SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] SC PER 1

A131/17

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

(1) CALUM SNOWIE,
(2) STEVEN MCLEARY & KAREN GRAHAM,
(3) CHRISTOPHER MARSHALL & LISA MARSHALL
and
(4) IRENE MACINTYRE

Pursuers

against

STEVEN FARISH

Defender

Pursuers: J Campbell QC; Dallas McMillan
Defender: Wilson; Ennova Law

Perth, 18 April 2018

The sheriff, having resumed consideration of the cause, sustains the first plea in law for the defender, repels the pleas in law for the pursuers, dismisses the action; finds the pursuers liable to the defender in the expenses of process, as agreed or taxed; and decerns.

NOTE:

Background

[1] This case concerns a dispute over a servitude – or, as the pursuers would have it, a purported servitude.

[2] The background is that in 2004 a company called Balado Ltd ("BL") became the owner of just over two hectares of land at Middle Balado, Kinross. In 2009 the defender

bought part of this land, now known as the Paddock, which is located roughly 50 metres from the public road at its nearest point. BL retained ownership of the remainder of the land, part of which adjoins the public road.

[3] In around 2010 BL obtained planning permission to build four houses on the retained part of the land. A private road was constructed to service these new houses, but it also served to link the Paddock to the public road. At around the same time BL registered a Grant of Servitude in the Land Register ("the grant"), bearing to grant to the defender as owner of the Paddock, and to his successors and assignees, a servitude right of access over the private road.

[4] BL then built or caused to be built the four new houses for which permission had been granted. These were then sold to each of the pursuers, between 2011 and 2014, but all subject to the grant.

[5] The defender's position on Record is that he purchased the Paddock for the express purpose of developing it by seeking permission to build further houses on it, and that the price he paid to BL was consistent with development value. He further avers that the grant of a servitude right of access to enable development of the Paddock was a condition of the purchase. The defender lives in a house called Beaufield, the grounds of which lie between, and adjoin, both the Paddock and the public road.

[6] The relative positions of the Paddock, the pursuers' houses, Beaufield, and the private access road, can all be more readily seen and understood by reference to the map lodged by the pursuers at 5/1/21 of process.

[7] The grant contains the following provisions, under the heading "Servitude Rights":

> "A heritable and irredeemable servitude right of vehicular and pedestrian access and egress at all times over the Servitude Area or such alternative route as the Burdened Owner shall determine acting reasonably; declaring that (One)

> such servitude right of access and egress shall be (1) sufficient to allow such residential development by the Benefited Owner for which Planning Permission may be granted by Perth and Kinross Council and (2) shall allow the accommodation of all necessary site/works traffic for the whole of any construction period and (Two) the maintenance and repair of the Servitude Area shall be based on user and if widening and/or upgrading of the Servitude Area is required at the instance of the Local Authority to facilitate any such development then the Burdened Owner shall agree thereto on the proviso that the proper costs or [sic] any upgrading and/or widening of the Servitude Area and any damage resulting therefrom shall be paid for by the Benefited Owner."

The "Servitude Area" is elsewhere defined as meaning "the roadway hatched brown on the said plan forming part of the Burdened Property", that is, the private access road. The defender is currently the "Benefited Owner". The pursuers, as successors in title to BL, are currently the "Burdened Owners". It is expressly provided that "any rights reserved to the Benefited Owner are exercisable by the tenants, agents, employees, workmen and others authorised by him from time to time."

[8] In this action the pursuers attack the grant at a fundamental level. They crave a declarator that its terms and provisions have no legal effect. They seek reduction of it (reduction being a remedy now available in the Sheriff Court: see Courts Reform (Scotland) Act 2014, section 38(2)) and, in consequence, seek interdict of the defender from taking access to the Paddock via the private road. The pursuers have no preliminary pleas, and in particular do not plead that they are entitled to decree *de plano* without inquiry into the facts. They seek a proof at large. The defenders concede only that interdict would follow should declarator or reduction be granted as craved, but dispute that there are any good grounds for these remedies. Indeed they maintain by their first plea in law that the pursuers' case is fundamentally irrelevant and that it can and should be dismissed without the need for proof.

[9] Thus the matter called before me for debate on the defender's preliminary plea on 22 February 2018. Mr John Campbell, QC, appeared for the pursuers and Mr David Wilson, solicitor, appeared for the defender. I am grateful to both of them for their helpful submissions.

Submissions for the defender

[10] Opening the debate, Mr Wilson moved to me sustain the defender's first plea in law and to dismiss the action. Having summarised the background as set out above by reference to the Record, he proceeded to set out ten principles which he said could be derived from the authorities on servitudes and which bore on the issues arising in the case. Mr Wilson's principles were stated as follows:

a. First, that a servitude cannot be created over land which is not part of the servient tenement; by definition, a servitude exists over a servient tenement and not over anything else: Cusine & Paisley, *Servitudes and Rights of Way*, at page 618, paragraph 15.13(2);

b. Second, that the existence of a servitude does not denude the owner of the servient tenement of the right of property in it: Cusine & Paisley, page 392, paragraph 12.13;

c. Third, that the rule of strict construction of burdens applies in relation to servitudes but with considerably less rigour than in the case of other real burdens: Gordon, *Scottish Land Law*, page 750 – 751, paragraphs 24.59 – 24.60; Cusine & Paisley, page 613, paragraph 15.06; page 621, paragraph 15.15; *McLean* v *Marwhirn Developments Ltd* 1976 SLT (Notes) 47, at page 49. It was submitted that this approach is applicable to the construction of the deed, and thus both to

any question as to the existence of the right, as well as the manner in which the right might be exercised: Cusine & Paisley, page 621, paragraph 15.15; *Crawford* v *Lumsden* 1951 SLT 64 per Lord Sorn; *Hunter* v *Fox* 1964 SC (HL) 95 per Lord Reid at 99;

d. Fourth, that in interpreting servitudes the court may resort to extrinsic evidence beyond the words used: Cusine & Paisley, page 671, paragraph 15.12;

