SHERIFF APPEAL COURT

[2023] SAC (Civ) 35
INV-A110-18

Sheriff Principal N A Ross
Sheriff Principal C Dowdalls KC
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

EH1 PROPERTIES LIMITED

Pursuer and Appellant

against

ALEXANDRA MARY MACLEAN or ROBERTS, JOANNA MORAG MACLEAN, MRS ALEXANDRA MARY MACLEAN and ANGUS DONALD WAUGH MACLEAN, as partners of and Trustees of the firm of ANGUS MACLEAN

Defenders and Respondents

Pursuer and Appellant: Middleton, advocate; Trainor Alston Limited
Defenders and Respondents: Garrity, advocate; Stronachs LLP

15 December 2023

[1] The appellant is heritable proprietor of a plot of land at Marybank, Ross and Cromarty, and has obtained planning permission to erect 6 houses on the plot. The respondents are the heritable proprietors of an adjoining plot of land to the north. The appellant wishes to construct drainage services across the respondents' property, and claims a servitude right to do so. The respondents do not consent. They maintain that any right to

construct on their property has prescribed by operation of long negative prescription, and in any event has not been effectively exercised.

[2] Formerly, the two plots of land were owned under a single title. By Disposition dated 10 and 14 September 1998 by Alexander Macleod and Rachel Macleod, recorded in the General Register of Sasines on 29 September 1998 (the "1998 Disposition"), the northern plot was sold to Alexandra Mary Maclean and Joanna Mary Maclean. In 2010 that plot was sold again, and by Disposition dated 4 May 2010 and recorded in the General Register of Sasines on 10 June 2010 (the "2010 Disposition"), it was disponed to the respondents. The appellant is proprietor of the remaining plot to the south.

[3] The 1998 Disposition created a servitude right in favour of the pursuer's plot over the respondents' plot. The servitude right was:

> "…there is reserved in favour of us and our successors in ownership of the said subjects retained by us a heritable and irredeemable servitude right to instal, if necessary, any part of a private drainage system which may be required for any building which may be erected on the said subjects retained by us as may require to be situated outwith the boundaries of the said subjects retained by us together with a heritable and irredeemable servitude right of access thereto for the maintenance, repair and renewal of the same but that subject to an obligation of us and our successors in ownership to…(E) ensure that the route of such apparatus shall be first agreed with our said disponees and their foresaids (which agreement will not be unreasonably withheld)…".

[4] The appellant obtained planning permission in around October 2015 for the erection of 6 houses. As part of the approved application, the appellant proposed that water from the development be drained to an existing watercourse via pipework to be installed running under the respondents' property. The appellant avers that, while alternative drainage routes are technically feasible, only this route avoids the requirement to pump water against gravity. Such pumping would be costly, unreliable and create a flood risk. The proposed drainage route was therefore "necessary", as required by the terms of the servitude.

[5] The respondents do not consent to the installation of drainage services across their property. They aver that the servitude right has expired by operation of law, having remained unexercised and unenforced for in excess of 20 years and without any relevant claim being made to interrupt the prescriptive period. They do not in any event accept that the drainage route is necessary, or that the requirements of the servitude right have otherwise been complied with.

[6] The relevant statutory provision is section 8 of the Prescription and Limitation (Scotland) Act 1973 (the "1973 Act") which provides:

> "(1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of twenty years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished."

[7] The appellant does not claim that the servitude right has been exercised timeously, but rather that it has been enforced timeously. The appellant claims that service of the present action upon the first and second respondents as individuals amounts to "a relevant claim…having been made", and therefore interrupts the prescriptive period. The respondents deny that any relevant claim has been made, as service was made on the wrong party.

[8] That position arises as a result of events surrounding service of this action. Parties agree that the servitude right would, unless exercised or enforced and in the absence of relevant claim, be extinguished on 29 September 2018. This action was served on 16 August 2018, within one month of expiry of the servitude. It was served on Alexandra Mary Maclean or Roberts and Joanna Morag Maclean as individuals. They are not the current proprietors. They were the former proprietors, who held title in a personal capacity. They

are also two of the trustees of the respondents. The current proprietors, since the 2010 Disposition, are the respondents.

[9] It came to the appellant's attention that the action had been incorrectly raised against Alexandra Mary Maclean or Roberts and Joanna Morag Maclean as individuals. The appellant lodged a minute of amendment on 19 November 2018 seeking to amend the instance. They have now convened the correct proprietors. The minute of amendment was allowed notwithstanding that the servitude had prima facie already been extinguished. The action was appointed to a proof before answer on the question of prescription.

