FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 17
A159/21

Lord President
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion

in the cause

ALASDAIR JOHN MacNAB

Pursuer and Reclaimer

against

HIGHLAND COUNCIL

Defenders and Respondents

Pursuer and Reclaimer: D Thomson KC, T Young; Currie Gilmour & Co (for Murchison Law, Inverness)
Defenders and Respondents: Burnet KC, D Blair; DWF LLP

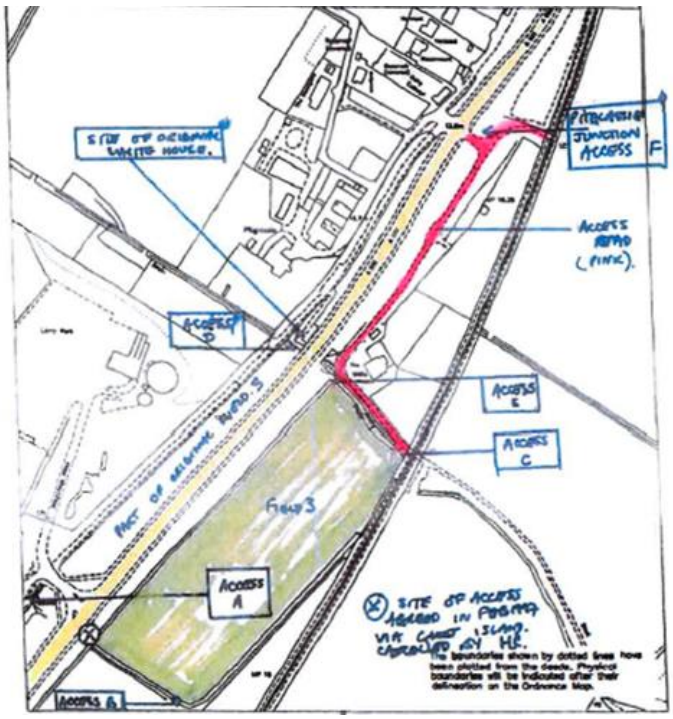
2 July 2024

Introduction

[1] The pursuer contends that there is a public right of passage by foot, bicycle and vehicle over a stretch of road which runs between the A862 and part of his land at Kildun Farm, near Dingwall. Highland Council accept that there is a public right of passage over the road, but they maintain that the right is restricted to access by foot and bicycle. The Lord Ordinary accepted the Council's view. The pursuer reclaims (appeals) that decision.

Background

[2] The A862 runs south to north from Maryburgh to Dingwall. This case is concerned with an area near the Dingwall Market where the A862 is called Station Road. Prior to certain road improvements, which are at the centre of the litigation, the pursuer's farm, notably Field 3, was bounded on its west by the road. Field 3 is shown coloured green on a plan (plan 11 *infra*). This plan is an annotated extract from the Land Registry. The pursuer's parents, who previously owned the farm, were able to take access at the south west corner of the Field directly from the eastern side of the road (access A). A house, the original White House, which was owned by a lawnmower repairer, namely James Oag, was also bounded by the road on its western edge. Access from it was again from the eastern side of the road (access D). The access to the White House continued, at least as a track, eastwards alongside Field 3, over a railway line to other properties, one of which was owned by a Dugald Lawson, and to a salmon fishing bothy on the River Conon.



[3] Between 1995 and 2000, parts of the farm were compulsorily purchased from the pursuer's parents by Highland Council. These included a strip of land, forming part of Field 3, running parallel to and on the east of the A862, the original White House, which was relocated to the east, and further land to the north towards what would become a new bellmouth junction with the A862 (access F). The pursuer could also access Field 3 on its north east corner by using the track (access C). The Council used the acquired land to construct a new section of the A862, running parallel to the old road, which then became a cycle path. The new section, coloured yellow on the plan, was built across the track, and through the land upon which the original White House had stood. Thereafter, no direct access could be taken from the A862 directly into Field 3.

