OUTER HOUSE, COURT OF SESSION

[2019] CSOH 65

A88/10

OPINION OF LADY PATON

in the cause

MAREN RUDDIMAN

Pursuer

against

IAIN HAWTHORNE AND OTHERS

Defenders

Pursuer: Lindsay QC; Addleshaw Goddard LLP
Defenders: Sandison QC; Brodies LLP

15 August 2019

Introduction

[1] The pursuer and her husband live at Bieldside House, Aberdeen. The first and second defenders live at an adjacent property Bieldside Lodge, with their three children, the third, fourth and fifth defenders. In this action, the pursuer seeks declarator and interdict concerning a servitude right of access burdening Bieldside House in favour of Bieldside Lodge. The defenders argue that the action should be dismissed as irrelevant, without any evidence being heard.

The servitude right of access

[2] The following facts are either averred on record or noted in the opinion of Lord Woolman in an earlier litigation involving the current defenders (*Hawthorne* v *Anderson and others* [2014] CSOH 65, hereinafter referred to as "the opinion").

[3] In 1989 the first defender purchased Bieldside House, a large mansion house set in its own ground. He intended the mansion to be his family home, but also considered the surrounding ground to have development potential. His wife, the second defender, was initially unaware of the purchase. The title to the property was taken in joint names of the first and second defenders.

[4] Access to the property was provided by (i) a horseshoe-shaped driveway leading to and from North Deeside Road and running past the mansion; (ii) a small access lane known as Mill Drive, leading from North Deeside Road to a garage situated to the west of the mansion, and used by the occupants of and visitors to two other properties, namely Bieldside Mill and Bieldside Mill Cottage (the opinion, paragraph [5]); and (iii) a garden gate for pedestrians at the south of the property, leading to the Deeside public walkway (a former railway line), and to Deeside Golf Course.

[5] It transpired that the second defender did not wish to live in the mansion. The mansion was therefore sold to Mr and Mrs Harding, together with some of the surrounding ground including the driveway. The first and second defenders retained the ownership of the remaining ground, described in the 1990 disposition in favour of the Hardings as two areas which were contiguous along one boundary: "Site 1" (situated to the east of the mansion) and "Site 2" (situated to the west of the mansion). The disposition also reserved to the first and second defenders a new servitude right of access in the following terms:

> "And also with and under the following additional burdens, reservations and conditions namely (One) there is reserved in favour of ourselves [i.e. the first and

> second defenders] and our successors in title to the said subjects marked 'Site 1' on the said plan annexed hereto a right of pedestrian and vehicular access over the driveway leading to Bieldside House, aforesaid shown coloured blue on the said plan annexed hereto in so far as necessary for access to and egress from Site 1 [subject to payment of a share of maintenance and repair costs]"

[6] No new servitude right of access over the driveway was created in favour of Site 2. Access to Site 2 was therefore *prima facie* provided by Mill Drive at the west of the property, and the garden gate at the south. Site 2 could also be accessed on foot from Site 1, by walking over the boundary between the two sites.

[7] The first and second defenders proceeded to build a new house known as Bieldside Lodge on Site 1. They relied on the servitude right for access to Site 1, including access for construction traffic during the building work. They moved into the Lodge in 1993 (the opinion paragraph [31]).

[8] The first and second defenders then decided to develop Site 2, a steeply sloping area of scrubland and bushes. As detailed in the opinion, they made a series of applications for planning permission from 1995 onwards. The planning authorities considered the applications and the objections, taking into account various matters including current planning policies, the amenity of the area, the fact that Bieldside House is a Category B listed house, road traffic problems, and the impact on trees.

[9] In 2004, Mr and Mrs Harding sold Bieldside House and its accompanying ground to the present pursuer. The pursuer and her husband live there. They are opposed to any development of Site 2, and are not prepared to grant a servitude right of access over the driveway in favour of Site 2 (the opinion, paragraph [42]). Nevertheless the first and second defenders continue to seek planning permission for the development of Site 2 (the opinion, paragraph [46]).

[10] In late 2005, the first and second defenders transferred Site 2 to their three children for tax reasons (the opinion, paragraph [46]). They continued to seek planning permission for the development of Site 2, but without success.

[11] In 2008 the first and second defenders raised an action (*Hawthorne* v *Anderson and others*, referred to in paragraph [2] above) alleging professional negligence on the part of the solicitors who acted in their conveyancing transactions. Evidence was led at a proof before answer before Lord Woolman. The first defender gave evidence. The court found as a fact that one of the first defender's complaints against his solicitors was that, following upon the conveyancing transactions, Site 2 could not be developed as "the site does not have an appropriate means of access" (the opinion, paragraph [2]). The first and second defenders sought damages of £525,000 calculated by "deducting the value of Site 2 without suitable access for residential development (£25,000) from the value of the site with adequate independent means of access for the purpose of residential development (£550,000)": the opinion, paragraph [78]. Ultimately the action was unsuccessful.

