SHERIFF APPEAL COURT

[2024] SAC (Civ) 6
CAM-A10-19

Sheriff Principal S F Murphy KC
Appeal Sheriff I M Fleming
Appeal Sheriff B Mohan

OPINION OF THE COURT

delivered by APPEAL SHERIFF I M FLEMING

in the appeal in the cause

(FIRST) PETER LITTLESON

(SECOND) MARGARET MUNDELL LITTLESON

Pursuers and Respondents

against

DUNCAN JOACHIM MACALISTER

Defender and Appellant

Pursuers and Respondents: MacColl, advocate; C & D Mactaggart,
Defender and Appellant: Sutherland, advocate; The McKinstry Company LLP

20 February 2024

Introduction

[1] In modern law the "foreshore" is the ground which lies between the high and low water marks of ordinary spring tides. This appeal concerns the ownership of a section of foreshore (extending to 4.22 acres) which runs along the western edge of Killegruer Farm, Argyll. Killegruer Farm is owned by the respondents and is adjacent to the western shore of

the Kintyre peninsula in Argyll, close to the village of Glenbarr and south of a river known as the Barr Water.

[2] In 2018 a dispute arose about the section of foreshore with which this action is concerned, with both parties claiming ownership based on their respective titles to surrounding land. As a result the respondents (pursuers in the court action) sought a declarator that their Sasine title to Killegruer Farm included the foreshore. The issue in this appeal is whether the appellant (defender in the proceedings at first instance) is the "proprietor in possession" of the foreshore in terms of section 9 (3) of the Land Registration (Scotland) Act 1979 ("the 1979 Act") and schedule 4 of the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act"). If he is not, then the appellant's title certificate contains a manifest inaccuracy and the Keeper will be required to rectify it and remove the foreshore from it. The action was served upon the Keeper of the Registers of Scotland as a second defender to the proceedings (a requirement under section 83 of the 2012 Act). However, she elected not to enter appearance and the action has proceeded against the appellant alone.

Background

[3] The appellant's grandfather Ranald MacAlister was a previous owner of the Glenbarr Estate on the Kintyre peninsula in Argyll. That estate included six coastal farms, each of which was separately tenanted. One of those farms was Killegruer. In 1935 Ranald MacAlister successfully claimed ownership from the Crown of all of the foreshore relating to the lands which formed the Glenbarr Estate. He did so on the basis of positive prescription.

[4] In 1983 the farm and lands of Killegruer – and the foreshore relating thereto - were sold by the executors of Ranald MacAlister to Neil and Elizabeth Littleson and the first

respondent. This was done via a disposition recorded in the General Register of Sasines on 27 June 1983 ("the 1983 disposition"). A plan was attached to the 1983 disposition. The farm's westernmost (coastal) side was not delineated in blue on the plan, but instead the two blue lines delineating the northern and southern boundaries each ran past a thick black line denoting the high water mark, to stop at a thin black line denoting the low water mark (see paragraph [7] below).

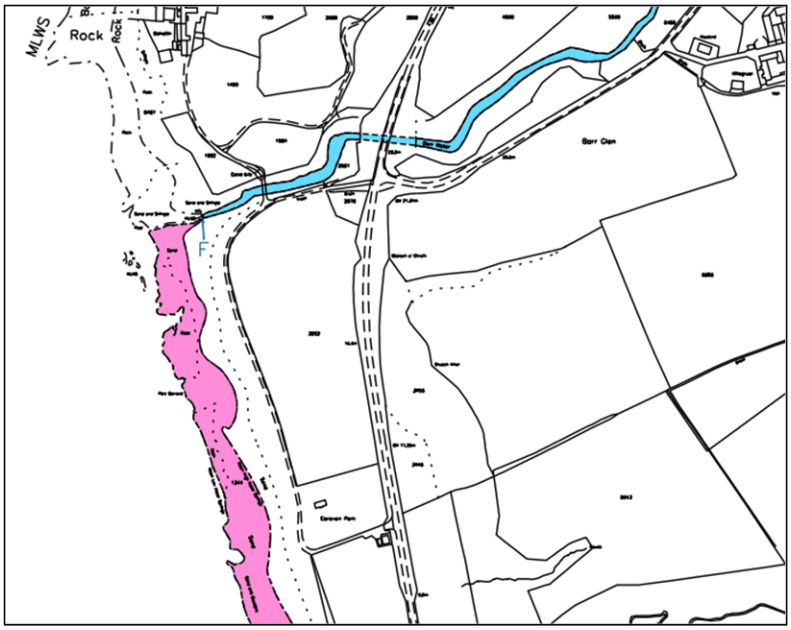
[5] Subsequently in 2011, the last remaining executor of Ranald MacAlister's estate transferred the residue of his estate to the appellant's stepmother, Jeanne MacAlister, via a disposition which (a) excepted all subjects sold off by Ranald MacAlister or his executors and (b) included an area of foreshore coloured red, noting that part of that area (including the foreshore) was included "insofar as [the remaining executor] as Trustee [had] right thereto". The plan attached to that later disposition included the Killegruer foreshore, notwithstanding the 1983 disposition to the Littlesons.