The sheriff's judgment

[10] The central issue for proof was whether the servitude had prescribed. The operation of the law of prescription was not disputed. There was no dispute that if the servitude right contained in the 1998 Disposition had not been interrupted by service of the present action, then the servitude right had expired.

[11] The sheriff found that the present action did not amount to a relevant claim under the 1973 Act, and accordingly that the servitude had prescribed. It had not been timeously served on the proprietor of the burdened property. Even though it had been served on two out of four trustees of the respondents, that service had been in a personal capacity, not as trustees of the firm. She further decided that the two individuals upon whom service had been made had not held themselves out as the correct owners, and that the identity of the proprietors was a matter of public record.

[12] She further found that, by reference to the wording of the servitude in the 1998 Disposition, the respondents had not unreasonably withheld their agreement to the drainage scheme, and that the intended drainage scheme went beyond what was necessary.

[13] In relation to withholding agreement, it followed from the first finding that agreement had never been sought from the correct proprietors, and therefore could not have been unreasonably withheld. In relation to what was necessary, the sheriff attempted to identify the least burdensome application of the servitude, and had regard to the likely intentions of the granter. She decided that on a proper construction of the 1998 Disposition the proposed drainage route was not "necessary" and that in any event only drainage for a single building, not six buildings, was permitted. She found that in any event consent had not been sought for the proposed route.

The appellant's submissions

[14] Counsel for the appellant advanced three grounds of appeal. The first challenged the finding that service of the present action did not amount to making a relevant claim for the purposes of section 8 of the 1973 Act. The sheriff appeared to add a requirement that a claim had to be made to all of the correct defenders, which was not contemplated by the 1973 Act. The sheriff erred in using procedural rules to identify what was relevant as defined in section 9 of the 1973 Act. She appeared to have applied section 9(1) which related to an obligation, not section 9(2), which related to a right. She was bound to follow *Royal Insurance UK* v *Amec Construction (Scotland) (No.2)* 2008 SLT 825. A failure not to call all parties was not a point of competency, and even if it were, it is curable. A failure to design the capacity in which the respondents were sued was a procedural rule, not a substantive rule. Certainty on these matters was important (*Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287). It was an error to conflate personal obligations with real rights in land.

[15] The second ground was that the sheriff erred in finding that consent was not unreasonably withheld. There was ample material upon which to decide that the respondents had done so, and she had ignored that raising the action itself amounted to a request for consent which had been refused.

[16] The third ground was that the sheriff had misconstrued what amounted to a necessity for the purposes of the servitude. Necessary did not, in context, equate to essential, and the existence of a more difficult but feasible alternative to the form of drainage proposed by the appellant did not render exercise of the servitude right unnecessary. Words in a servitude required to be construed in the context of the relevant deed, read as a whole in light of the surrounding circumstances (Cusine and Paisley; *Servitudes and Rights of Way* (1998)) at paragraph 15.15). In any event, the sheriff had failed to take into account that the planning authority would not support the alternative, so it could not be described as feasible. This submission did not go as far as to seek the deletion of findings in fact, and no transcript of evidence was examined.

The respondent's submissions

[17] Counsel for the respondent submitted that the sheriff correctly identified that a relevant claim had not been made. That was because a relevant claim must be brought against the debtor in that obligation and not against somebody else (Johnston; *Prescription and Limitation* (2nd ed) at paragraph 5.28). It had been served only on two individuals, not the trustees. While the instance of the initial writ had been amended by minute of amendment, that had occurred only after the servitude had prescribed.

[18] As to unreasonable withholding of consent, that was also a matter for assessment on the facts. The sheriff was not plainly wrong in her conclusions. The service of the action itself could not be an application for consent, as it was not served on the correct proprietors.

[19] In construing the servitude, the sheriff heard evidence about what was known at the time of creation in 1998, and as to what was necessary about the proposed drainage system. The sheriff's assessment of the evidence was rational, and could not be challenged. The appellant was disputing facts, not identifying errors of law, and the matter could not be reheard on appeal. Findings in fact should not be re-examined without knowing all of the evidence, and could only be changed if the sheriff was plainly wrong. A drainage route did not become necessary just because it was cheaper than an alternative.

