OUTER HOUSE, COURT OF SESSION

[2019] CSOH 82

A345/18

OPINION OF LORD PENTLAND

In the cause

GCN (SCOTLAND) LIMITED

Pursuers

against

JAMES STEVENSON GILLESPIE (known as STEVEN GILLESPIE)

Defender

Pursuers: Thomson QC, Turner; Lindsays
Defender: McNairney; Pollock Fairbridge Schiavone

24 October 2019

Introduction

[1] In this action, which was remitted from the Sheriff Court, the pursuers seek declarator that they possess and have possessed openly, peaceably and without judicial interruption for a continuous period in excess of 1 year an area of ground known as Garrion Business Park in Wishaw ("the property"). The pursuers do not have a registered title to the property. Nor does the defender.

[2] In order to understand what has brought the present dispute before the court, it is important to recall that a party in possession of ownerless land can obtain a real right to the land by registration in the Land Register of Scotland of an *a non domino* disposition of the

land in his or her favour followed by 10 years continuous possession of the land openly, peaceably and without any judicial interruption (section 1(1) of the Prescription and Limitation (Scotland) Act 1973). An *a non domino* disposition is a deed granted by a person who is not the owner of the land disponed and who does not act with the authority of the person who is the owner (Reid and Gretton; *Land Registration*, 2017; page 314, footnote 75).

[3] Following a comprehensive examination of the law by the Scottish Law Commission in a project led successively by Professor Kenneth G C Reid and Professor George L Gretton (*Report on Land Registration,* 2010; Scot Law Com No 222), new rules were introduced by sections 43 to 45 of the Land Registration etc (Scotland) Act 2012 ("the 2012 Act") tightening up the system for obtaining title to land by prescriptive possession based on title conferred by an *a non domino* disposition. This followed concerns about abuse and the possible wresting of land from unwary or inattentive owners (Reid and Gretton, *op cit*, page 315). The new system requires an applicant seeking to register an *a non domino* disposition to satisfy a number of requirements, the aim of which is to alert the owner of the land and allow him or her to challenge the disposition.

[4] The pursuers aver that the property mainly comprises a number of large storage sheds; the pursuers use these for the purposes of their transportation and pallet delivery business. The pursuers explain in their pleadings that they have a fleet of over 40 articulated lorries and vans; they say that these vehicles use the property 24 hours a day, 7 days a week.

[5] Over and above the declarator to which I have already referred, the pursuers also seek separate declarators that (a) they are entitled to retain possession of the property and (b) they have a patrimonial interest arising from their ability to grant and/or register an *a non domino* disposition of the property and thereby acquire or convey a proprietary right

over the property. In addition to the declaratory remedies, the pursuers seek various orders for interdict against the defender from interfering with their rights in the property by erecting obstructions along the boundary with the public road, from preventing the pursuers gaining access to the property, and from entering or taking up occupancy in the property.

The pursuers' pleadings

[6] In their pleadings the pursuers aver that they have possessed the property openly, peaceably and without judicial interruption since around 1998. They claim that no other person has occupied, used or entered the property during the period since then.

[7] The pursuers go on to explain in their averments that the last registered owner of the property was a company by the name of Whitechurch Developments Limited. This company (the pursuers aver) was incorporated in 2006 as a property holding company. It was dissolved in 2010. The pursuers' averments continue by saying that the property would, therefore, ordinarily have fallen to the Queen's and Lord Treasurer's Remembrancer ("QLTR") as *bona vacantia*. The QLTR disclaimed the property in 2012, however. In 2015 and 2016 the pursuers, through their solicitors, entered into negotiations with the liquidator of another company understood to have an interest in the property, but these negotiations, despite being extensive, came to nothing. The pursuers aver that they have taken all necessary and legal steps properly to acquire the property. They say that neither the previous owners of the property nor the QLTR has any interest in it. Consequently, there is no legally entitled owner of the property.