e. Fifth, that where a servitude fails to specify a route of access, that is not fatal to the servitude. And where, as in the present case, there is express provision that the servient owner may specify an alteration to the route, this in no way detracts from the validity of the servitude Cusine & Paisley, pages 480 to 481, paragraphs 12.131, 12.135;

f. Sixth, that in a case of a general grant of a right of access in otherwise unlimited terms, the dominant proprietor may exercise the servitude for any lawful purpose he may have: *Alvis* v *Harrison* 1991 SLT 64 HL per Lord Jauncey of Tullichettle at 67, citing with approval *Irvine Knitters Ltd* v *North Ayrshire Co-operative Society Ltd* 1978 SC 109 at 117 per the Lord President (Emslie), and at 121 per Lord Cameron;

g. Seventh, that a servitude may be subject to conditions and qualifications, and the existence of such conditions and qualifications does not made it invalid as a servitude. Indeed the imposition of conditions is commonplace in servitudes and does not provide a ground of invalidity: Cusine & Paisley, page 617, paragraph 15.12; page 600, paragraph 14.58;

h. Eighth, that if there is an ambiguity in the wording of a servitude that will not of itself render the servitude invalid. Instead the court will favour the construction

least burdensome to the servient proprietor: Cusine & Paisley, page 620, paragraph 15.14;

i. Ninth, that on subdivision of the dominant tenement, the owner of each subdivided plot can exercise the servitude if that subdivision (and thus the increase in the volume of exercise of the servitude and so the increase in the burden on the servient tenement) was anticipated in the grant of servitude: Cusine & Paisley, pages 54 – 55, paragraph 1.49; pages 114 – 115, paragraph 2.48; *Alba Homes Ltd* v *Duell* 1993 SLT (Sh Ct) 49 per the Sheriff Principal (Ireland) at 51; and

j. Tenth, that servitudes must be exercised *civiliter*, that is, reasonably and so as to cause the minimum practicable disturbance or inconvenience to the owner of the servient tenement consistent with proper use of the servitude: Cusine & Paisley, page 391, paragraph 12.09.

[11] Mr Wilson turned to apply these principles to the pursuers' pleadings. In Article 8, there appears the following averment:

> "Extrinsic considerations are not permitted for the definition or interpretation of such a right of access."

This averment, it was submitted, was incorrect in law, being contrary to the fourth principle, and should be excised. That was without prejudice to the defender's primary position that the words of the servitude were in any event clear and unambiguous, and that extrinsic evidence was therefore unnecessary.

[12] Turning to Article 9, Mr Wilson drew attention to the pursuers' averments that:

> "…The purported right bestowed by the Grant of Servitude is neither clear nor unambiguous, but is ill defined, uncertain and ambiguously expressed. It is accordingly unlawful in character, and therefore of no legal effect. Until the sales of house plots to the pursuers, the land upon which the pursuers' houses

> are individually built, and the Paddock, were together one heritable subject. Any future use of the Paddock after the date of the Grant of Servitude could not be defined with any precision in 2010 and would in any event be substantially beyond the scope and extent of any purported right of access as expressed in the Deed, and would therefore be unlawful."

Mr Wilson submitted that as a matter of law, the question of interpretation involved reading the grant and giving the words their plain and natural meaning. Doing so, it was apparent that there was a clear definition of both the dominant and servient tenements, the servitude was said to include both vehicular and pedestrian access, the servitude area (the private road) was defined by reference to a plan, and there was an expression of purpose of future development, clearly anticipating such development taking place. Mr Wilson accepted that the deed does not say how much development was anticipated, but submitted that it there was no requirement for it to do so. In the light of the sixth principle the dominant proprietor was entitled to make whatever lawful use of the servitude he wished to.

[13] Expanding on this submission, Mr Wilson pointed out that the cases were littered with examples of servitudes created to permit future development. There was no reason for the court to interpret the general grant of a servitude on the hypothesis that future development might potentially become unduly burdensome. Were that the case, in pretty much every case of a servitude granted with a view to future development the court would have to regard the servitude as ineffective or invalid just in case it might become unduly burdensome. Such an approach would effectively destroy the use of servitudes in development.

[14] I asked Mr Wilson to address an example of a case where a servitude right of access down a quiet country lane was granted anticipating development, the deed was silent as to the amount of development, and where the dominant proprietor then obtained permission to build 100 flats. Mr Wilson submitted that in such a case the point at which the servient

proprietor would be entitled to take action (by seeking interdict) was when it could be reasonably anticipated that the development would become unduly burdensome on the servitude. That would involve questions of fact and degree. The pursuer might, for example, aver the terms of the grant of the planning permission, and found on solicitors' correspondence to show an intention by the dominant proprietor to start building works. He might seek to lead expert evidence as to the likely increase in vehicular traffic resulting from the building works and subsequent use of the new properties. However Mr Wilson submitted that the pursuer's pleadings did not set out a case seeking to show that there would be undue burden from the present development. They did not offer to prove this and had no plea in law to this effect. Rather their case was that the mere uncertainty as to the extent of the development itself, the mere possibility that undue burden might result, was sufficient to render the servitude invalid. This case was irrelevant as a matter of law.

[15] Moving to consider Article 10 of condescendence, Mr Wilson drew attention to the following averments:

> "…the purported right of access… depends on a planning permission being granted by the local planning authority. A right of servitude cannot be created subject to a suspensive condition which itself depends on the creation of an external unrelated document between different parties, such as a putative grant of planning permission"

Mr Wilson submitted that this averment proceeded on an erroneous construction of the grant. As a matter of simple interpretation, there was no suggestion that the servitude was conditional on planning permission being granted. The statement in the deed that it should be "sufficient to allow such residential development" was not a qualification of the *grant* of the servitude, but merely an expression of one of the purposes for which it was *being* granted. There was nothing to say that the servitude right of access could not be exercised until planning permission was granted. It was not therefore subject to any suspensive

condition. Looking at the grant, the servitude right was really to be found in the wording from the beginning down to the semi colon on the third line; what followed thereafter simply anticipated future development and the possible use of the servitude in the light of it.