Decision

[20] The appellant served the initial writ in the present action on 16 August 2018, within 20 years of the creation of the servitude in the 1998 Disposition. The initial writ was, however, served on the wrong parties, being the previous proprietors. The 20 year period expired on 20 September 2018. The servitude right had not been exercised or enforced. The appellant thereafter amended the instance of the writ by minute of amendment intimated on 29 November 2018 and allowed on 15 January 2020. It is not disputed that the servitude right was extinguished on 29 September 2018 under section 8 of the 1973 Act, unless a relevant claim were made prior to that date. The appellant relies on the present action as the relevant claim.

[21] Section 9(2) of the 1973 Act defines "relevant claim":

> "In section 8 of this Act the expression "relevant claim", in relation to a right, means a claim made in appropriate proceedings by or on behalf of the creditor to establish the right or to contest any claim to a right inconsistent therewith".

[22] It is not disputed that these are appropriate proceedings as defined in section 4 of the 1973 Act. The appellant submitted that the sheriff erred in finding that service required to be on all of the respondents. It was submitted to be no more than a procedural, not a substantive rule (*Royal Insurance UK Ltd* v *Amec Construction (Scotland) (No.2) Ltd* 2008 SLT 825).

[23] *Royal Insurance UK Ltd* (above) does not, in our view, assist the appellant. In that action, the pursuer's title to sue was challenged, not the identity of the defenders. That action was raised after the pursuer had transferred its whole insurance business to a group company. The pursuer purported to act as a trustee for the group company in relation to any remaining rights they had. The defenders raised a plea of no title to sue on the basis that the contractual rights did not any more vest in the pursuer. The court found that the pursuer did have title to sue at the outset, even though they had failed to designated themselves as acting as trustees, but that the writ was incompetent as being defective in form. The pursuer sought to amend to remedy the instance and explain the capacity in which they acted. The defender opposed that, in part on the basis that the claim had been raised in a different capacity, that any claim qua trustee had not been raised timeously and so the claim had prescribed.

[24] The court repelled the argument based on prescription. It was not disputed that the pursuer did have title to sue, albeit in a different capacity. Accordingly, where the correct legal persona, which had title and interest, had raised the action, it was a relevant claim. The pleading of capacity was a procedural rule of pleading, which did not displace the fact the pursuer had a right to sue. Whether or not the pursuer was the correct creditor was a matter of law, not of perception. The court identified a common theme of the authorities,

namely the emphasis on the need for careful identification of the obligation in issue and of the party in right of it. With that in mind, the court did not consider the pursuer to be seeking to assert any new or different obligation, or that the title, interest and capacity to found on the contract had changed in any way. The trustee status had been acquired before the action was raised, not after.

[25] In our view, the present case is quite different. Here, the appellant raised the action against the wrong legal personae. The considerations surrounding a pursuer's title and interest to sue are not the same as for a defender's right to receive a relevant claim. *Royal Insurance* provides that the former right arises as a matter of law. The latter requires a voluntary act, without which there can be no obligation. The claim also requires to be relevant if the requirements of section 8 of the 1973 Act are to be satisfied.

[26] The present case, unlike *Royal Insurance*, does not require careful identification of the obligation in issue or the party in right of it. Both of these facts are unchallenged. The issue here is only whether the claim was relevantly brought against these respondents.

[27] This action was raised against the previous owners, in a personal capacity. As it happened, those two individuals were also trustees. The claim was not raised against the trustees of the Firm of Angus MacLean. Two of those trustees did not receive any claim at all. The true owners of the property were readily ascertainable from public records.

[28] A claim under section 8 requires to be made "to establish the right" or contest any claim. The individuals who received notice were not convened in their capacity as trustees. They were therefore of no assistance to the appellant in establishing a right. They had, as individuals, no locus to contest, or affirm, any right which the appellant might assert. Were they to attempt to enter appearance to resist his claim, any resulting decree would be of no effect against the true owners of the property who were not called. The claim required to be

against the owners. No attempt was made to establish any right against the trust itself, or its trustees.