[8] In these circumstances, the pursuers wish to have recourse to the procedure set out in section 43 of the 2012 Act. So far as relevant for present purposes, section 43 provides as follows:

> "(1) For the purposes of sections 23(1)(b), and 26(1)(a), a disposition is to be treated as being valid despite not being so if the conditions mentioned in subsections (2) to (4) are met.
>
> (2) It appears to the Keeper that the disposition is not valid (or, as regards part of the land to which the application relates, is not valid) for the reason only that the person who granted it had no title to do so.
>
> (3) The applicant satisfies the Keeper that the land to which the application relates (or as the case may be the part in question) has been possessed openly, peaceably and without judicial interruption—
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> (a) by the disponer or the applicant for a continuous period of 1 year immediately preceding the date of application, or
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> (b) first by the disponer and then by the applicant for periods which together constitute such a period.
>
> (4) The applicant satisfies the Keeper that the following person has been notified of the application—
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> (a) the proprietor,
>
> (b) if there is no proprietor (or none can be identified), any person who appears to be able to take steps to complete title as proprietor, or
>
> (c) if there is no proprietor and no such person (or, in either case, none can be identified), the Crown."

[9] I should explain that sections 23(1)(b) and 26(1)(a), to which reference is made in subsection (1) of section 43, prescribe as conditions for registration of deeds that the deed requires to be valid.

[10] The pursuers aver that in early November 2018 the defender contacted them and indicated that he wanted to have a discussion with them about acquiring the property for the purpose of housing development. A meeting took place between the parties on

8 November 2018. According to the pursuers' averments, the defender indicated that he was going to acquire and take control of the property because he had ascertained that there was not any true owner of it. He indicated that he was going to erect fences, block off part of the property, take possession of it and exclude the pursuers from it. The pursuers contend that the defender had no right, title or interest to take any of these steps and, as it is put in the pursuers' averments, his actions were purely speculative. The pursuers aver that the defender had ascertained that the property appeared to have no beneficial ownership and, therefore, he wanted to try and secure it for himself. The pursuers say that the defender's statements to them disclosed an intention to dispossess the pursuers of the property without judicial authority.

[11] In view of the defender's intentions, the pursuers brought the present proceedings in the Sheriff Court. They aver that they have been using and occupying the property for over 20 years and have required to expend substantial sums in relation to it. They say that they have used and treated the whole of the property as their own and have the patrimonial right to secure title to it or to occupy it with a view to potential acquisition in terms of the 2012 Act. According to the pursuers, the defender wishes to seize the property from them. The pursuers say that they wish to protect their patrimonial interest.

The parties' arguments

Defender

[12] The case came before me on the Procedure Roll. For the defender, it was argued that the action should be dismissed. Essentially, four lines of argument were advanced.

[13] First, it was said that the action was incompetent because the pursuers did not seek declarator that they had possessed the property openly, peaceably and without judicial

interruption for a continuous period of 1 year immediately preceding the date of an application to the Keeper under section 43 of the 2012 Act. Under the statutory scheme it was for the applicant to satisfy the Keeper that the various requirements set out in section 43 were satisfied. In the event that the Keeper refused to grant an application under section 43, the correct way to challenge her decision was by a petition for judicial review.

[14] Secondly, the defender argued that the crave seeking a declarator that the pursuers have a patrimonial interest arising from their ability to grant and/or register an *a non domino* disposition was confusing and unnecessary. Section 43 of the 2012 Act contained no such requirement.

[15] Thirdly, the defender submitted that the pursuers could not bring proceedings, such as the present action, in which a possessory judgment was sought because they admittedly did not have an *ex facie* valid title to the property. The only forms of action available to the pursuers in the event of their being dispossessed of the property would be to raise an action seeking a possessory remedy, such as ejection or intrusion. It was submitted that when, as in the present case, a possessory judgment was sought (as distinct from a possessory remedy), the possession alleged must be for at least 7 years on a written title, *ex facie* apt to include the subjects possessed; reference was made to Gordon and Wortley on *Scottish Law Land* (3rd ed) paragraphs 4-11, 4-13, 4-14 and 4-18.

[16] Fourthly, the defender contended that since the pursuers did not have a *prima facie* case, the *interim* interdicts previously granted should be recalled. In the course of discussion at the debate, counsel for the defender abandoned this line of argument. I need not, therefore, say any more about it.

Pursuers

[17] For the pursuers, it was submitted that they did not require to found on any formal heritable title to the property because (a) in the circumstances of the present case, bare possession of the property afforded sufficient title to sue and (b) the pursuers had a patrimonial interest sufficient to afford them title to sue. If the pursuers had title to sue on one or other or both of those bases, the averments in the defences pertaining to the need for a heritable title were irrelevant and should not be admitted to probation.