[12] In 2009, the pursuer raised the present action seeking declarator of the extent of the servitude right created in 1990, and interdict preventing any use not permitted by that right. In March 2010 the action was sisted for negotiations. At the same time the defenders lodged another planning application, on this occasion proposing access to Site 2 by means of the horseshoe-shaped driveway. As Lord Woolman explains in his opinion paragraph [49]:

> "In their March 2010 application, [the defenders] made a radical change to their approach. They proposed that access to Site 2 should be taken from the horseshoe drive, despite the fact that they did not have title and knew that the Ruddimans would not agree to grant a servitude right over it …"

The application was ultimately refused, although as noted by the Lord Ordinary in paragraph [49], planning officials recommended approval, and the vote was finely balanced.

The grounds for refusal included siting, scale, design and landscape impacts, all at odds with the terms of various planning policies.

[13] In 2012, the defenders lodged a further planning application, again proposing that access to Site 2 would be by means of the horseshoe-shaped driveway (the opinion, paragraph [50]). The application showed the proposed house as a semi-subterranean building with a grassed roof. The Lord Ordinary noted that the first defender explained that the application was made "to demonstrate that Site 2 is capable of residential development".

[14] On 19 July 2012, outline conditional planning permission for Site 2 was granted. Negotiations between the parties continued, without success. On 13 November 2015, on the pursuer's *ex parte* application, Lord Glennie granted interim interdict in the present action in terms of the second conclusion (set out in paragraph [19] below). In January 2016, the action was sisted in order to explore settlement.

[15] On 13 January 2017 the first defender applied for detailed planning permission to build the house on Site 2 for which outline conditional planning permission had been granted. By notice dated 27 April 2017, Aberdeen City Council refused permission. The first defender appealed to the Planning and Environmental Appeals Division of the Scottish Government. On 10 October 2018, a reporter from that Division visited Site 2. On 11 December 2018 the reporter issued the Appeal Decision Notice, which included many decisions favourable to the first defender, but ultimately cast doubt on whether the proposed method of construction would protect the historic boundary wall and gazebo of Bieldside House in terms of policy D4 "Historic Environment" of the local development plan. Detailed planning permission was accordingly not granted.

[16] In March 2019 the first defender had inspection trenches excavated along the northern boundary of Site 2, exposing the foundations of the B-listed walled garden wall

forming the southern boundary of the pursuer's property. The first defender, in his amended pleadings (see paragraph [43] below) confirmed that the purpose of the trenches was to "facilitate a structural analysis of the boundary wall … with a view to ascertaining how it might be safeguarded in any future development of [Site 2]'".

[17] Meantime, in the Court of Session, the pursuer's present action for declarator and interdict had been sent to debate on the defenders' motion, to argue the defenders' first plea-in-law challenging the relevancy and specification of the pursuer's averments.

A plan showing the areas of ground

[18] The three areas of ground referred to above are shown on the plan appended to this opinion as follows:

Bieldside House and its ground: pink.

Site 1 (Bieldside Lodge and its ground): yellow.

Site 2 (the steeply sloping area of scrubland and bushes): brown.

Excerpts from the pleadings

[19] The conclusions of the pursuer's summons are in the following terms:

> "1. For declarator that the servitude right of access burdening the subjects owned by the Pursuer known as Bieldside House, 9 North Deeside Road, Bieldside, Aberdeen, AB15 9AD and registered in the Land Register of Scotland under Title Number ABN73030 ('Bieldside House'), constituted by reservation in the Disposition granted by the First and Second Defenders in favour of Alan John Harding and Mrs Tove Harding dated 1 March 1990 and recorded in the General Register of Sasines for the County of Aberdeen on 19 July 1990 ('the 1990 Disposition'), and noted in entry seven of the Burdens Section of the Title Sheet for Bieldside House, over the driveway forming part of Bieldside House shown tinted blue and also hatched on the Title Plan for Bieldside House ('the Title Plan') is restricted to a pedestrian and vehicular right of access for the benefit of the First and Second Defenders and their successors in title as heritable proprietors of that part of the subjects known as Bieldside Lodge, North Deeside Road, Bieldside, Aberdeen, AB15 9AD shown, together

with other subjects, coloured red on the plan annexed to the 1990 Disposition and now shown tinted yellow on the Title Plan, and is to be exercised only so far as necessary for access to and egress from the area tinted yellow on the Title plan;