[29] In relation to the appellant's arguments relating to competency, we accept that questions of competency are not engaged, that no particular form of claim is required, and that this is not a question of applying procedural rules. It is a question of whether the requirements of section 9(2) of the 1973 Act have been met. For a claim to qualify as a relevant claim in relation to a right, it must be a claim made in appropriate proceedings by or on behalf of a creditor to establish the right or to contest any competing claim. How it is possible to establish a right against a party which was not the proprietor was not explained. It bears consideration that appropriate proceedings might include (section 9(4), section 4) arbitration or court proceedings in a country other than Scotland. The appellant's submission would mean that proceedings raised abroad, possibly in private, against someone who is not the proprietor, would qualify as a relevant claim under section 8(2). Such a result is similar to the result of analysis in *Kirkcaldy DC* v *Household Manufacturing Ltd* 1987 SLT 617, there dismissed by the court as "absurd". That description could also be applied here. It serves to rule out the appellant's interpretation. Such would be a claim, but not a relevant claim.

[30] For completeness, the appellant did not advance any submission that intimation to two individuals, who happened to be trustees, without convening them in that capacity, was equivalent to intimation to the whole of the trustees. We would not have sustained such a proposition.

[31] The question of who the claim must be brought against is, in our view, correctly stated in Johnston; *Prescription and Limitation* (2nd ed paragraph 5.28): "A relevant claim must be brought against the debtor in that obligation and not against somebody else."

[32] While that proposition is stated in relation to a claim relating to an obligation under section 6 of the 1973 Act, we can see no justification to exclude claims under section 8. The claim could only be brought against the trustees, acting in that capacity. They are the only parties, in the context of this case, against whom the servitude right could be enforced. While a servitude is not a personal obligation, any court action nonetheless required to be capable of amounting to enforcement. No such action of enforcement was timeously raised. The servitude right was extinguished by operation of prescription on 29 September 2018. Warrant for service on the current respondents was not granted until 15 January 2020. That was too late to affect the extinction of the servitude right. Accordingly, this appeal must be refused.

[33] While the remaining grounds do not arise for decision, we will indicate our view. In relation to the question of whether consent was unreasonably withheld, it follows from the foregoing that consent could not be unreasonably withheld where it had never been asked for. The appellant submits that the present proceedings amount to a request for that permission. We do not accept that proposition. The action was not served, and therefore consent was not sought, prior to the extinction of the servitude right. Even if that were wrong, and service of the initial writ were capable of amounting to a request in terms of the 1998 Disposition, the question then becomes one of reasonableness of refusal. If there were a prospect of the underlying claim of right being defeated, as has in fact happened, it is difficult to see that consent was unreasonably withheld while that underlying claim, and the pursuer's entitlement to ask for consent, was being litigated. It was not unreasonable to withhold consent pending the resolution of the dispute about the existence of the servitude right itself.

[34] In relation to construction of the servitude right, the meaning of necessity requires to be established in the factual context of the 1998 Disposition. The words should be construed in a reasonable and fair manner, in the context of the deed itself, read as a whole, in the light of surrounding circumstances (Cusine and Paisley; above, at paragraph 15.15). To the extent that the sheriff appears to refer to the subjective intentions of the parties, that was not open to her as a relevant source of evidence. We would not, however, have differed from her conclusion. In our view, the 1998 Disposition did not restrict the meaning of necessity. Necessity would fall to be construed in the light of its ordinary meaning, in the context of both the deed as a whole and the surrounding facts.

[35] The sheriff carried out such an exercise. She identified that necessity referred to being "needed in order to achieve a particular result", or "needed in order for something else to happen", or "essential or needed to do something, provide something, or make something happen". She found, on the evidence, that the drainage plan could not be said to be necessary in the sense of being essential. She heard evidence that a different, albeit more difficult, form of drainage was feasible. That evidence had not been explored further in evidence. She did not find, although such a proposition was urged during the appellant's submission, that drainage was limited to surface water only; rather it referred to domestic drainage also. The appellant failed to prove that the proposed drainage route was necessary. That is primarily a question of fact, and the sheriff made a finding in fact and law to the effect that the route of the proposed drainage was not necessary. We agree that finding of fact was open to the sheriff, and is not tainted by any reference to parties' subjective intentions. We would therefore not have interfered with the finding. It is otherwise in relation to whether "any building" encompassed more than one building - that

is a question of construction, and we would not have found the servitude to be limited to drainage of a single building. It is unnecessary, however, to make any such finding.

Disposal

[36] The appeal is refused. Parties agreed that expenses should follow success, and that sanction for junior counsel should be given. Accordingly, we will find the appellant liable to the respondent in the expenses of the appeal, and certify the appeal as suitable for the employment of junior counsel.