprietor has an absolute right of veto in respect of any "extraordinary use" of the common property or "any operations on the common subject by which its condition is to be altered" (Bell's *Principles* (10th ed), para 1075).

[58] I do not consider that the erection of a shed on common garden ground, to which access appears to have been available to all co-proprietors (even if it may not have been used by the pursuer) represents an extraordinary use of that property. Equally, on the evidence there was nothing to suggest that the condition of the common property was altered. For example, it was not said that the new shed had acceded to the land. Accordingly the consent of the pursuer was not needed as regards the erection of the shed on the common garden ground.

Encroachment - decision

[59] As such, that part of the declarator sought, relating to wrongful and illegal alteration of common property, cannot be granted. The defenders took issue with the specification of the declarator sought. I am satisfied however, having been addressed on the matter, that it is open to the court to grant such decree of declarator as it considers right within the limits of that which is craved (*Assets Co* v *Ogilvie* (1897) 24 R 400, *Rothfield* v *North British Railway Co* 1920 SC 805) and, specifically, that part of it relating to encroachment by the new shed on the land owned exclusively by the pursuer. Declarator will be granted to that extent.

[60] In principle, a party encroached upon is entitled to have the encroachment removed. It was not suggested that the court should exercise its discretion against that remedy. I will grant decree ordaining the defenders to remove the new shed to the extent that it encroaches on the land owned exclusively by the pursuer.

Expenses

[61] I was not addressed on liability for expenses. A hearing will be set down on that matter.