[4] In order to provide access to the new White House, Field 3, the other properties and the fishing bothy on the Conon, the Council created the new junction. A new road was laid from the junction, past the new White House and down towards the railway level crossing. This tarmacadamed road is coloured pink on the plan. The track continued, as before, beyond that point towards, and across, the railway line. By October 2002, the new access road was complete.

[5] The pursuer acquired the farm from his parents in 2006. Ten years later, he obtained planning permission to develop Field 3 as a site for commercial tractor repairs and sales. Customers of the new facility would require to use the new access road in order to reach the site. The planning process prompted the present dispute between the pursuer and the Council about the extent of the access rights over the road. The dispute prevented the development from progressing. At first instance, Iain and Dawn Gilmour, the present owners of the White House, participated as second defenders. They too disputed the extent of the pursuer's rights over the road. They did not appear in this reclaiming motion.

[6] The pursuer sought various declarators, all of which were, essentially, to the effect that he had an unrestricted vehicular right of access over the road. The Lord Ordinary refused to grant any of the orders sought. He rejected contentions that there was an implied servitude over the new road or the existing track. In relation to the pursuer's claim that there was a public right of pedestrian and vehicular passage over the road, he held that there was such a public right, but that the right was restricted to pedestrian and bicycle access. The pursuer appeals the Lord Ordinary's decision solely in relation to this finding. He no longer insists upon the other declarators. He seeks a declarator only that a public right of passage exists between: (i) the junction between the access road and the A862 (access F); and (ii) the point at which the access road joins the north-west corner of Field 3 (access E).

The Lord Ordinary's decision

[7] Unfortunately, it is not easy to understand what facts were found by the Lord Ordinary beyond those taken from a joint minute. He sets out in detail the testimony of each witness, rather than provide a narrative of facts found proved. This is problematic because, although no issues of credibility arose, there were questions of reliability of testimony covering events, some of which occurred over a quarter of a century ago. For example, the pursuer's evidence and his deceased father's affidavit are not identical in relation to the pre-road construction use of access A; the pursuer saying that this was the only access and his father referring to access also from C from the late 1970s. The pursuer spoke to the track being used by, *inter alios*, "members of the general public". He had reached an agreement with Highland Council, contained in the missives of sale relative to the compulsory purchase, about access from the new bellmouth for heavy vehicles.

[8] Samuel MacNaughton, who was Highland Council's transport planner, referred to the need to replace existing infrastructure and to discussions about the replacement access road having the same "status" as the original access track. He too spoke to the existing use of the track, including the landowners, fishermen and Network Rail. Under reference to a letter of September 2017 he accepted that farm vehicles used the track but it was not suitable for "general vehicular use". The new access road was a replacement of the existing track where it met the A862 and was intended to have the same status. Geoffrey Potter, the Council's civil engineer, gave similar evidence, including use of the track by "members of the public". The new road had been constructed for use by "a limited number of agricultural vehicles".

[9] Mr Lawson referred to using the track for his agricultural vehicles and by fishermen, and the general public, on foot. There was evidence from the Gilmours about limited use of one sort or another. Exactly what facts might be extracted from the rehearsal of the testimony may not be obvious, but it was clear that the Lord Ordinary found that the new access road had been designed to replace part of the pre-existing track. As he put it in the Opinion (para [93]):

> "… by 2000 … the Council's focus was on replacing the top part of the pre-existing track. This was for the benefit not just of [the pursuer's parents] but a number of different users, the principal being [the Gilmours' predecessor] Mr Oag and his customers, but also Mr Lawson, users of the salmon bothy and Network Rail".

The Lord Ordinary found that the evidence established that there was a public right of passage for pedestrians and cyclists over the track and the access road. That right extended over the whole road including the verge (Roads (Scotland) Act 1984, section 151; *Hamilton* v *Nairn* 2010 SLT 399). A right of passage could exist over only part of a road (*Hamilton*; *McRobert* v *Reid* 1914 SC 633). The right existed to and from the A862 to Field 3.