2. For interdict against the First, Second, Third, Fourth and Fifth Defenders and all others acting on their behalf or with their authority from using the servitude right of access burdening the subjects known as Bieldside House, 9 North Deeside Road, Bieldside, Aberdeen, AB15 9AD and registered in the Land Register of Scotland under Title Number ABN73030 ('Bieldside House'), constituted by reservation in the Disposition granted by the First and Second Defenders in favour of Alan John Harding and Mrs Tove Harding dated 1 March 1990 and recorded in the General Register of Sasines of the County of Aberdeen on 19 July 1990 ('the 1990 Disposition'), and noted in entry seven of the Burdens Section of the Title Sheet for Bieldside House, over the driveway forming part of Bieldside House shown tinted blue and also hatched on the Title Plan for Bieldside House ('the Title Plan') benefiting the First and Second Defenders and others acting on their behalf or with their authority and their successors in title as heritable proprietors of that part of adjacent subjects known as Bieldside Lodge, North Deeside Road, Bieldside, Aberdeen, AB15 9AD shown, together with other subjects, coloured red on the plan annexed to the 1990 Disposition and now shown tinted yellow on the Title Plan, as a means to access the area tinted brown on the Title Plan and for any other purpose other than is necessary for access to and egress from the area tinted yellow on the Title Plan, and otherwise from trespassing on Bieldside House for the purpose of accessing the area tinted brown on the Title Plan."

[20] In Condescendence 6, the pursuer avers:

" … The pursuer is also concerned that the … defenders are planning to develop the brown area or part of Bieldside Lodge in conjunction with the brown area and intend to use the servitude, or a newly created servitude benefiting the brown area through prescription, as a means to access that site in future. The … defenders have no right to enter onto Bieldside House other than to exercise the servitude. Notwithstanding the terms of planning condition 7 the defenders have attempted to develop the brown area. Indeed when the first and second defenders purchased the whole subjects … in 1990 it was their intention to develop the brown area by constructing a dwellinghouse on it when market and planning conditions permitted. The brown area can only be developed by taking access and egress from the access drive. Any such development of the brown area would substantially affect the value, views and amenity of the pursuer's heritable property, Bieldside House. The defenders have made a number of planning applications to develop the brown area by constructing a dwellinghouse upon it. Their planning applications made on October 1995, February 2005, November 2006 and March 2010 were all refused by Aberdeen City Council. However in April 2012 the first and second defenders re-applied for planning permission for the brown area. They proposed, as they had done in their March 2010 application, that access to the brown area should be taken from the access drive.

They proposed a semi-subterranean building, with grass on its roof with the proposed car parking on Bieldside Lodge. Aberdeen City Council granted conditional approval on 19th July 2012. On or about September 2015 the defenders entered into an agreement with Aberdeen City Council under section 75 of the Town & Country Planning (Scotland) Act 1997 as amended by the Planning Etc (Scotland) Act 2006 ("the Section 75 Agreement"). The Section 75 Agreement has been signed but has not been registered or otherwise placed in the public domain. The defenders have refused to provide the pursuer with a copy of the Section 75 Agreement and have refused to disclose its contents. Having regard to the purpose of such agreements in the planning system, the pursuer is reasonably apprehensive that the terms of the Section 75 Agreement relate to the development of the brown area and are intended to enable Aberdeen City Council to grant full planning permission without further delay. There is no other reason that such an agreement would be entered into by the defenders. In addition, the defenders have refused to give an undertaking in terms of the second conclusion. In such circumstances the pursuer is reasonably apprehensive that the defenders will use the servitude as a means of gaining vehicular access to and egress from the brown area for the purposes of developing it in accordance with the conditional planning permission dated 19th July 2012. This is an impermissible use of the servitude for the reasons hereinbefore condescended. Further, the pursuer is reasonably apprehensive that such development is imminent as entering into a Section 75 Agreement with a planning authority is generally a mechanism for removing the remaining planning obstacles to development. The pursuer is under the necessity of seeking interdict and interdict *ad interim* as second concluded for. [There follow averments relating to the balance of convenience.] … The defenders' averments in answer are denied except insofar as coinciding herewith."

[21] In Answer 6, the defenders aver *inter alia*:

" … Further explained and averred that the 'brown area' can be accessed otherwise than by way of the access drive, and in particular can be accessed by pedestrians from another drive and path to the west of Bieldside House, and also from a gate leading to a public path to the south of the 'brown area'. Development of the 'brown area' in the way for which planning permission has been granted by the local planning authority would not materially affect the value or amenity of, or the views from, Bieldside House. The dwellinghouse for which conditional permission exists is set into the slope of the ground falling away to the south of Bieldside House and would be, as the pursuer avers, semi-subterranean with grass on its roof. It would not be visible from Bieldside House. If constructed, it would have pedestrian access from and to the path to the west of Bieldside House condescended upon, and from and to the public path to the south similarly condescended upon. If the proposed dwellinghouse were to be constructed, no vehicular access would be taken over the access drive, through the 'yellow area' and into the 'brown area'. All vehicular access taken over the access drive would, as at present, be for the purpose of parking on the 'yellow area'. The servitude right upon which the present action proceeds does not prevent any person, having driven over the access drive in order to arrive at and park on the 'yellow area', from thereafter proceeding on foot to the 'brown area'. The respective owners of the 'yellow area' and the 'brown area' are free, as an

> incident of their respective rights of ownership, to permit free passage to and from those areas to whomsoever they choose. The grant of interim interdict as second concluded for does not continue the status quo; on the contrary, it inverts it, is wholly unnecessary, and is unjustified in fact or law."