[16] Turning to Article 11 of condescendence, Mr Wilson sought to criticise the following averment:

> "An effective grant of a right of access by way of a conventional servitude may be created by way of the written grant of such a right or the written imposition of a clear obligation, for example, as a real burden in a heritable title. Such a right and co-relative duty cannot be acquired or imposed with sufficient precision if it depends on a suspensive condition or clause, such as one expressed in the uncertain manner for which the defender now contends."

He submitted in the first place that if by this it was being suggested that servitudes should be interpreted with the same strictness as a real burden in a heritable title then this was in breach of his third principle. Secondly, he again submitted that on a proper reading of the deed the servitude did not depend for its effectiveness on the possibility of an event occurring at a future date.

[17] Turning to Article 12, Mr Wilson drew attention to the following averments:

> "Accordingly the language used in the creation of the purported servitude right is too indefinite and uncertain to be enforceable, and cannot therefore be of any legal effect, since it imposed no enforceable obligation at the date it was created. It has no force and effect, and cannot have future legal effect even if planning permission is granted for the development on the Paddock. The purported grant of servitude, in so far as it purports to grant a servitude right of access to the Paddock by way of the access road, should therefore be reduced. In an email of 4 March 2017 the defender has agreed that the operation of the purported grant of servitude depends on planning permission being granted and does not stand apart from such a planning permission."

For the reasons he had already advanced in relation to Article 10, above, Mr Wilson submitted that there was no force in any of these averments. The reference to the email of 4 March 2017, whose terms were not set out in the pleadings, could not affect the validity of the servitude, and added nothing to the pursuers' case.

[18] As to Article 13, in which averments are made as to the standard to which the access road has been built, Mr Wilson submitted that the grant made provision for this. In particular, in relation to the averment that "the extent to which the access road may accommodate additional access or egress by others to and from the Paddock is entirely uncertain", Mr Wilson submitted that this had to be considered in the light of his sixth principle and the case of *Alvis* v *Harrison*. Providing lawful use is being made of the servitude, the only issue between the parties could be once it is known or can reasonably be anticipated what extent of additional access will be necessary. At that stage, in an appropriately framed action, the court would be in a position to consider this as a question of undue increase in the burden.

[19] It is averred in Article 14 that:

> "Accordingly, use of the access road may increase variably for both construction or residential traffic without the possibility of any control, management or limitation by the owners of the servient tenement. Such use would be incapable of any control, management or limitation by the pursuers or any of them, since future users of the access are not subject to the limitations in the Deed of Servitude of 2010 anent use of the subjects which they may acquire."

Again, submitted Mr Wilson, this was an incorrect statement of the law. If purchasers of sub-divided plots in the Paddock are to benefit from the right of access in the servitude, they will be subject to the same limitations as currently apply to the defender's use of it. In particular they would be under the same duty to exercise the right of access *civiliter*. Reference was made to *Moncrieff* v *Jamieson* 2008 SC (HL) 1 per Lord Scott at paragraph 63:

> "The manner of exercise of the rights of parking to which the respondents as owners of Da Store are entitled is limited by the principle of *civiliter*. The lower courts were correct to leave matters of detail regarding the exercise of those rights to be determined from time to time in accordance with that principle."

In other words, submitted Mr Wilson, the House of Lords was shying away from trying to regulate precisely *how* access should be regulated in the future, and leaving any further issues to be determined by reference to the requirement to exercise *civiliter*, when the case arose. As to the further averment in Article 14, that

> "Heritable property in Scotland, including rights of servitude, cannot be defined or made to be effective upon a suspensive or conditional basis.",

Mr Wilson submitted firstly that the servitude was not suspensive or conditional, for the reasons already stated. However even if it were, this averment was an incorrect statement of law having regard to the seventh principle stated above.

[20] Turning to Article 15 Mr Wilson observed that this contained averments that the defender had an alternative right of access to the Paddock through the grounds of his own property, Beaufield. Mr Wilson submitted, however, that there was no authority for any proposition that the existence of another right of access detracts from, or indeed bears on the existence of, a servitude providing a right of access to that land. He recognised however that the averments in Article 15 were linked to those in Article 16, where it is stated that:

> "In accordance with the Grant of Servitude, by the execution of a Deed of Determination dated 24 July 2017 and registered in the Books of Council and Session 26 July 2017, the pursuers have determined that an alternative right of access to and egress from the Paddock shall be taken by way of land under the control of the defender at Beaufield."

Mr Wilson submitted that what the Deed of Determination ("the determination") purported to do was in effect to discharge the existing right of servitude over the pursuers' properties and to impose in its place a servitude over Beaufield, which was neither part of the servient tenement, nor within the ownership of any of the pursuers. This contravened the first principle set out above, as dominant and servient tenements cannot be owned by the same person. Mr Wilson submitted that the reference to an "alternative route" in the first

sentence of the servitude meant an alternative route "over the servient tenement", and that these words were necessarily implied: cf. *Hunter* v *Fox*. The words could not reasonably be construed as creating a free standing right to nominate an alternative route, whether on the servient tenement or not, because to do so would not be to alter the route of the servitude, but to discharge it, in that there would no longer be any servitude right over the servient tenement. Even if the determination did not create a new servitude over Beaufield, it nevertheless still bore to create a right of access over property to which the pursuers had no right or title. Regardless, all this was a question of law. There was no need to inquire into whether the pursuers' determination had been made "acting reasonably" as a matter of fact.