[18] The pursuers argued that they were entitled to seek declarator to protect their possession of the property so that they could make an application to the Keeper under section 43 of the 2012 Act on the basis of their having occupied the property openly, peaceably and without judicial interruption for a period of more than 1 year.

[19] It was drawn to my attention that the Keeper had rejected an application by the pursuers under section 43 of the 2012 Act in July 2019 on the basis that possession of the property was in dispute and was subject to the present action; in the circumstances, the Keeper's position was that she was not satisfied that the test in section 43(3) had been met. Given that there was a dispute between the parties to the action, the Keeper's view was that she would not accept an application until the present action had come to an end and she could be satisfied that the test in section 43(3) could be met.

Analysis and decision

[20] In my opinion, the pursuers' averments on title and interest to sue are relevant and must be allowed to proceed to an inquiry. It is true, of course, that they do not have a heritable title to the property, but the law has not always insisted on this as a requirement for entitlement to protect possession by court action against a person who himself has no

title to the land which is the subject of the dispute. Moreover, under the modern law it is the essence of an application to the Keeper under section 43 of the 2012 Act that the applicant does not have a title to the land he claims to be in possession of. It seems to me that a person who claims to be qualified to make such an application should be entitled to raise a court action to prevent a third party, who is not in possession of the land in question, from dispossessing him and so denying him the right to make the application. In my opinion, an action for declarator and interdict is competent in such circumstances.

[21] A person possessing land in good faith undoubtedly has the right to maintain or to recover possession by having recourse to the possessory remedies of intrusion and ejection. The law on these remedies is explained as follows in Gloag and Henderson, *The Law of Scotland* (14th ed) paragraph 34.11:

> "Removing, along with ejection and intrusion, are the remedies available for recovering possession which has been lost. In all cases some *prima facie* title is required. Infeftment is obviously the best of all titles, but a lease is sufficient, or a title which, though not expressly including the subject is *prima facie* applicable thereto. Interdict has on occasion been granted even to a party who could not show a title, but a good deal seems to turn on what kind of title, if any, the other party is able to show."

[22] It is notable that in this passage it is acknowledged that an application for interdict may competently be made by a party who has no title, although it will be relevant to consider what title is relied on by the party opposing the grant of interdict. In the present action the pursuers seek *inter alia* interdict.

[23] In Rankine, *The Law of Land Ownership in Scotland* (4th ed) pages 9 and 10, the question of what is required by way of a title to seek a possessory judgment is discussed in the following passage:

> "The law of Scotland, in the case of heritable property, requires some title as the foundation for a possessory judgment against disturbance, or for summary recovery of possession; but it may be any lawful title which *ex facie* applies to the subject

> encroached on, and is not of the nature of a claim of debt. There is no trace to be found in the books of an interdict being granted without any title of possession being alleged. Yet it is easy to imagine a case in which one who is a mere squatter, settling down on land to which he has no right whatever, shall be disturbed in his possession by one equally devoid of title. He would be entitled to resist such disturbance by appeal to the ordinary tribunals and not solely at his own hand, as is shown not only by the action of ejection, but by the analogous provision of the civil law, which puts the reply of tenancy-at-will into the mouth only of the complainer's own author. The rule requiring a title would, however, be justified in the case supposed, by regarding the squatting as tenancy at the will of the real owner, based on the latter's own title, and good against all but him."

[24] In that passage Rankine recognises that a mere squatter, a party having no title, can nonetheless apply to the courts to resist attempts to dispossess him by a party without a title. That is essentially the position in the present case.

[25] In *Irvine* v *Robertson* (1873) 11 M 298 the Inner House granted suspension and interdict in favour of a bare possessor of land. The Second Division affirmed the conclusion of the Lord Ordinary that the complainers had a right and interest to prevent the respondent from taking possession, without any right or title on his part, of an area of reclaimed ground, which had at one time been part of the seashore of Lerwick, situated opposite the properties of the complainers and respondent. The Lord Ordinary (Lord Mackenzie) held that the complainers were entitled to seek interdict to maintain the existing state of possession and that their right and interest arose from their being proprietors of the ground adjoining or in the immediate vicinity of the seashore, from their having assisted in and paid for reclaiming the ground from the sea, and from the use and occupation thereof as an access to and from the sea and the public quay. This was despite the fact that neither the complainers nor the respondent had any right of property in the area of ground. The Lord Ordinary said this at page 300:

> "Such an interest is, it is conceived, sufficient to entitle (the complainers) to insist in the present application, more especially seeing that the respondent is a mere

> squatter, without any right or title whatever to support his claim, and that he is by his operations attempting to disturb the existing state of possession."