[6] In 2013 the appellant and his stepmother agreed to an exchange of property. As part of that agreement, the appellant was to have transferred to him title over the Barr Water as well as an area of foreshore running from Rosehill in the north to Barrmains in the south (both farms which were part of the original Glenbarr Estate). This included the foreshore at Killegruer. A disposition giving effect to this agreement was made in favour of the appellant on 23 September 2013 ("the 2013 disposition"). The 2013 disposition induced first registration and the Keeper issued a land certificate under title number ARG20184. The foreshore in the cadastral map is tinted pink.

[7] For the purposes of illustration, set out below are (a) an excerpt of the plan attached to the 1983 disposition and (b) an excerpt of the plan for title number ARG20184. Both show the disputed area of foreshore:

(a) Excerpt of plan attached to the 1983 disposition

(b) Excerpt of plan for title number ARG20184



[8] The first respondent and his sister operate a caravan park. It is located to the east of Killegruer beach. In February 2018 the first respondent and his sister began construction of a sewage outfall pipe to serve the caravan park. The pipe ran from the caravan park west across Killegruer beach (including the foreshore) to the sea. The appellant became aware of

the construction of the pipe. On 20 February 2018 he contacted the first respondent's sister and they agreed to meet the next day. At that meeting, the appellant asserted that he owned the foreshore. Subsequent to that meeting, the respondents checked their own title deeds and considered that they were the owners of the foreshore.

[9] The respondents served proceedings against the appellant (and the Keeper as already noted) in October 2019 and sought declarator:

i. that the 1983 disposition in their favour included the foreshore adjacent to Killegruer Farm and;

ii. that the title sheet and the cadastral map for title number ARG20184 are manifestly inaccurate in showing the appellant as the registered proprietor of the foreshore adjacent to Killegruer Farm.

[10] Following a proof before answer, the sheriff held that the appellant's stepmother had no title to convey the foreshore to the appellant when she sought to do so in 2013, as it had already been disponed by the appellant's grandfather to the first respondent and his parents in the 1983 disposition. Accordingly, the sheriff granted the first declarator sought by the respondents. That decision is not challenged by the appellant. The dispute in this appeal concerns the second declarator sought by the respondents.

Legislation

[11] Section 9 of the 1979 Act (now repealed) provided:

> **"Rectification of the register**
>
> 9.
>
> (1) Subject to subsection (3) … the Keeper may … and shall, on being so ordered by the court or the Lands Tribunal … rectify any inaccuracy in the register by inserting, amending or cancelling anything therein. …

(3) If rectification ... would prejudice a proprietor in possession–

(a) the Keeper may exercise his power to rectify only where – ...

(ii) all persons whose interests in land are likely to be affected by the rectification ... have consented in writing; [or] ...

(iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; ...

(b) the court or the Lands Tribunal for Scotland may order the Keeper to rectify only where sub-paragraph ... (iii) ... of paragraph (a) ... applies."

[12] Paragraphs 17, 18 and 22 of schedule 4 to the 2012 Act are transitional provisions relating to the continuing power of the Keeper to rectify inaccuracies, preserving the power she had to rectify by virtue of section 9 of the 1979 Act. Those paragraphs state as follows:

"17

If there is in the register, immediately before the designated day, an inaccuracy which the Keeper has power to rectify under section 9 of the 1979 Act (rectification of the register) then, as from that day—

(a) any person whose rights in land would have been affected by such rectification has such rights (if any) in the land as that person would have if the power had been exercised, and

(b) the register is inaccurate in so far as it does not show those rights as so affected.

18

For the purpose of determining whether the Keeper has the power mentioned in paragraphs 17 and 22, the person registered as proprietor of the land is to be presumed to be in possession unless the contrary is shown.