Submissions for the defenders

[22] Senior counsel for the defenders accepted that the defenders wish to develop Site 2, but are hampered by access issues. In relation to the pursuer's present action, he contended that there were no relevant averments to support the conclusions of the summons, and that the action should be dismissed.

[23] In respect of the first conclusion (declarator), the terms of the servitude were clear from entry number seven of the Burdens section of the Title Sheet for the mansion house. Accordingly the first conclusion was academic and pointless.

[24] The real dispute was what use that servitude permitted. Senior counsel submitted that the pursuer was adopting an "adamantine" position in that she maintained that under no circumstances could a person use the driveway in order to get to and from Site 2 via Site 1. But that was not the law. As was clear from *Irvine Knitters Ltd* v *North Ayrshire Co-operative Society Ltd* 1978 SC 109; *Paisley "The Use of Praedial Servitudes to Benefit Land outside the Dominant Tenement" (Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie) McCarthy et al* (2015), the fourth exception at page 219; *Alvis* v *Harrison* 1991 SLT 64; *Williams* v *James* (1867) LR 2 CP 577; and *Miller* v *Tippling* (1918) 43 DLR 469 at pages 469-470, 475, 479, if access was for the legitimate and general purposes of Site 1, it mattered not that the users went on to Site 2. A legitimate use of the servitude was an ordinary and reasonable use. Beneficiaries of the servitude could pass to adjoining land without being in breach. There was no absolute ban preventing passage from Site 1 to Site 2.

Provided that the servitude-user was not treating the dominant tenement as a "bridge", the user was entitled to reach Site 1, then to move on to Site 2.

[25] The defenders had called upon the pursuer to aver (and prove) that there had been some use beyond that which was permitted by the servitude, such as using the dominant tenement as a bridge. An example of such an averment might be: "On 17 June 2018 the first defender walked up the driveway, straight through Site 1 to reach Site 2 where he set up a barbecue". But the call had gone unanswered. There was no claim in the pleadings which could be regarded as a relevant averment of excess of use. There were no averments of what might be regarded as a "ruse". There were no averments concerning planning permission or a building warrant such that one might conclude that it was necessary to use the driveway for construction purposes, bearing in mind the existing accesses to Site 2 (Mill Drive and the gate from the public path). The stage had not been reached when the pursuer could make a relevant case of a reasonable apprehension that some wrong was about to occur.

[26] Furthermore, the second conclusion was too restrictive. An adjustment of the wording would be required.

[27] Ultimately there was no relevant case to go to proof. The court was invited to sustain the first plea-in-law for the defenders and to dismiss the action.

Submissions for the pursuer

[28] Senior counsel for the pursuer invited the court to allow a proof before answer, all pleas standing.

[29] A proof was necessary as certain factual matters had to be clarified. First, planning approval was very much in issue. There was a long history. Conditional approval had been granted on 19 July 2012. Further applications had been made, so the matter was still live. In

2015 a section 75 agreement had been entered into. The latest planning application had been remitted to a Scottish Government Office Reporter. He had carried out a detailed site inspection and heard parties' submissions together with over 90 objections from neighbours. His report was awaited. There remained a real prospect that there might be development on Site 2.

[30] Secondly, the condition of Site 2 had to be established. Counsel described Site 2 as wild, overgrown, wooded, and sloping.

[31] Thirdly, in the action for negligence against his solicitors, the first defender averred that he did in fact intend to use the horseshoe-shaped driveway in order to develop Site 2 (the opinion, paragraphs 1, 2, and 49).

[32] In response to the submissions made by senior counsel for the defenders, the following points were made.

[33] First, it was agreed that the law was as set out in *Irvine Knitters Ltd* v *North Ayrshire Co-operative Society Ltd* 1978 SC 109. The dispute arose from the application of that law to the present case. A servitude could only be used *bona fide* for the legitimate and genuine purposes of the dominant tenement. Here, the intention was to use the horseshoe-shaped driveway for the purposes of Site 2, and not for the purposes of the dominant tenement, Site 1.