[26] In the present case the pursuers aver that the defender is, in Lord Mackenzie's words, a person without any right or title whatever to support his claim. They offer to prove that he is, again to echo Lord Mackenzie, attempting to disturb the existing state of possession. In these circumstances, on the authority of *Irvine* v *Robertson*, the pursuers are entitled to seek declarator and interdict against dispossession.

[27] In *Watson* v *Shields* 1996 SCLR 81 Lord Morison, in giving the opinion of the Inner House, stated as follows at page 83:

> "The first question which seems to us to arise is whether, as the pursuers maintain, they are entitled by virtue of their possession to interdict any person seeking to interfere with that possession who does not produce evidence of a valid and irredeemable title. The question whether the deeds produced by the defender constitute evidence of such a title only arises if the pursuers are correct in maintaining that they are entitled to interdict in its absence.
>
> We were referred to no authority on the matter, but on ordinary principles we consider it clear that a possessor of heritable property can obtain permanent interdict against someone who challenges that possession only if he is able to establish that the challenger has no right to do so: otherwise it cannot be said that any wrong is apprehended. If the challenger produces no evidence at all that he is entitled to possession, the inevitable inference must be that he is not entitled to interfere with the possessor's rights. But where some evidence that he is entitled to interfere has been produced, the court must assess the weight of that evidence in determining whether the possessor has established that the challenge is ill founded."

[28] In the present case the defender has produced nothing to show that he has any entitlement to possess the property; he has no averments to the effect that he has any legitimate basis for occupying the property or taking any steps in relation to it. So, applying Lord Morison's approach, the inevitable inference (on the basis of the pleadings) is that the defender is not entitled to interfere with the pursuers' rights as possessors of the property. It will be recalled that the pursuers aver that they have been in possession of the property over the past 20 years (article 7 of condescendence).

[29] Having regard to the pursuers' averments of exclusive possession of the property over a lengthy period and the lack of any title on the part of the defender, I consider that the pursuers are entitled to bring the present proceedings. In my opinion, the pursuers were well-founded in submitting that even before one considers the impact of the 2012 Act, the law would have recognised the legal relation which the pursuers offer to prove as sufficient to establish title to sue the defender, notwithstanding that the pursuers do not have a formal legal title to the property.

[30] As the pursuers pointed out, before the reforms brought about by the 2012 Act a party in *de facto* possession of land without a title could take steps to protect himself against being dispossessed by recording an *a non domino* disposition. The 2012 Act has the effect, however, of meaning that parties in the pursuers' position can no longer obtain an immediate title by this route; such persons must now be able to demonstrate that they have occupied the land in question for a continuous period exceeding 1 year.

[31] Particularly given the important development of the law brought about by sections 43 to 45 of the 2012 Act, it would be highly unsatisfactory if a party who claimed to be in a position to avail himself of these procedures could not establish his right to do so by means of an action of declarator and interdict. If such a party could only rely on the traditional possessory remedies, such as ejection or intrusion, this could give rise to real inconvenience and injustice. He would have to wait to be dispossessed before he could bring proceedings. He would not be able to take effective steps to protect his prospective rights under section 43 of the 2012 Act. He might have to make repeated applications for a possessory remedy. Such an approach might serve to encourage parties in the position of the defender to interfere with established possession and, in effect, to drive *bona fide* possessors from their land.

[32] In my opinion, the pursuers' averred prospective entitlement of having their application under section 43 of the 2012 Act considered and accepted by the Keeper is sufficient to confer on them title and interest to pursue the present action against the defender.

[33] That is sufficient to dispose of the main issue between the parties at the present stage of the action. It leaves for consideration just a few minor points.