…

22

If there is in the register, immediately before the designated day, an inaccuracy which the Keeper does not have power to rectify under section 9 of the 1979 Act, then on that day it ceases to be an inaccuracy."

[13] The 2012 Act came into force on 8 December 2014, which thereby became the "designated day" under paragraph 17 above. Although the 2012 Act repealed section 9 of the 1979 Act, the latter provision was still in force when the appellant's title was registered in 2013. Accordingly, the transitional provisions set out above have effect in this case. Reference by parties in this appeal to 7 December 2014 were intended to denote the position "immediately before the designated day". The meaning of "inaccuracy" was not specified in the 1979 Act, but under section 80(1) of the 2012 Act it is defined as "a manifest inaccuracy".

The sheriff's judgment

[14] Parties accepted that the respondents' Sasine title included the Killegruer foreshore. They also recognised that, for the purpose of the Land Register, the appellant was named on the title sheet as the proprietor. Section 9(3) makes clear that the power to rectify can be exercised only in limited circumstances where it "would prejudice a proprietor in possession". Given that legal framework, the question of whether the inaccuracy in title number ARG20184 could be rectified in the respondents' favour depended firstly on whether the appellant was found to be a proprietor in possession. In determining that question the sheriff made findings in fact concerning the parties' respective involvement with the disputed foreshore.

Respondents' involvement (pursuers at first instance)

[15] The respondents own Killegruer farm. From 1836 to 1983, the Littleson family had tenanted Killegruer farm. During their tenancy, the Littleson family had had a right of access to the foreshore, which they used primarily to recover gravel for use on their own property. The second respondent often assisted the first respondent in the removal of gravel

from the foreshore between 2010 and 2017, usually at a frequency of once per month. The evidence of the respondents' witnesses was that no attempt had been made by the appellant to prevent their use of the foreshore until their work on the sewage pipe in February 2018. No witness for the respondents had ever seen the appellant walking along the foreshore.

[16] The sheriff made findings in fact that the respondents removed gravel and rocks from Killegruer beach several times a year, including from both the shore and the foreshore. Since 1983 the respondents had not sought permission from any party to do so. No other party, with one exception in 1992, had removed gravel or other material from the foreshore without the respondents' consent.

Appellant's involvement (defender at first instance)

[17] During examination-in-chief, the appellant gave evidence that he walked along the foreshore three to five times per year. He also gave evidence that his wife collected cowries (a type of shell) from the foreshore. The evidence did also explore whether the appellant removed gravel and sand from the foreshore. There was an averment to that effect on record; however, during cross-examination the appellant's evidence was that he had not removed gravel or sand from the foreshore. On the basis of the evidence he heard, the sheriff made a single finding in fact as to the appellant's use of the shore, namely that, since registering his title, the appellant had occasionally taken recreational walks on the foreshore but had had no other enjoyment or use of it.

Conclusions

[18] The sheriff concluded that the appellant was not the proprietor in possession of the foreshore as at 7 December 2014 for the purposes of section 9 of the 1979 Act. On that basis,

the sheriff made a finding in fact and law that, as at 7 December 2014, the Keeper would have had the power to rectify the manifest inaccuracy in title number ARG20184.

[19] The sheriff accepted that the respondents had openly and regularly taken gravel from the foreshore during their time as owners of the farm since 1983. The sheriff rejected the suggestion that the respondents had only taken gravel from the shore rather than the foreshore. The only basis for that assertion was the evidence given by the appellant. The sheriff generally found the appellant to be credible; however, he considered the divergence in evidence from the position as pled regarding his own removal of gravel and sand from the foreshore damaged his reliability as a witness.

[20] The sheriff held that the main use of the foreshore was for the removal of gravel and sand. The only parties who benefited from this use were the respondents, who accessed the shore and foreshore from roads within Killegruer farm. Pedestrian and vehicular access to Killegruer beach from the north was impractical because of the presence of rocks and the need to cross the Barr Water. Vehicular access to Killegruer beach from the south was not possible due to the presence of rocks. Pedestrian access to Killegruer beach could be taken readily from the neighbouring farm to the south. Given the location of the foreshore and the difficulty of access for the appellant, the sheriff held that the respondents were the only people who could enjoy and use the foreshore.