[34] Secondly, the purpose of interdict was to prevent some future event. The need for interdict could arise because of certain actings in the past, from which future events could be inferred; alternatively nothing might have happened in the past, but there might be a clear statement of what was proposed. The present case was in the latter category. The first defender's stated intention in Answer 6 was to use the horseshoe-shaped driveway for the purpose of developing Site 2.

[35] The combination of the above matters gave rise to a reasonable apprehension that a wrong would be committed. The pursuer was not relying upon "every day usage", but rather upon (i) the live planning application, and (ii) the defender's stated intention that he intended to use the driveway for the purpose of developing Site 2 (Answer 6). There were no averments of prior usage in breach of the servitude, and there was no need for such averments. The averments, as they stood, were relevant, and should go to a proof before answer.

[36] The terms of the servitude could be found in the 1990 disposition in favour of the Hardings (6/3 page 11 of 12). The dominant tenement was Site 1; people could use the driveway for the sole purpose of access to and egress from Site 1. If the servitude had been intended to benefit Site 2, it would have contained express words to that effect: but the wording related solely to access to and egress from Site 1. When the lodge was constructed, vehicular and other traffic was "necessary" for the building of the lodge.

[37] It was admitted that the first and second defenders continue to enjoy the use of Site 2 (Answer 6), but that did not affect the issue, namely the use of the driveway in order to carry out a development of that site. The pursuer was concerned about the proposed development from the point of view of damage to the amenity of the area (including hitherto uninterrupted views); disturbance from construction vehicles; and increased traffic of occupiers and visitors to Site 2. The capital value of the mansion would be diminished.

[38] The first defender had made it quite clear that if planning permission were to be granted, he would use the driveway to access the yellow area, park vehicles there, and take materials into Site 2 and also walk into Site 2. The only other access routes were the gate leading from the public path to the south and the small entry lane lying to the west of the mansion: but both were pedestrian routes; neither gave adequate vehicular access to Site 2.

So the first defender intended vehicles to drive up the horseshoe-shaped driveway into Site 1; park there at a point close to Site 2; then take materials by hand into Site 2. Visitors to Site 2 would also park there. What was proposed offended against *Irvine Knitters.* The proposed use did not fall within the exceptions in *Irvine Knitters.* It was not legitimate to use Site 1 as a "jumping-off-point" for Site 2. Site 1 was not a "construction yard" or a "distribution centre": it was a residence. The proposed use was not a legitimate or genuine purpose.

[39] The pursuer's averments were therefore relevant. There was a reasonable apprehension of a wrong. One did not have to wait until a wrong was perpetrated before seeking interim interdict. Since 1995, there had been repeated attempts to obtain planning permission. Conditional planning permission had been granted. A section 75 agreement was in place. A reporter had been appointed. The defenders specifically averred that they would use the driveway, rather than the small entry lane or the gate from the public path. When interim interdict was sought, Lord Glennie had the same information as at present. He did not consider it necessary to await the outcome of the planning process. The available information demonstrated the determination of the defenders to develop the site. The pursuer was reasonably apprehensive that a wrong would be perpetrated. A relevant case was averred.

[40] It was significant that the interim interdict had been in place for 3 years without any problem. The interim interdict did not strike at the normal use which was permitted by the servitude, and caused no difficulties in the every-day use of the servitude. There had been no motion for restriction or recall of the interim interdict.

[41] In support of his submissions, senior counsel referred to *Alvis* v *Harrison* 1991 SLT 64; *Moncrieff* v *Jamieson* 2008 SC (HL) 1, Lord Hope at paragraph 26; *Paisley "The Use of Praedial*

Servitudes to Benefit Land outside the Dominant Tenement" (Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie) McCarthy et al (2015) page 220; *William* v *James* (1867) LR 2 CP 577; *Miller* v *Tippling* (1918) 43 DLR 469.

[42] In the circumstances, where there was a dispute about the extent of the servitude right (condescendence 6 and answer 6) it was competent and appropriate to have a conclusion seeking declarator in addition to the conclusion seeking interdict. The conclusions of the summons reflected the proper *ratio* of *Irvine Knitters,* did not prevent normal enjoyment and day-to-day usage of Site 1, but merely struck at the intended use of the servitude for the purposes of the development on Site 2.