[21] As to Article 17, Mr Wilson noted that it was averred by the pursuers that the grant bore to allow for the optional taking of the pursuers' land for road widening, subject to compensation, but that a servitude could not be used to take from a heritable proprietor land in which he was infeft. Mr Wilson accepted that a servitude should not do this, but submitted, as per his second principle, that the existence of a servitude does not denude the servient proprietor of ownership, and that there was nothing in the present servitude to suggest that widening of the road would take away the title of any of the pursuers to any part of their subjects. He referred again to *Moncrieff* v *Jamieson*, per Lord Neuberger at paragraph 140. Mr Wilson submitted that the fact that the pursuers in that case were unable to use the land on which the defenders' cars were parked did not mean that there could not be a servitude, nor that the defenders were in some way deprived of their right of ownership of that part of his land, at least insofar as that was consistent with reasonable exercise of the servitude right. Even if there was a problem with the wording of that part of the present grant relating to maintenance and repair, however, it was severable, and did not detract from the existence of the servitude itself. Any defective words could simply be excised and

treated as *pro non scripto*, as in *Hunter* v *Fox*. There were no factual issues to resolve. Accordingly even in this event, the action would still fall to be dismissed, because there would still be no ground to reduce the servitude, which was the remedy sought by the pursuers.

[22] Accordingly, Mr Wilson submitted, each of the pursuers' criticisms was misconceived, or resulted from a strained and impermissible interpretation of the words used in the grant. He moved me to refuse to remit the action to probation, to sustain the first plea in law for the defender, and to dismiss the action.

Submissions for the pursuers

[23] Mr Campbell QC, for the pursuers, formally adopted his amended Rule 22 Note as the basis of his submissions, and moved me to repel the defender's first plea and appoint the case for proof. He noted that as matters stood, an interim interdict previously granted had been recalled on the giving of an undertaking by the defender, and Mr Wilson confirmed that that undertaking would remain in place at least until the present decision was advised.

[24] Mr Campbell reminded me that this was a matter of title, not planning, but he referred by way of context to the timeline of events set out on the first two pages of his Note. The pursuers' case was about construction of part of their title. Their essential position was that the purported servitude set out in the title deeds, although predating the construction of their houses, was too imprecise and uncertain to have any legal effect. Accordingly it felt to be reduced. There was no requirement to explore the consequences of such an order in the present debate, for example, of frustrating the development which planning permission had been granted, that the defender might have a right of action against his solicitors in relation to the framing of the grant of access, or any financial consequences.

[25] In accordance with the language used in the grant of servitude, the pursuers had registered the determination in the Books of Council and Session, whereby they had all determined, acting reasonably, that access to the Paddock should be taken through Beaufield. The weight or value of that determination was, Mr Campbell submitted, not a matter presently before the Court, but was simply an adminicle of evidence which had occurred as matters had moved along.

[26] Mr Campbell referred me directly to the words of the grant. They were to be found in that section of the pursuers' title sheet headed "burdens detail", which can be found at page 6 of production 1 for the pursuers. Mr Campbell submitted that it was essential to the defender's argument in the debate that the two parts of the grant were read discretely, part one being the words to the semi colon after the words "acting reasonably". However that was the wrong approach. What followed the semi colon was not merely colouring, but regulated the operation of the right itself. It was quite clear that the author intended that this should be part of the way in which the right was exercised. It was to allow for residential development, for traffic, for maintenance and repair, and for the cost of upgrading. Mr Campbell submitted that the only sensible way to read it was as a whole, and he invited me to do so. Nothing turned on the use of expression "declaring that". It did not make what followed less than regulatory. The grant of servitude should be read as a *unum quid*.

[27] Developing his submissions, Mr Campbell pointed out that a servitude is a positive obligation, an obligation on the servient tenement to allow normal use and activity. He pointed out that it was common, for example, in agricultural circles, to see a servitude right of access over a track for agricultural purposes, and examples had often arisen in deeds created in the 19th century. Where such a track had been used by horse and cart and was

now subject to tractor use, questions arose about the extent to which this was permissible in terms of the original grant. What was important was that where the servitude was contained in a deed its exercise was constrained by the words used. It was therefore necessary in the present case to examine the words used in the grant, and to see where imprecision arose. Imprecision was important because it was the corollary of effective enforcement.

[28] The first issue was that in terms of the grant the route was neither fixed, nor precise. The pursuers were empowered to state an alternative route, which they had done by the determination. The provision which allowed them to do so was curious, but it could not be meaningless. A servitude is a positive obligation which needed to be defined clearly, but here there was provided access either over the servitude area or over some other route at the option of those subject to it. Properly construed, the pursuers' right was entirely free from any duty being imposed on the owner of the dominant tenement. The deed said "such alternative route", not "such alternative servitude". Accordingly the defender's point that dominant and servient tenements cannot be owned by the same person was irrelevant. On the face of the plain language used there was nothing to stop access to the Paddock being taken through Beaufield. It was irrelevant whether that was inconvenient to the defender. The pursuers had averred that such access was available, was lawful, and offered to prove that it had in fact been taken by the defender for groundworks exploration, etc. Nor did the words of the deed require the alternative route to be over the servient tenement. The defender wanted the Court to read in the words "over the servient tenement" after the words "alternative route", but they were not there and it would be impermissible to read them in. On the contrary this all showed that the language of the deed was so imprecise as to be incapable of enforcement.

[29] The second issue arose from the use of the words "such a servitude right of access and egress shall be… sufficient to allow such residential development by the benefited owner for which planning permission may be granted by Perth and Kinross Council." It followed, submitted Mr Campbell, that the amount of use which can be predicted depended absolutely on the actions of some other body, which was not party to the deed, namely the local authority. Planning permission had in fact been granted for eight houses, but suppose, submitted Mr Campbell, it had been granted for two blocks of ten apartments. There would then be a different level and intensity of use than to begin with. That was of course speculative, but the point was that the language used in the grant was language which placed the extent of the use of the so-called right in the hands of someone else. Mr Campbell submitted that that this introduced a level of uncertainty and imprecision such that the grant could not create enforceable obligations. A person purchasing a house on the servient tenement would wish to know with some certainty what was predicted in terms of traffic going past the house. It might well be a factor to be taken into account in deciding whether to purchase.