[21] Paragraph 18 of schedule 4 to the 2012 Act (narrated above) provided a presumption that the appellant – as registered proprietor – was in possession of the foreshore on the designated day. However, the sheriff was satisfied that the statutory test to overcome the presumption had been met by the respondents (ie that "the contrary is shown"). The sheriff found that the respondents had demonstrated that they – and not the appellant - possessed the foreshore. That being so, paragraph 17 of schedule 4 applied. As the manifest

inaccuracy in title number ARG20184 was capable of rectification, the sheriff granted the respondents' second crave.

Submissions for the appellant

[22] Counsel for the appellant submitted that the sheriff erred in holding that the appellant was not a proprietor in possession. The sheriff erred by failing to hold that the appellant would be prejudiced by rectification of his title. The appellant submitted that the sheriff failed to make adequate findings in fact and had failed to take into account material evidence which directly addressed the appellant's possession of the foreshore.

[23] The position as at 7 December 2014 was that the appellant was the registered proprietor of the foreshore. The sheriff had found that the appellant did make use of the foreshore, namely that he took recreational walks on the foreshore. While the respondents had also had use of the foreshore, their use was of a temporary nature which left no lasting mark. There was no obvious physical act that had been undertaken by the respondents that put the appellant on notice of a challenge to his possession (cf *Souter* v *Combined Corporation (BVI) Limited* 2019 SC 261).

[24] The sheriff adopted the wrong test in assessing who was the proprietor in possession. He had elevated the use to which the respondents put the foreshore (the extraction of sand and gravel) to a higher level of use and possession to that of the appellant (using it for family walks). If that approach were correct, it would require a registered proprietor of land to make all uses of every area of the land over which they had a registered title in order to prevent rectification of that title, even when they made an ordinary use of it.

[25] Paragraph 18 of schedule 4 to the 2012 Act created a presumption that the registered proprietor (ie the appellant) is in possession of their land unless the contrary is shown by

evidence. In order to determine whether the appellant was in possession the correct approach was to determine, first, whether the contrary had been shown, since, if it had not, the presumption would operate. This primarily required examining the involvement of the appellant with the land: *Souter* (*supra*) per Lord President (Carloway) at paragraph [22]. The type of possession required is not the same as would be necessary to establish prescriptive possession: *Kaur* v *Singh* 1999 SC 180 per Lord President (Rodger) at 193G-194C. As a general principle of law there could only be one person in possession of land: Stair, *The Institutions of the Law of Scotland* (2nd ed, 1693) at II.1.20 and *Stair Memorial Encyclopaedia: The Laws of Scotland*, vol 18, paragraph [118].

[26] The test that the sheriff ought to have applied was to have considered the possession of both the appellant and respondents: *Safeway Stores plc* v *Tesco Stores Limited* 2004 SC 29 per Lord Osborne at paragraph [60]. Counsel submitted that the sheriff had failed to apply this test. He had failed to consider properly the appellant's possession of the foreshore. The sheriff had made a finding in fact that the appellant was the registered proprietor and that he had undertaken possessory acts. The appellant's possession of the foreshore had not been lost due to contrary possession by the respondents. The appellant was a proprietor in possession of the foreshore as at 7 December 2014. In terms of section 9(3) of the 1979 Act, the Keeper would not have been able to rectify the inaccuracy in the appellant's title. By virtue of paragraph 22 of schedule 4 of the 2012 Act, there was no longer an inaccuracy in the appellant's title.

[27] If this court allowed the appeal, that would have a consequence for the finding of expenses against the appellant made by the sheriff on 10 July 2023. In the event the appeal was allowed, the appellant moved for this court to recall the interlocutor of 10 July 2023 and

find the respondents liable to the appellant in the expenses of the cause and to sanction the cause as suitable for the employment of junior counsel.

Submissions for the respondents

[28] Counsel for the respondents accepted the appellant was recorded in the Land Register as the registered proprietor of the foreshore. The central question for the court to address was whether, as at 7 December 2014, the appellant was a proprietor in possession of the foreshore. Counsel submitted that the timeline was of relevance in answering that question. Any evidence regarding possession of the foreshore after 7 December 2014 was irrelevant standing the terms of the 2012 Act. The relevant period in assessing the appellant's possession of the foreshore was between 28 November 2013 (the date of first registration for the appellant's title) and 7 December 2014.

[29] Where an inaccuracy was one that could have been rectified under section 9 of the 1979 Act then, on 8 December 2014, the real rights of the parties became those which they would have enjoyed had rectification taken place. Where an inaccuracy was one that could not have been so rectified at the time, then it ceased to be an inaccuracy on that date: K Reid and G Gretton, *Land Registration*, (2017), paragraph 11.09.