[10] The Lord Ordinary found that a public right of passage could be created by a number means (1984 Act, s 151). There was a distinction between specific categories of road, including footpaths and cycle tracks, according to the means by which the right could be exercised (*ibid*

s 151(2); *Hamilton* v *Dumfries and Galloway Council (No 2)* 2009 SC 277, para [26]). The existence of a public right of passage by one specific means did not infer that there was a similar right by other means. The fact that land had been acquired by a local authority in connection with the construction of a road did not mean that that land had been dedicated to unrestricted public passage (*Elmford Limited* v *Glasgow City Council (No 2*) 2001 SC 267). The access road had been designed to allow private landowners, including the pursuer and Mr and Mrs Gilmour, as well as Network Rail and the Cromarty Firth Fishery Board, vehicular access. There was no evidence of members of the public generally taking vehicular access over the road. The road was not designed and built to facilitate routine vehicular access.

Submissions

Pursuer

[11] A public right of passage could vary from passage by foot only, foot and bicycle, or by vehicle (Roads (Scotland) Act 1984, s 151(2)). A public right of passage was created by the act of the relevant public or roads authority in opening or dedicating the way to members of the public (Faulds *et al*, *Scottish Roads Law* (2nd ed), para 4.4; cf. *Elmford* at para [19]). The Lord Ordinary correctly held that a public right of passage had been created over the access road, but erred in concluding that that right was restricted to foot and bicycle.

[12] It was an error for the Lord Ordinary to hold that there was no public right of passage by vehicle because the intended beneficiaries and users of the access road were a limited number of private landowners. That usage fitted with the existence of a public right of passage by vehicle. It was an error for the judge to draw a distinction between a situation in which the users were limited in that manner and one in which members of the public generally took vehicular access. A public right of passage could exist over a *cul-de-sac* or a road that provided

access to a single private property (*Hamilton (No. 2)* 2009 SC 277, at para [55[). It did not require to have two *termini* (*Melfort Pier Holidays* v *The Melfort Club* [2006] CSOH 130, at para [16[). Private owners of land which bordered a road over which there was a public right of passage generally had a right to gain access to the road from their own land (*McRobert* at 648 – 649; *Hamilton* at para [20]). There was no evidence that the Council had ever sought to restrict the use of the road by, for example, erecting barriers.

[13] The Lord Ordinary made no findings about the level of present, historic or even contemplated use of the access road. He had held, correctly, that the road had been designed to permit vehicular access, including by farm vehicles, to the fields. His finding that it had not been built to facilitate "routine vehicular access" was unclear. The Lord Ordinary had confused the issues of whether a public right of passage existed and the management of that right. If Highland Council wished to prevent excess vehicular use of the access road, they could do so using powers under the 1984 Act.

[14] The Lord Ordinary's decision created an absurd situation. The access road was owned and maintained by the Council. It was constructed of tarmacadam and was designed for vehicular use. It led directly to a busy public road. It had a wide bellmouth junction and traffic signs, including "give way" markings. Despite all of this, according to the judge, the access road was to be classified as a cycle track and no members of the public were entitled to turn into it from the A862.

Respondents

[15] The Lord Ordinary was correct to conclude that any public right was restricted to pedestrian and cycle access. A road included any way over which a public right of passage was exercised. A public right of passage was created whether a road was public or private and could be "by whatever means" (Roads (Scotland) Act 1984, s 151(1)). The 1984 Act envisaged

the existence of public rights which were limited to a specific type of passage, for example, pedestrian or cycle (s 151(2)). The acquisition of land for the construction of a road by a local authority did not dedicate land for unrestricted public passage (*Elmford (No 2)* at para [19]). In determining the scope of a public right of passage, regard had to be had to the type of passage which had been exercised by the public (Gordon & Wortley, *Scottish Land Law* (3rd ed) vol 2 at paras 27.41 and 27.44; *Sheriff* v *Ferguson* (1844) 6 D 530).