[30] The third issue arose from the stipulation that the right of access "shall allow the accommodation of all necessary site/works traffic for the whole of any construction period". This was clearly a reference back to "such residential development" as may be granted. Mr Campbell submitted that he had some difficulty with the word "accommodation", because he didn't know what it meant in this context. Was traffic to be allowed to pass, or also to park? As to the words "necessary site works/traffic", who was to determine what was necessary? One would normally expect that to be the contractor or developer. But if the servitude was to be exercised in such a way as to require the pursuers to accommodate necessary traffic, then that must import some level of judgment about what is meant by

these expressions. It would be unusual in the extreme if neighbours of a development had any say at all in the manner in which it was carried out. Yet the language must mean something, because the verb was "allow", and that must mean that the pursuers could allow (or as a corollary, not allow) traffic to have access to the Paddock. How was that to happen? Who was to decide? Further, the expression "the whole of any construction period" was inherently uncertain. In good times houses might sell quickly and so the construction period might be short. In hard times, however, sales might be slower, and the construction period might be protracted, with properties being built to order as and when demand arose. The pursuers might continue to be subjected to site traffic for years, without knowing how long construction would go on for. Mr Campbell submitted, again, that this was too uncertain an obligation to be enforceable by way of servitude.

[31] The fourth issue related to the wording of the deed relating to maintenance and repair of the servitude area. It was said to be based on "user", but whose? The pursuers? The developers? The occupiers of any new houses? And what was user? The number of times a person came and went in the course of the day, or the type of vehicle which they drove? In short, how was "user" to be calculated? Mr Campbell submitted that the defender had offered no answer to this question, other than to say that a liberal and general contextual interpretation was required, and that problems could be sorted further down the road.

[32] As for "widening and/or upgrading", Mr Campbell noted that it was pled that the curtilage of the pursuers' houses extended to the edge of the road. Part of it was kerbed and part of it was not. There was a service strip at the edge of the lawns, containing utilities such as telephone, water, electricity and gas lines. However what the grant appeared to envisage was some undefined power to widen the road, which necessarily meant taking land from

the pursuers on one side of the road or the other. Even on the most generous construction of the language the defender was saying that local authority had by the deed acquired some sort of right to widen the road. There was a distinction between exercising a right of access and building a wider road; the two things were not the same. And what was meant by the expression "at the instance of" the local authority? Did this mean the authority acting of its own volition to widen or upgrade the road, or only on the application of the owner of the dominant tenement? In any event, however, if the local authority required road widening the pursuers were then required to agree to it on the "proviso" (not agreement) that the "proper costs" would be paid for by the benefited owner. But what, asked Mr Campbell, were the proper costs? The gravel? The tarmac? The white lines? And what would happen if the defender refused to pay, as the corollary of the pursuers being required to agree to road widening? What was provided for was not sufficient to create enforceable servitude rights and obligations in this regard.

[33] Standing back, Mr Campbell accepted that it might be said that a common sense view of these matters ought to be accepted, and that he might be criticised for being too legalistic in the circumstances. He acknowledged that it might be said that in the real world of housebuilding some accommodation and flexibility must be accepted and that servitudes should be construed accordingly. But he submitted that the authorities showed that a strict approach to construction of servitudes was required, even if not exactly akin to the way in which a burden would be construed. This servitude was contained in the burdens section of the title, and was close to being a burden. What it certainly was not, was a loose co-operative arrangement which essentially allowed the dominant proprietor to do what it needed to, in any way it wanted to, so as to facilitate development. Mr Campbell submitted that the true extent of the actual and potential burden on the servient tenement was actually

unquantifiable. It was a mixture of so-called rights and obligations jumbled with suspensive obligations and conditions and key terms which required actions beyond mere access and/or under the control of others. All this rendered it effectively useless. This was not a case like *Hunter* v *Fox*, submitted Mr Campbell, where the pursuers pled ambiguity, but rather uncertainty, set against the nature of servitude rights which requires a sufficient degree of precision so that they can be observed by both dominant and servient owners. The present case was not a narrow one. The language used left many questions unanswered. The defenders went much too far in submitting that what was pled was irrelevant, and that the pursuers were not entitled to a proof: cf. *Jamieson* v *Jamieson* 1952 SC (HL) 44. Mr Campbell accepted, however, that if the present action fell to be dismissed, because it was found that a proper servitude right of access had been created, then any question of whether the exercise of that right was, or would become, unduly burdensome, was for another day and a different action.

[34] On page 9 of the pursuers' Rule 22 Note an argument is set out in relation to transmission of rights to the individual owners of any of the new properties. Mr Campbell expressly departed from this argument in the course of his oral submissions, and did not seek to rely on it. He did however adhere to the propositions in law set out at pages 10 to 12 of the Note, and having regard to these and to the submissions summarised above moved me to repel the defender's first plea in law and appoint the cause to a proof simpliciter.

Reply for the defender

[35] In reply Mr Wilson addressed firstly the question of the widening of the road. He submitted that this was very much what had happened in the case of *Alvis* v *Harrison*. The defender created a bellmouth on the verge of an access road, and the House of Lords

ultimately held that he was entitled to do as an incident of his servitude right of access. Mr Wilson therefore did not accept that there was any distinction to be drawn in principle between the exercise of a right of access and widening of the access road as an incident of that right. He submitted that the limitation on widening a road again came back to whether what was proposed would give rise to an undue burden, for example, where it involved turning a narrow country lane into a three lane highway. Part of the reasoning in *Alvis* v *Harrison* was that comparatively speaking the area of the bellmouth was slight. But the loss of the use of land occasioned by the widening was not in itself inconsistent with the existence of the servitude. Should a proposal for widening the road in the present case appear unduly burdensome, then it would remain open to the pursuers to raise proceedings for interdict on this basis. But that was not their case in the present action.

[36] Turning to the reference to the word "user", Mr Wilson noted that Lord Jauncey in *Alvis* v *Harrison* had himself used that word as a well-recognised term in this context. It was not necessary to draft a servitude for every possible eventuality in relation to the use of the road by construction traffic. It has to come down to the use that is made of it at the time.