[30] The phrase "in possession" imports some significant element of physical control, combined with relevant intent. The phrase suggests actual use or enjoyment to a more than minimal extent of the subjects in question: *Safeway Stores plc* (*supra*) per Lord Hamilton at paragraphs [77] and [78]. In this action, the appellant had not extracted any sand or gravel between 28 November 2013 and 7 December 2014. He had not disclosed to any party that he had acquired the foreshore in 2013. The appellant's use and enjoyment of the foreshore was minimal. The appellant's use was not even the type of use limited to that of an owner. For

example, members of the public had the right to walk along the foreshore in same manner that the appellant had.

[31] The sheriff had applied the correct test. He had considered the possession of both the appellant and the respondents: *Safeway Stores plc* (*supra*) per Lord Osborne at paragraph [60]. Where the dispute over possession relates to only part of the registered subjects, the matter for determination will be whether the proprietor is in possession of that part, either directly itself or as an integral element of the registered subjects as a whole: *Safeway Stores plc* (*supra*) per Lord Hamilton at paragraph [77]. Accordingly, the appellant's use of other parts of the foreshore contained in title number ARG20184 was not relevant to the issue of possession of the disputed foreshore at Killegruer.

[32] With respect to the proposed additional findings in fact, the respondents took no issue with some of them. One was objected to in part. The remainder were opposed on the basis that they were either not relevant to the determination of possession or had no basis in the evidence. Counsel considered that the purpose of introducing the additional findings in fact was to allow the appellant to contend that he was unaware of the respondents use of the foreshore between 28 November 2013 and 7 December 2014; however, the test under section 9 of the 1979 Act was to consider the actual possession taken by parties, not their knowledge of other parties' possession.

[33] The appellant had not identified any suitable element of physical control or use of the foreshore that the sheriff had missed in applying the test set out in *Safeway Stores plc* (*supra*). The sheriff also correctly took into consideration the possessory acts of the respondents in relation to their own property. Both parties claimed to be the owner of the foreshore. Their claims were antagonistic. Nothing in the appeal nor in the proposed additional findings in fact pointed to any possessory acts of the appellant referable to

ownership between registering as proprietor on 28 November 2013 and 8 December 2014. The sheriff was correct to hold that the appellant was not a proprietor in possession. The presumption at paragraph 18 of schedule 4 to the 2012 Act did not apply. The sheriff was correct to grant the respondents' second declarator.

Analysis

Proposed additional findings in fact

[34] In the appellant's challenge to the sheriff's decision the first issue we were invited to consider was the motion by the appellant to allow a number of additional findings in fact to be included in the sheriff's judgment. In relation to findings in fact more generally, we observe firstly that the court of first instance will always be better placed to pass comment and judgment on the evidence heard. Lord Neuberger states in *In re B 2013 UKSC 33*, at paragraph 53 that:

> "where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."

Similar judicial commentary is repeated in the decision of Appeal Sheriff Cubie in *AB and CD* v *LM* 2019 Fam LR 60. The case makes clear that the sheriff's written judgment is not to be subjected to detailed scrutiny such as would be applicable (perhaps ironically in this case) to a conveyancing document (paragraphs 18 and 27). An appellate court should only interfere with the findings in fact by a trial judge if it is satisfied that his decision cannot reasonably be explained or justified. In this context, "explained" does not require the sheriff

to explain each and every possible outcome (paragraphs 29 and 30). While these authorities relate to family actions, the general principles are applicable in consideration of this case.

[35] Our second observation is that the inclusion of a new finding in fact should not be conflated with the consideration of what weight or importance is to be given to that finding. Such a function is entirely within the discretion of the presiding sheriff upon whom the obligation lies to assess the importance to be applied to each fact which has been found to be established.

[36] In this appeal the appellant lodged a note of eight short paragraphs of proposed additional findings in fact. The respondents had no difficulty with a number of these. The additional findings which were agreed between the parties were as follows (for assistance we use the same lettering as that used in the appellant's note at section 2):

(a) Finding in fact 5A: The beach at Killegruer is a mixture of solid rock, stones, gravel and sand.