[34] First, I do not consider that the action is incompetent because the pursuers do not seek a declarator that they have possessed the property openly, peaceably and without judicial interruption for a continuous period of 1 year immediately preceding the date of an application to the Keeper under section 43 of the 2012 Act. I see no reason why the declarator has to be so closely linked to the proposed application to the Keeper. In the event that a declarator is granted after proof in the present action, it would then be open to the pursuers to make an application under section 43 to the Keeper, relying on the court's findings and decree. It would be for the pursuers to satisfy the Keeper that their open, peaceable and uninterrupted occupation of the property had continued up to the point immediately preceding the date of their application.

[35] Secondly, insofar as the defender sought to argue that the right course for the pursuers to adopt would have been to challenge the Keeper's refusal of their application by a petition for judicial review, I consider the argument to be misconceived. As I understood it, the argument was predicated on the view that the Keeper is responsible for resolving a dispute between the parties as to whether the pursuers have possessed the property openly, peaceably and without judicial interruption for a continuous period of 1 year. In my opinion, the Keeper is not in a position to resolve a dispute of the type that has arisen in the

present action; this is a matter for the courts. As the Scottish Law Commission observed in paragraph 18.6 of its report on Land Registration (*op cit*):

> "The Keeper is not well placed to hear and determine disputes - very often neighbour disputes - either in relation to law or in relation to facts. The Keeper is not a member of the judiciary. There is no power to cite witnesses or to compel the production of documents. In a nutshell, the Keeper's position is that the Department of the Registers of Scotland is not a court of law."

[36] In this connection, reference may also be made to the decision of the Lands Tribunal for Scotland to similar effect in *PMP Plus Ltd* v *Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2 at paras [32], [42], [43], and [50]. It is notable also that section 103 of the 2012 Act provides that an appeal may be made to the Lands Tribunal on a question of fact or on a point of law, against any decision of the Keeper under the Act. By subsection (2), that right of appeal is, however, expressly stated to be without prejudice to any other right of recourse, whether under an enactment or under a rule of law.

[37] In my opinion, the Keeper was correct to say, in her rejection of the pursuers' application under section 43 of the 2012 Act, that consideration of the application must await resolution of the present action.

[38] Finally, the defender argued that the crave seeking a declarator that the pursuers have a patrimonial interest arising from their ability to grant and/or register an *a non domino* disposition was confusing and unnecessary. I disagree. In my opinion, the pursuers' interest in the property and their associated interest in making an application under section 43 of the 2012 Act are of obvious patrimonial value. The pursuers wish to register title to the property and to bring the property back into economic use. This points towards their having a patrimonial interest in retaining possession of the property. It is well recognised that interference with a patrimonial interest may be sufficient to establish a title to sue (Burn-Murdoch, *Interdict in the Law of Scotland*, paragraphs 44 to 46).

[39] For all these reasons, I conclude that the defender's attack on the relevancy of the pursuers' pleadings fails.

Pursuers' challenge to the relevancy of averments in the defences

[40] The pursuers submitted that certain averments in the defences were irrelevant. These were: (a) in answer 10 the words "*Esto* the pursuers are in possession of the property (which is not known and not admitted) said possession is without any title."; (b) in answer 11 the words "The pursuers have no better rights, title or interest in the area of ground hatched orange and outlined in pink than the defender has. The pursuers have no heritable title to the property."; and (c) in answer 13 the words "Explained and averred that the pursuers have no better rights, title or interest in the area of ground than the defender has."

[41] In my opinion, all these averments are irrelevant. They invite an exercise in comparison to be undertaken between the respective titles of the parties, but the defender accepts that he has no title to the property. He puts forward in his pleadings no basis for entering into possession of the property or for disturbing the pursuers' possession of it.

Disposal

[42] I shall repel the defender's second and fourth pleas-in-law; these seek to challenge the relevancy of the pursuers' averments on patrimonial interest and to assert that the pursuers' claim to retain possession must fail because they have no underlying title. I shall sustain the pursuers' first and second pleas-in-law to the extent of excluding from probation the averments in the defences to which I have referred in paras [40] and [41] above. *Quoad ultra* I shall reserve the parties' pleas-in-law (including the defender's first plea-in-

law, on the basis that it is a general plea to the relevancy of the pursuers' averments and is not restricted to challenging title to sue) and allow a proof before answer.

[43] I shall reserve all questions as to expenses.