[37] As regards the use of the word "allow", it was clear submitted Mr Wilson that it was not the pursuers who had to allow anything. It was the servitude itself that was drafted so as to allow certain activities. In other words, all that was being set out was one of the purposes for which the servitude was being granted. In relation to who decides what was "accommodation", "necessary", "required", Mr Wilson submitted that ultimately this would be a matter for the court. However the use of these terms, and the fact that the court might ultimately have to decide their meaning, did not mean that there was no enforceable servitude right of access.

[38] As regards Mr Campbell's submission that in relation to a servitude the "exercise of right is constrained by the words used", Mr Wilson submitted that this was not so. Indeed it was the other way around. The point of the cases looked at previously was to draw the distinction between interpretation of conventional servitudes created by deed and those created by positive prescription. In interpreting a deed there was no constraint other than lawful use in terms *of Alvis* v *Harrison*, whereas in relation to prescription the constraint was use or possession that had been made to date. So a more liberal interpretation was used in construing a deed, and Mr Campbell had been using the test more appropriate for prescriptive servitudes. Either way, however, Mr Wilson accepted that the deed had to create clear and enforceable obligations as between the dominant and servient tenements.

Discussion

[39] It is important to recognise what the pursuers' case is, and what it is not. Only by this can the defender's motion for dismissal at this stage be understood. The essential point is that the pursuers seek declarator, reduction and interdict solely on the ground that the grant is of no legal effect whatsoever. They claim that properly understood its terms are wholly ineffective, for want of precision, to create a servitude right of access over (what is now) their land. Accordingly they do not make any averments that the manner in which the defender is currently exercising access goes beyond what is permitted by the terms of a servitude, nor that they reasonably anticipate that he will do so in the future. Nor do they seek to establish that the registration of their deed of declaration has been effective to alter the access route from its present location on the private road to an alternative route through the defender's property, and thus that they are entitled to interdict against further use of the private road by the defender on this basis.

[40] It follows from all this that it is not enough for the pursuers to show at this stage that there are aspects of the wording of the deed that are imprecise or problematic, either as regards the present use of the servitude or its anticipated use in the future. If on a proper construction of the deed the defender has a recognisable and legally effective servitude right of access over the pursuers' land, then the action as laid is irrelevant and falls to be dismissed. Any questions about how the servitude can or might be used or misused would be for another day, and a different case. Furthermore, although the pursuers have no preliminary plea, and seek a proof, it is hard to see what useful proof there could be from their perspective. Indeed as Mr Campbell said in the course of the debate, he regretted having no plea for decree *de plano*, as had he had such a plea he would have asked me to sustain it. This is all another way of saying that in reality this case turns on matters of law, that is whether the defender has a servitude right of access on a proper construction of the wording of the deed, and accordingly can be determined at the stage of debate and without need for proof: cf. *Alvis* v *Harrison*, per Lord Jauncey at 67.

[41] As to the correct approach to interpretation of deeds creating servitudes, Mr Wilson's ten principles were not seriously disputed, and I broadly accept them as correct. More particularly the following points emerge from the authorities and academic commentary cited.

[42] First, it is at least probable that conventional servitudes are not to be construed with the same rigidity as is applicable to real conditions or burdens. In *McLean* v *Marwhirn Developments Ltd* 1976 SLT (N) 47 the Inner House had to consider a deed which granted the dominant tenement:

> "…the right to use for … drainage, sewerage and supply of water… all existing pipes [etc.] … in and under the adjoining lands… which are at present so used…"

The defender argued that a servitude constituted by express grant fell to be interpreted as strictly as a real burden or condition in the title deeds. However the deed was silent on how the relevant services were "so used" at the time when the grant had been made many years before. Accordingly it was said that it was too vague and indeterminate to be enforceable, and it was not permissible to lead evidence to try to make clear what the language of the deed had not. The court rejected this argument, holding that even on a strict construction the extent of the servitude was sufficiently identified within the disposition, and that the pursuer was at least entitled to a proof for the purpose of identifying the specific pipes on the ground. Furthermore (page 49):

> "…there is *prima facie* some attraction to the view that although a positive servitude of a kind well known to the law which is constituted by express grant must be unambiguously described in the grant, the sufficiency of the description need not meet the very stringent standards which are applied in considering the validity of a real burden."

Although *obiter*, these observations provide support for the view that it is not essential that servitudes be in such precise terms as are required for constitution of a real burden in the narrow sense: see also Cusine & Paisley, at paragraph 15.06.

[43] Second, if the meaning of the servitude obligation remains clear, the grant will not necessarily be invalidated by poor drafting. Thus in *Hunter* v *Fox* 1964 SC (HL) 95 the deed stated that the burdened proprietor:

> "…shall not plant or allow to grow any shrubs, trees or other plants or build any erections of such a nature as to exclude at present a clear and open view of the sea…"

The Inner House held that the words "at present" were ambiguous and thus that there was no enforceable burden. The House of Lords disagreed. Lord Reid, accepting that strict construction was appropriate, stated that he could:

> "…think of no stricter method of construction… than to ask whether a reasonable man with a competent knowledge of the English language could have any real doubt about the meaning of the provision read in its context in the disposition. If the words used are self-contradictory, or so obscure that one has to grope for the meaning, then the provision is ineffective, and it is also ineffective if it is ambiguous or reasonably capable of having more than one meaning. There can be no benevolent construction in the sense of spelling out meaning out of obscure phraseology or preferring one or two or more reasonably possible meanings. But if the meaning is clearly apparent, that is sufficient to satisfy the test of strict construction."

It was held that the words "at present" were meaningless rather than ambiguous. They were thus surplusage, included by mistake in a document whose meaning was otherwise clear. They could therefore simply be ignored, with effect given to what remained.

[44] Third, the existence of a conventional servitude right of access is not dependent on clear specification in the deed of the route by which such access is to be exercised. As Cusine & Paisley put it (at paragraph 12.131), even if the deed:

> "… is indefinite as to the exact route, the grant is not void due to lack of precision, but the dominant proprietor may choose the route over which the servitude is exercisable. As Bankton says, this must be done in such a way as not to prejudice the rights of the servient owner."