Minute of amendment and further submissions

[43] While the case was at *avizandum*, the defenders sought to amend their pleadings. Leave was granted, and the record was amended on 9 May 2019. The amendment *inter alia* introduced new averments in Answer 6. For the purposes of this opinion, the major part of those new averments (underlined) is shown below together with the original text already quoted at paragraph [21] above:

> " … Admitted that two inspection trenches were excavated in March 2019 as condescended upon by the pursuer, and that the purpose of that excavation was to facilitate a structural analysis of the boundary wall condescended upon with a view to ascertaining how it might be safeguarded in any future development of the 'Brown Area'… The position in relation to planning permission for development of the 'Brown Area' is as follows: On 13 January 2017 the first defender applied for detailed planning permission to build the house for which outline permission had previously been conditionally obtained as hereinbefore condescended upon. Such permission was refused by Aberdeen City Council by notice dated 27 April 2017. The first defender appealed against that refusal to the Planning and Environmental Appeals Division of the Scottish Government and a Reporter from that Division visited the site on 10 October 2018. On 11 December 2018 the Reporter issued the Appeal Decision Notice which, although it allowed the appeal in respect of certain matters determined by the Council, refused it in respect of condition 1(iv) of the grant of outline permission (protection, preservation and enhancement of the historic environment). Although the defenders intend to continue to attempt to obtain such,

there is accordingly no existing planning permission for development of the 'Brown Area' which could be acted upon by the defenders. The various planning applications for development of the 'Brown Area' and their disposal are matters of public record. The pursuer has no reasonable basis for any apprehension that development of the 'Brown Area' will occur in the foreseeable future. The existence of the right in any event confers no right upon her to prevent development of that area, so long as the servitude is not used unlawfully in that connection. The pursuer has [*sc* does not have?], and never has had, any reasonable basis for any apprehension that the Access Drive will be used in any manner involving unlawful use of the servitude right. Further explained and averred that the 'brown area' can be accessed otherwise than by way of the access drive, and in particular can be accessed by pedestrians from another drive and path to the west of Bieldside House, and also from a gate leading to a public path to the south of the 'brown area'. Development of the 'brown area' in the way for which planning permission has been granted by the local planning authority would not materially affect the value or amenity of, or the views from, Bieldside House. The dwellinghouse for which conditional permission exists is set into the slope of the ground falling away to the south of Bieldside House and would be, as the pursuer avers, semi-subterranean with grass on its roof. It would not be visible from Bieldside House. If constructed, it would have pedestrian access from and to the path to the west of Bieldside House condescended upon, and from and to the public path to the south similarly condescended upon. If the proposed dwellinghouse were to be constructed, no vehicular access would be taken over the access drive, through the 'yellow area' and into the 'brown area'. All vehicular access taken over the access drive would, as at present, be for the purpose of parking on the 'yellow area'. The servitude right upon which the present action proceeds does not prevent any person, having driven over the access drive in order to arrive at and park on the 'yellow area', from thereafter proceeding on foot to the 'brown area'. The respective owners of the 'yellow area' and the 'brown area' are free, as an incident of their respective rights of ownership, to permit free passage to and from those areas to whomsoever they choose. For the avoidance of doubt, the defenders accept and always have accepted that the Access Drive could not lawfully be used for the purpose of facilitating the construction of any development on the 'Brown Area', even if permission for any such development existed, and hereby judicially undertake not to make any such use of it. The grant of interim interdict as second concluded for does not continue the status quo; on the contrary, it inverts it, is wholly unnecessary, and is unjustified in fact or law. There is no proper basis in fact and law for the interim interdict in place since 13 November 2015, which in any event is of far wider scope than might lawfully be granted, and which should, accordingly, be recalled."

[44] Supplementary submissions were presented, as follows.

[45] *For the defenders:* It was accepted that the defenders had not given up the intention of developing Site 2, and that they would continue to attempt to obtain planning permission. But as matters stood, (i) there was at present no existing planning permission for

development of the brown area. Accordingly there was no reasonable basis for any apprehension that the defenders would, in the absence of interdict, carry out any act in breach of the terms of the servitude. It was important to remember that the servitude was about a right of access to the yellow area, and not about the issue of the development of the brown area. The servitude did not give the pursuer the right to prevent the development of Site 2. (ii) By their formal judicial undertaking, now on record, senior counsel for the defenders submitted that the defenders accepted that they could not lawfully develop the brown area unless (a) the pursuer's successor in title gave appropriate consent, or (b) a route other than the servitude route was made available for the construction phase of the development. (iii) In any event, the second conclusion was too wide, and the first conclusion was unnecessary: accordingly the action should be dismissed. The fact that the pursuer had so far chosen not to enforce the interim interdict according to its terms, and had allowed the defenders to move from the yellow area to the brown area even although the defenders had come onto the yellow area by using the servitude route, did not justify the continuation of interdict in terms wider than those properly allowable in law.

[46] Senior counsel for the defenders renewed the motion for dismissal of the action, and invited the court to reserve meantime the expenses of the amendment process.