[16] The access road was a private road. The Lord Ordinary found that Highland Council's intention in constructing the access road had been to replace the track which had existed before the improvements to the A862 were carried out. He found that, before the new access road was built, members of the general public had taken access by foot and bicycle only. He had found that the only vehicular access taken was not by members of the public generally, but by private landowners. The access road had not been designed for unrestricted vehicular access.

[17] The history of the use of the track, which pre-existed the access road, was restricted to foot and bicycle access. There was no evidence to suggest that the public had made greater use of the track. The access road had been intended to replace the track. The question was whether any positive act by Highland Council conferred a wider right of passage over the road than the track, or whether any such conferral could be inferred from any act of the Council. The Council had not intended to confer a broader right. They had not consented to members of the public generally taking vehicular access. Tarmacadam was used on the access road because it was built to facilitate vehicular access for local landowners and the owners of the White House who had lost the use of the track. The use of tarmacadam did not imply that the Council had intended that anybody would be entitled to drive over the road.

Decision

[18] A right of passage over a road or track can exist in one of two forms. First, there may be a private law servitude right permitting a landowner (the dominant tenement) to use a road or track on another person's land (the servient tenement). This right is usually confined to the landowner, his employees, tenants and invitees. It may be for pedestrian, vehicular or other means of travel as defined in the relevant deed or by long usage. The Lord Ordinary found that no such servitude right exists in respect of the access road and the track under consideration. That begs a question of the nature of the right which the pursuer, the Gilmours, Mr Lawson and the other present users of the road and track, actually have. In that connection, the Lord Ordinary held that they all have a right to use the track and road, including by vehicle, yet that right cannot be a private one.

[19] The second, and only other, right to use a road or track is a public law right of passage. A public right of passage can be created by, *inter alia*, prescription or by grant of the landowner (*Hamilton* v *Dumfries and Galloway Council (No. 2)* 2009 SC 277, Lord Reed, delivering the opinion of the Extra Division, at para [39]). What is clear, from the public nature of the right, is that it cannot normally be confined to a restricted class of persons, at least in the absence of the use of statutory powers which have not been invoked here. Once it is accepted, as it is, that there is no private right, the right currently used by the neighbouring proprietors, the fishers and others must be a public one. Since the public right admits vehicular use, by at least the pursuer, the Gilmours, Mr Lawson and the many others referred to by the Lord Ordinary, that vehicular right of passage must be available to any other member of the public.

[20] Highland Council maintain that they did not intend to create such a public right of vehicular access. However, in order to avoid doing so, at least in practical terms, they would have had to have given all the landowners (and perhaps others with an interest) a servitude

right of a restricted nature. They did not do so. The pre-existing right, which the new section of the A862 cut across, was vehicular access to Field 3, the White House and the other properties and to those interests at and beyond the railway level crossing. That was a public right of passage. If, as the Lord Ordinary found, what the Council were endeavouring to do was to replace that access it must have involved the grant of a public right of vehicular access over the new junction and access road. That is the inevitable consequence of the Council's actions to preserve the existing public right of passage, including by vehicles, such as tractors.

[21] The court will allow the reclaiming motion. It will recall the Lord Ordinary's interlocutor of 31 August 2023 in so far as it repelled the pursuer's second plea-in-law and refused to grant decree of declarator in terms of the second conclusion. It will repel the first defenders' sixth plea-in-law, sustain the pursuer's second plea-in-law and declare that there is a public right of pedestrian and vehicular access along the access road owned by the defenders and coloured pink on plan 11 to and from access E and access F. *Quoad ultra* the court will adhere to the Lord Ordinary's interlocutor. It will recall the relative expenses interlocutor of 12 October 2023 and will revisit that issue in due course.