However this principle is applicable (paragraph 12.135):

> "…only to those cases where the grant sufficiently defines a servient tenement but is so unspecific as to the route of the servitude that there remain a number of unspecific routes within that servient tenement over which the servitude could be exercised. Even in these cases the application of the principle will be excluded if the grant reserves to the servient proprietor the right to determine the route of exercise or states that the route of the servitude is to be agreed between parties."

Accordingly the existence of a clause in a deed reserving to the servient proprietor a right to determine an access route is distinct from the existence of a servitude right of access in the first place. It relates to the way in which the right of access might be exercised, but is not essential to or determinative of the existence of the right. Indeed it is contingent upon it. In my view it also follows that as in the case where there is no such clause and there is a

consequent lack of clarity as to the route, a lack of clarity in relation to the wording of such a clause where one does exist will not of itself render a grant of servitude void.

[45] Fourth, a deed may in principle both create a servitude right and stipulate conditions on the exercise of that right. Such conditions may be either positive (requiring the dominant proprietor to do something in relation to the servitude right) or negative (restraining him in this regard). Frequently encountered examples would be where the deed creates a servitude right of access and then both positively obliges the dominant proprietor to maintain the access road, while negatively restricting him from using it in a specified manner or at specified times: see Cusine & Paisley, paragraph 13.01. It is also clear, again in principle, that conditions may be imposed on the servitude by way of reservations in favour of the dominant proprietor. In relation to a right of way this may include the right to vary the route, or to carry out specified works or repair or improvement to the access road: Cusine & Paisley, paragraphs 14.56, 14.58. Issues may arise as to whether such conditions or reservations are properly to be understood as real burdens, and if so whether a more strict approach to construction of that part of a deed which contains them is appropriate: Cusine & Paisley, paragraph 15.12. Be that as it may, however, a lack of precision in the drafting of a servitude condition or reservation does not mean that there is a lack of precision in the servitude right itself. The two can in principle be considered separately. It follows that an enforceable servitude right may be seen to exist, even if a specified servitude condition or reservation is unenforceable for want of clarity.

[46] Fifth, and as explained by Lord Jauncey in *Alvis* v *Harrison* at 67:

> "Where a right of access is granted in general terms the owner of the dominant tenement is entitled to exercise that right not only for the purpose of the use to which the tenement is then being put, but also for any other lawful purposes to which it may be put thereafter."

Furthermore, and in particular:

> "For the better enjoyment of the right the dominant owner may improve the ground over which that right extends providing that he does not substantially alter the nature of the road nor otherwise prejudice the servient tenement."

In *Alvis* the pursuer owned a driveway and its verges. The defender had a right of access over it, and owned land adjoining the driveway. He constructed a road over this land, linking the driveway to a public road. At the junction of the new road and the driveway, he constructed a tarmac bellmouth. It was located over an area of the verge of the driveway, a few feet in depth and around fifteen meters in length. The pursuer sought damages and interdict on the ground that the bellmouth constituted an encroachment onto his land. He was successful in the Court of Session, but the defender's appeal to the House of Lords was successful. It was held that the grant of access being in general and unlimited terms, the defender was entitled to exercise it for any lawful purpose, which included linking it to the new road over his land. This necessarily involved taking the new road across the verge. The creation of the bellmouth and the laying of tarmac was, in effect, incidental to this, and was not unduly prejudicial to the servient tenement as a whole. As Lord Jauncey explained, by way of an example, the defender could in principle have built houses along his new road and obtained access to the driveway for those houses (page 68), as this would have been lawful use of the servitude. In principle, therefore, a servitude right of access up a country lane would not be rendered void or of no legal effect just because the dominant proprietor widened the road and started to run construction traffic up and down it, these being lawful purposes to which it might be put.

[47] Sixth, it is clear that the existence of a servitude may restrict, but does not denude, the owner of the servient tenement of the right of property in it. Thus where the servitude is a right of access, the servient proprietor continues to own the land over which access is

exercised, and can exercise all physical and juristic acts which are inherent in that right of ownership except insofar as they are inconsistent with or restrained by the proper exercise of the servitude: see Cusine & Paisley, page 392, paragraph 12.13. Thus in *Alvis* v *Harrison*, as just noted, the right of access included the right, in effect, to widen a relatively small part of the driveway by placing tarmac over an area of the verge to create the bellmouth. The pursuer continued to own the verge, and thus the land on which the bellmouth was constructed, but his right of ownership was found to be subject to the defender's right under the servitude. Further, in *Moncrieff* v *Jamieson*, it was inherent in the finding that the pursuers had a servitude right to park their cars on the defender's land that his rights to make use of that land while they did so would be significantly restricted as a result. Indeed, as Lord Neuberger put it at paragraph 140:

> "At least, as presently advised, I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being *effectively excluded* from his property." (my emphasis).

It seems to me to follow from this that in principle it cannot properly be said that there is no enforceable servitude right of access simply because either by operation of law or by express condition on the grant the dominant proprietor is entitled to widen an existing access road, including by laying tarmac on the verge owned by the servient proprietor.

[48] Seventh, the real question in the cases just mentioned is not whether the servitude is void because of the actions of the dominant proprietor, but whether his actions, for example in increasing the traffic on the servitude, or restricting the ownership rights of the servient proprietor by tarmac or parking, amount to an undue burden on the servitude. That is because it is clear that servitudes must be exercised *civiliter*. This means that the servitude right "must be rendered as little burdensome to the servient tenement as is consistent with

its fair exercise" (*Sutherland* v *Thomson* (1876) 3 R 485 at 495 per Lord Gifford), or "so as to impose the least possible burden on the servient tenement, consistently with the fair enjoyment of this right by the dominant proprietor" (*Hill* v *Maclaren* (1879) 6 R 1363 at 1366 per Lord Justice Clerk Moncrieff), or "in the mode least disadvantageous to the servient tenement, consistently with full enjoyment" (*Alvis* v *Harrison* per Lord Jauncey at 67, citing Rankine, *Land Ownership in Scotland*, at page 417). As Lord Rodger of Earlsferry makes clear in *Moncrieff* v *Jamieson*, however (at paragraph 95), this doctrine regulates the exercise of a servitude right, once the right and its scope have been established: it does not determine the extent of that right. It follows that one does not decide whether a right of access does or does not exist by reference to the high volume of traffic which it is feared that the dominant proprietor might seek to drive across it, or whether he intends to widen the road. Rather, if such a right exists, the question is whether the actual or anticipated volume of traffic exceeds the fair exercise of the servitude right, or put another way, places an undue burden on the servient tenement. Ultimately, that is a matter for the Court to decide, in an appropriately framed action, having regard to the terms of the grant of servitude and all the circumstances of the case.