[47] *For the pursuer:* The motion for dismissal should be refused, and a proof before answer allowed. In the first place, the planning application was not at an end: the defenders could appeal. The defenders had been carrying out surveys of the land with a view to developing the brown area. There was still a reasonable apprehension that there may be unreasonable use of the servitude. Secondly, there was a tension between what senior counsel said in submissions, and the averments giving the undertaking on record. On the basis of the averments, there was a reasonable apprehension that the dominant tenement

would be used as a bridge. The defenders' undertaking begged the question of what was "unlawful use". As the averments stood, the parties were in dispute about concepts of "no unlawful use", "facilitating the construction of any development", and "to whomsoever they choose". The averments were relevant. The conclusion for interdict was not too wide, and in any event a Lord Ordinary could grant interdict in a more limited form.

Discussion

[48] In this case, there appears to be little dispute concerning the law. Counsel agreed that *Irvine Knitters Ltd* v *North Ayrshire Co-operative Society Ltd* 1978 SC 109 set out the fundamental principles and guidance, and that other authorities such as *Alvis* v *Harrison* 1991 SLT 64; *Williams* v *James* (1867) LR 2 CP 577; and *Miller* v *Tippling* (1918) 43 DLR 469 at pages 469-470, 475, 479 provided further examples and illustrations.

[49] As Lord Cameron explained in *Irvine Knitters Ltd* at pages 121-122:

> "The proposition in law which the submissions for the pursuers [owners of the servient tenement] were based is that the proprietor of a dominant tenement cannot at his own hand increase the burden laid upon the servient tenement and in particular 'communicate the benefit' of the servitude to a non-dominant tenement. The proposition was illustrated by reference to a tract of authority in Scotland of which the cases of *Scott v Bogle*, 6th July 1809 FC and *Anstruther* v *Caird* (1862) 24 D 149 are instances, and is in my opinion sound …
>
> As to the law applicable to the present case I do not think that there was any real divergence of view between the parties. Their dispute lay in the application of it in the circumstances disclosed in the proof … I do not doubt that if the defenders decided to designate and to use the whole of the subjects 84-90 High Street [the dominant tenement] as a store or distribution centre for the whole of their supermarket compound within the range 78-106 High Street, they could legitimately do so, but equally I am of opinion that if they were to claim a right to import through the access or accesses giving on to 84-90, goods of any kind which immediately were delivered or transported to other parts of 78-106 High Street then they were acting beyond the legal limits of the right of way in favour of the subjects identified as 84-90 High Street. The proof [in which evidence had been led before Lord Ordinary Grieve] appears to me to yield an inference beyond doubt that this is precisely what the defenders have been doing to a material degree. What the defenders are not entitled, in my opinion, to claim a right to do in virtue of this servitude right, is to

> use the subjects nos 84-90 as a 'bridge' over which passengers or goods can pass as of right to the subjects nos 78-82 [a contiguous but non-dominant tenement]. That the defenders might legitimately 'ferry' such goods once properly received by this right of access into the subjects nos 84-90, used as a storage and distribution centre, by way of the public highway to other subjects in the same ownership is a very separate issue, and one in which other considerations might operate and I expressly reserve my opinion on that matter. In the light of the law governing the issues which do arise in the present case, I am of opinion that the pursuers succeed in showing that the defenders have acted in material excess of the grant of servitude applicable to 84-90 High Street, and the question now is to what remedy are they entitled in the present process …"

[50] Similarly the present case is one in which there is no real divergence of view between the parties as to the law applicable, and the dispute lies in the application of the law in the particular circumstances. No evidence has yet been led, but on the basis of the facts pled on record and noted in Lord Woolman's opinion, the following inferences are ones upon which the pursuer is entitled to rely.

[51] First, the defenders' wish to build a house on Site 2 remains undiminished, despite the history of refusals from the planning authorities. That history, as set out in Lord Woolman's opinion and the averments in the present action, demonstrates repeated efforts to achieve planning permission over a period from 1995 to date. The recent refusal from the planning authority cannot be assumed to be the end of the matter, for, as the defenders know, planning policies change, reporters may react more favourably, councils may take different views. In their averments as amended, the defenders acknowledge that they intend to continue to attempt to obtain planning permission for development of Site 2. As the court has not yet heard any evidence about the various ways in which construction materials could be brought to Site 2 and a house built thereon, it must be assumed for present purposes that the usual type of site preparation, laying of foundations and services, construction of weight-bearing and watertight walls and roof, will be required.

[52] Secondly, on the basis of the parties' averments and the documents lodged as productions, Site 2 has in my view no obvious access route of its own whereby heavy construction vehicles (for example, plant to be used for excavation for foundations, or lorries carrying loads of beams, joists, stone, bricks, cement, piping, other construction materials, or excavated site soil) can safely enter and exit the site. In Answer 6, the defenders aver:

> "If the proposed dwellinghouse were to be constructed, no vehicular access would be taken over the access drive, through the 'yellow area' and into the 'brown area'. All vehicular access taken over the access drive would, as at present, be for the purpose of parking on the 'yellow area'. The servitude right upon which the present action proceeds does not prevent any person, having driven over the access drive in order to arrive at and park on the 'yellow area', from thereafter proceeding on foot to the 'brown area'. The respective owners of the 'yellow area' and the 'brown area' are free, as an incident of their respective rights of ownership, to permit free passage to and from those areas to whomsoever they choose."