(b) Finding in fact 5B: Pedestrian and vehicular access to Killegruer beach from the north is impractical because of the presence of rocks at Dalkeith and the need to cross the River Barr. Pedestrian access along Killegruer beach can be taken readily from Barrmains/Patchen to the south. Vehicular access along Killegruer beach from the south is not possible due to the presence of rocks.

…

(g) Finding in fact 47: The recreational walks taken on the beach were taken by the first pursuer along with members of his family – being his children when they were younger, and his wife.

(h) Finding in fact 54: Rectification of the defender's title would result in the foreshore at Killegruer beach being removed from the defender's registered

> title over the foreshore. [Only this first sentence of the proposed addition under this heading was agreed].

[37] So far as the remaining proposed additional findings were concerned, extended shorthand notes were produced by the appellant in support; this is a requirement when a party invites an appellate court to alter the findings of the judge who has heard the evidence (Macphail, *Sheriff Court Practice 3rd edition* paragraph 18.63; *Anderson* v *Harrold* 1991 SCLR 135). Nevertheless, in the absence of agreement between the parties, and even with notes of the evidence available, an appellate court should be slow to insert additional facts to the findings at first instance. As was observed in *SY* v *FA* [2019] SAC (Civ) 5 at paragraph [10]:

> "The Sheriff Appeal Court is … entitled and bound in the absence of compelling reasons to assume that the sheriff has taken consideration of the whole evidence and is thereby prohibited from making different or further findings in fact."

[38] In our view the remaining findings in fact proposed by the appellant are not merited. More specifically (again using the lettering system used by the appellant) proposed findings:

(c) 34A concerning the specific part of Killegruer Beach from where sand and gravel was taken,

(d) 34B regarding changes to the beach occurring overnight,

(e) 34C concerning the operation of tides and removal of any evidence of sand and gravel having been taken, and

(f) 46A regarding the behaviour of the appellant in taking "action to protect his interest."

All are either too vague or were not findings which the sheriff was minded to make after consideration of the evidence. This leaves one remaining, paragraph (h) of the appellant's

note (proposed finding in fact 54). The first sentence thereof was agreed and is noted above. In our view the remaining sentences are not proposed findings in fact. They include the phrases "The defender would be unable" and "the sewage outlet pipe could potentially interfere". As such they involve conjecture and we are not persuaded that they are additional "facts" which the sheriff ought to have found on the evidence before him.

The policy behind rectification

[39] The disposals of land to the parties detailed above meant that, between the 1983 disposition to the first respondent's family and the 2013 disposition to the appellant there was an overlap; this consisted of the foreshore at Killegruer. The respondents sought rectification of the appellant's title in the Land Register. In *Kaur* v *Singh* 1999 SC 180 the Lord President (Rodger) summarised the working of the rectification provision at page 193H:

> "Under sec 9(3) of the 1979 Act possession … comes into play only in the situation where the person seeking rectification may *ex hypothesi* have a 'better' title to the land than the proprietor whose name appears on the register. Possession is then relevant, not because it shows that the registered proprietor has a better claim to the title, but because, for reasons of policy, the law chooses not to disrupt the proprietor who is in possession. In this context the role of possession is as a criterion for choosing whether the person seeking rectification of the title should succeed ..."

[40] Under the transitional provisions of the 2012 Act, the appellant argued that he was a "proprietor in possession", while the respondents - in seeking rectification - challenged this. Since the sheriff found that the respondents had a Sasine title which included the Killegruer foreshore (a decision which is not challenged), registration of the appellant's title created an inaccuracy in the Land Register. However, the limitation of the rectification provision is

that - notwithstanding the background behind the inaccuracy - the appellant's position as proprietor would be protected from disruption if he was found to have been in possession of the foreshore immediately before 8 December 2014. The issue before us was therefore whether the sheriff correctly decided that the appellant was not a "proprietor in possession", such that the legislation did not provide protection in the circumstances of this case.

Meaning of "proprietor in possession"

[41] What does "possession" mean in this context? In *Safeway Stores Plc* v *Tesco Stores Ltd* 2004 SC 29 an error in the Keeper's office resulted in the proprietors of two adjacent areas of land both being registered as owners of an overlap area. The Lands Tribunal had found that *Safeway* were "a proprietor" but not "a proprietor in possession". In refusing an appeal against that decision the court noted the test at paragraph [60] (Lord Osborne):

> "… [T]here exists a principle of law that, save for a situation in which joint possession by two or more parties is involved, no more than one person may be in possession of the same land at the same time. The matter was put thus by Stair in his *Institutions* at II.1.20:
>
> > 'Possession then is lost by a contrary possession, and it is interrupted by contrary acts or attempts of possession, which if they do not attain the effect to expel it, is called a troubled or disquieted possession; for nothing can be possessed *in solidum* by more than one, either simply or in relation to the same right' …
>
> The same point is made in more modern terms in the *Stair Memorial Encyclopaedia of the Laws of Scotland*, Vol 18, paragraph 118:
>
> > 'as a general rule only one person can be in possession of property at any one time, for exclusivity is of the essence of possession.'"

In the same case Lord Hamilton expanded on what is required by a party seeking to prove possession of land in such circumstances. At paragraph [77] he observed:

> "… In my view the term 'in possession' in this statutory context imports some significant element of physical control, combined with the relevant intent; it suggests actual use or enjoyment, to a more than minimal extent, of the subjects in question as one's own ... Where the issue of possession relates only to part of registered subjects, the matter for determination will be whether the 'proprietor' is in possession of that part, either directly itself or as an integral element of the registered subjects viewed as a whole. The existence of physical features on the ground, including natural physical boundaries, and the activities of the 'proprietor' within or beyond such features may be material to what inference may properly be drawn as to the extent of his possession."

[42] How is a court or tribunal to determine possession, and who has the burden of proof? In a recent authority which concerned another overlap area between a party with a Sasine title and one whose title was registered in the Land Register, the Inner House reviewed the approach of the Lands Tribunal to a claim for rectification under the transitional provisions. In *Souter* v *Combined Corporation* (BVI) Ltd 2019 SC 261 the court noted that (1) it is for the party challenging the proprietor in possession to show the contrary, and (2) this is primarily a matter of fact for the first instance court. Lord Carloway expressed the test as follows:

> "[22] The determinative issue before the Tribunal was whether the appellants were 'in possession' of the disputed area. Since para 18 of sch 4 to the 2012 Act creates a presumption that the registered proprietor ... [is] … in possession of the relevant land 'unless the contrary is shown', the correct approach is to determine, first, whether the contrary has been shown, since, if it has not, the presumption will operate. This primarily involves examining the involvement of the [party who is not the registered proprietor] with the land … The exercise is not a legal one of weighing competing presumptions. It is one involving the determination of fact; a matter primarily for the tribunal of first instance having heard the detail of the evidence presented."

Decision

[43] It was submitted by the appellant that the sheriff ought to have made other factual findings relevant to the issues in dispute, and that he failed to take into account material

evidence which directly addressed the appellant's possession of the foreshore. We do not accept that position. The respondents' submissions on this point are preferred.

[44] While we have accepted a limited number of additional findings in fact, as detailed above, for the sake of completeness we note that this court would have had real difficulty in making a new decision on the facts. Even if that had been considered appropriate, there was not sufficient principal evidence before us to allow a full and balanced reassessment. That exercise is a holistic one. It cannot be carried out by consideration of isolated points only. The proof in this case took place over a period of five days. The sheriff heard evidence from 11 witnesses and had before him a joint minute which introduced evidence from another witness. He availed himself of the opportunity to visit the site. It was after that process that the sheriff was able to assess the totality of the evidence and productions, and decide what weight to attach to each individual piece of evidence. The presentation of extracts of evidential transcripts at an appeal hearing does not allow that same perspective.

[45] The appellant submitted that the sheriff's consideration of the appellant's own use of the Killegruer foreshore was erroneous. It was submitted that, as the appellant owned and used other areas of the Kintyre foreshore, the examination of his use of the part at Killegruer in isolation was artificial. This approach, it was argued, would require a registered proprietor to make use of every area of land over which they had a registered title to prevent rectification of their title. We do not accept that this follows logically from the sheriff's conclusions. Furthermore, that approach is not supported by the authorities. We return to *Safeway Stores plc (supra*) in which it was made clear by Lord Hamilton at paragraph [77] that, where the dispute over possession relates to only part of the subjects, the matter for determination will be whether the proprietor is in possession of that part.

[46] Accordingly, we are not persuaded that the appellant's ability to extract sand and gravel from other areas of foreshore which he owns is relevant to his use of the foreshore at Killegruer. Nor are we persuaded that the sheriff adopted the wrong test and "elevated" the use to which the respondents put the land to a higher level of use and possession than that to which the appellant put the foreshore. The fact of the matter is that the sheriff was required to consider the evidence of "possession" by both parties before deciding whether the respondents (as the pursuers) had proved that the appellant was not a proprietor in possession.