[53] Against that background, there are averments on record which, in my opinion, outline a stateable case that what the defenders propose to do, in the absence of Site 2's own viable access route for construction vehicles and construction materials, is what was held to be acting "in material excess of the grant of servitude" in *Irvine Knitters Ltd*, namely to use Site 1, with the advantage of a servitude right of access over the horseshoe-shaped driveway, as a 'bridge' over which construction plant and/or materials can pass as of right to Site 2 (the contiguous but non-dominant tenement). While other inferences might be drawn from the pleadings, the above is an obvious and reasonable inference, and is sufficient to satisfy the test of relevance set out in *Jamieson* v *Jamieson* 1952 SC (HL) 44 at page 50. Although the defenders have now given a formal undertaking on record (and it is the undertaking in those particular terms to which the court has regard, rather than any verbal submissions made in the course of debate), difficulties remain, including what "purpose" underlies any use of the horseshoe-shaped driveway (which may be a subtle question of fact for the court to determine, depending on the type of use involved, and on issues of

credibility and reliability), and also whether any such use is lawful or unlawful in terms of the grant of servitude and the established case-law. As can be seen from *Irvine Knitters Ltd,* issues of "use" and the "lawfulness" of any use were very much in contention. Evidence was led, and it was then for the court to decide the parties' dispute which, in Lord Cameron's words, "lay in the application of the [law] in the circumstances disclosed in the proof". The same can be said in the present case. Parties disagree about issues of fact and law concerning the servitude and its use, and it is for the court, having heard evidence to decide those issues.

[54] Senior counsel for the defenders submitted that the pursuer has not averred some actual use of the horseshoe-shaped driveway by the defenders going beyond that which is permitted by the servitude, such as the use of the dominant tenement as a "bridge". There was no claim in the pleadings which could be regarded as a relevant averment of illegal use. It was submitted that the action was irrelevant for that reason also. However in my opinion it is well settled law that an interdict may competently be granted in respect of a wrong which is reasonably apprehended. *Burn-Murdoch, Interdict* explains at page 86:

> "Interdict is the appropriate remedy to prevent an apprehended wrong even if no similar wrong has actually been committed … It is … not necessary to prove that any injury has actually been inflicted. A threat of injury is a sufficient ground for an application for interdict, and in like manner a reasonable apprehension of injury from the proceedings of the parties complained against is also in many circumstances a very good ground for such an application."

In the present case, the defenders' contention in relation to the extent of entitled use is made clear in the pleadings. Their averments, taken with their confirmed determination to build a house on Site 2 despite the lack of any obviously suitable access to that site for construction vehicles and construction materials, may be construed as an indication that the defenders' view of a lawful use of the horseshoe-shaped driveway may in some way involve construction materials being brought by construction vehicles to Site 1 by way of that

driveway, in the defenders' contention "legally"; the construction materials possibly remaining on Site 1 for a period of time (ie a staged programme), and then the materials being transferred in some way to Site 2 as and when required. Similarly, excavated soil and debris from Site 2 might be brought to Site 1, in the defenders' view legally; the soil and debris possibly remaining on Site 1 for a period of time, and then being transferred away from Site 1 as and when appropriate. In other words, on one view of the pleadings, there is a reasonably apprehended wrong, depending upon (i) time-tabling and the sequence of events; (ii) the view taken of the purpose underlying any use of the horseshoe-shaped driveway; and (iii) the definition of a reasonable and legitimate use of the servitude and whether a use for a particular type of purpose falls within that definition. I consider that these are questions of fact and law to be determined by a court, having heard evidence and *inter alia* assessed the credibility and reliability of the witnesses. The precise terms of an interdict (if granted) can be adjusted after evidence and submissions.

[55] The conclusion for declarator is a competent adjunct to the conclusion for interdict. The pursuer is entitled to seek a judicial declaration of the terms of the servitude.

Decision

[56] For the reasons given above, I am not persuaded that the action is irrelevant or lacking in specification. I refuse the defenders' motion for dismissal and allow a proof before answer, all pleas standing. The question of expenses will be continued.

6/6

A88/10

APPENDIX

LAND REGISTER OF SCOTLAND	Officer's ID / Date	TITLE NUMBER
	2911 20/2/2009	**ABN73030**
N ORDNANCE SURVEY NATIONAL GRID REFERENCE		70m
NJ8802SW NJ8802SE NJ8802NW NJ8802NE		Survey Scale 1/1250