[47] In his finding in fact 47 the sheriff addresses the appellant's possession and use of the foreshore; the basis for this finding is further detailed in paragraphs 36 and 81 of his judgment. He addresses the first respondent's use of the foreshore in findings in fact 34 to 38; paragraphs 80 and 81 of his judgment detail the basis for those findings. In our view that evidence before the sheriff clearly favours the respondents' position, namely that the appellant was not a proprietor in possession.

[48] The sheriff's findings (including those additional findings in fact agreed by the parties which we have allowed to be included) demonstrate the physical characteristics at the site which restricted access to the disputed foreshore. Pedestrian access was only possible from the south. Vehicular access to the foreshore was only possible through Killegruer Farm.

[49] The appellant's evidence reflected that he had little, if any, involvement with the disputed foreshore. The only witness who testified that the appellant had "possession" of the area was the appellant himself. The high point of his evidence of possession was that he and his family took occasional recreational walks along the beach (which, of course, consisted of both the shore and the foreshore). Such an activity is not readily associated

with ownership, as members of the public had the same rights of access. The only evidence found by the sheriff of the appellant having used the foreshore for the collection of sand and gravel is contained in paragraph 36 of the judgment. This event was in 1992 (before the appellant had acquired title but after the 1983 disposition to the respondents) and the sheriff notes from the appellant's own evidence that he sought permission from one of the respondents to use that area. We therefore agree with the respondents' submission that nothing in the appeal (nor even in the proposed additional findings in fact) points to any possessory acts of the defender referable to ownership between registering as a proprietor in 2013 and the designated day of 8 December 2014.

[50] By contrast the sheriff found that the respondents made use of the foreshore regularly (around once per month) to collect sand and gravel for use in building and maintenance projects around their property. The operation of the tides and sea of the Kintyre peninsula resulted in materials such as sand and gravel frequently being deposited onto the foreshore along that whole coast, thereby giving a plentiful supply (findings in fact 6 to 9, and paragraph [81]). The sheriff found that the extraction of sand and gravel was, on occasions, a significant activity, and met no challenge from the appellant over the many years that the respondents carried this out (paragraph [82]).

[51] The appellant, citing the case of *Souter* (*supra*) argued that this use of the foreshore was of a temporary nature and left no lasting mark, as there was no obvious physical act carried out by the respondents in relation to the foreshore. We reject that argument in view of the sheriff's findings. The locus and nature of the works carried out by the respondents in removing gravel from a foreshore will inevitably mean that the evidence of their work will be removed by the tide at some point. At this juncture we should note that we rejected a number of proposed additional findings in fact relative to this issue moved by the appellant.

In particular, the proposed findings 34B and 34C to the effect that overnight tides immediately removed any evidence of work were not specific findings made by the sheriff and, in the absence of agreement, not findings which we were prepared to insert. Notwithstanding that, in the absence of an averment or evidence that the removal of sand and gravel was carried out clandestinely - which it clearly was not given that a significant number of witnesses spoke to it - we attach little weight to the argument that there was no evidence of the respondents' removal of material from the foreshore.

[52] The appellant argued that he remained unaware of the activities of the respondents and that he was therefore unaware of any challenge to his possession. We do not accept this argument as being soundly based in fact or in law. Firstly, the sheriff's findings demonstrate the regular, open and significant actions of the respondents on the foreshore. Secondly, the absence of knowledge of the appellant is a distinct point. The test under section 9 of the 1979 Act was to consider the actual possession of the parties and not their knowledge or perception of another's possession.

[53] Paragraph 18 of schedule 4 to the 2012 Act creates a presumption that the registered proprietor is in possession of the land unless the contrary is shown by the evidence. The sheriff clearly applied that test. The sheriff found on the basis of the evidence before him that the contrary had been shown. We consider that the sheriff was fully entitled on the evidence to hold that the appellant was not a proprietor in possession. That being the case, he was entitled to find that the transitional provisions of paragraph 17 and 22 of schedule 4 applied, and that rectification by the Keeper of the appellant's title should be ordered. No error in law is evident.

Disposal

[54] As a result of these findings we refuse the appeal and adhere to the sheriff's interlocutors of 31 May 2023 and 10 July 2023. Parties should attempt to agree the disposal of the expenses of the appeal. If this does not prove successful within 14 days, a hearing will be assigned.