[49] Against this background, it seems to me to be clear that the wording of the grant in the present case can be broken down into three distinct parts: (i) those words which bear to create a servitude right of access ("the servitude clause"), (ii) those which bear to confer on the pursuers a right to determine an alternative access route ("the alternative route clause"), and (iii) those which bear to create conditions and reservations on the exercise of the right of access ("the development conditions clauses"). The last of these comprises two parts. The first relates to the volume and nature of use of the access, and the second to the repair and maintenance of the access road. Critically, I consider that on a proper reading of the grant,

and in the light of the considerations discussed above, the alternative route and development condition clauses are severable from the servitude clause. This conclusion is fatal to the pursuers' case.

[50] As regards the servitude clause, this as noted states that there is to be a

> "…heritable and irredeemable servitude right of vehicular and pedestrian access and egress at all times over the Servitude Area…"

Read in context, and having regard to the defined terms in the deed and the map attached to it, these words set out all that is necessary to create a valid servitude right of access: cf. Cusine & Paisley, paragraph 2.01. The dominant and servient tenements are identified, a recognised servitude right is specified, and the route is clearly described. Additionally, it is clearly expressed that access may be exercised by foot or vehicle, and is not limited to particular times of the day or week. In my view the words used are precise and free from ambiguity. On a plain reading they create a valid servitude right of access over the pursuers' land.

[51] The alternative route clause comprises the words:

> "…or such alternative route as the Burdened Owner shall determine acting reasonably".

This confers on the pursuers the right to nominate an alternative access route to that specified in the servitude clause. For the reasons explained above, the provision of such a right is not uncommon in conventional servitudes, and in principle is consistent with, but distinct from, the existence of the servitude right itself. That the route by which access is exercised may not be specified in a servitude deed, or may expressly be subject to alteration, does not mean that there is a want of precision in the servitude right itself. In my view there is nothing in the particular wording used in the alternative route clause in the present case which points to a different conclusion. Accordingly, it follows that even if there were to be

a lack of clarity or precision in this clause, this in itself does not render void, or liable to reduction, the right expressed in the servitude clause.

[52] In any event, I think it sufficiently clear that the clause confers on the pursuers the right to nominate an alternative access route over the servient tenement, and not a freestanding right to nominate an alternative route over other land generally, and still less over other land owned by the dominant proprietor. That the words "over the servient tenement" have not been expressly inserted by the drafter after the words "or such alternative route" does not to my mind obscure the fact that the clause was clearly intended to be read as if they were. Just as the presence of superfluous words in *Hunter* v *Fox* did not obscure the true meaning of the clause under consideration in that case, so neither is it obscured by the absence in this case of words obviously to be implied.

[53] In particular that is because I consider that to read the words of the clause in the manner suggested by the pursuers would lead to absurd consequences which could not have been intended by the parties to the grant. To empower the servient proprietor to nominate a route other than over the servient tenement would be in effect to empower him to discharge the servitude. Had that been intended it would have been expressly stated, and not effected by such a circuitous device. Furthermore, read in context, the intention is clearly to intend to permit the servient proprietor to nominate an alternative route for the exercise of the right of access created by the words of the servitude clause, not simply an alternative route in some more general sense. This necessarily implies that any alternative route must run over the servient tenement, and nowhere else. And in any event it certainly could not run over the dominant tenement, or over other land owned by the dominant proprietor, for the reason stated by Mr Wilson.

[54] That being so, the question of whether or not the alternative route selected by the pursuers in their deed of determination is reasonable or not is beside the point for present purposes. Given my construction of the servitude grant, however, it is plain that the route selected by them cannot be reasonable, simply because it was not a route open to them to select in terms of the servitude. However even if I was wrong, and it was open to the pursuers as a matter of construction of the deed to select the route which they did, subject to reasonableness, I would still not have allowed them a proof on this matter. That is because they do not seek such a proof. As Mr Campbell submitted, the pursuer's deed of determination is simply an adminicle of evidence in the present action. The pursuers are not seeking to argue, for example, that they are entitled to interdict against the defender from exercising access along the private road on the ground that they have reasonably nominated an alternative route. They have no averments or plea in law to that effect.

[55] Turning to the development clauses, being the remainder of the words of the grant, these bear to create a number of conditions on the servitude relating to its anticipated development use, both negative and positive. Again, and as discussed above, the setting out of such conditions is in principle consistent with, but distinct from, the underlying servitude right. They may regulate aspects of the exercise of the right, but they are not essential to the existence of the right itself. And the underlying right does not become void just because conditions on which it may be exercised may as a result of poor drafting be unclear or otherwise problematic. Again, the wording used in the particular clause in the present case does not suggest otherwise to me. In other words they are severable both in principle and in the circumstances of this case. Therefore even if pursuer's criticisms of any of the particular conditions were well founded, this would not have the consequence that the servitude itself was devoid of any legal effect and liable to reduction.

[56] In any event, I do not accept that the pursuers' criticisms are well founded. In particular, and as regards that part of the development clause which deals with the volume and nature of use, I do not consider that the grant of the servitude is 'suspensive' by being dependent on the grant of planning permission by the local authority. The servitude confers on the defender a right of vehicular and pedestrian access. This right became effective when the grant was registered. As Lord Jauncey said in *Alvis* v *Harrison* (at page 67)

> "…if the terms of the grant are clear and unambiguous the character of any actual possession and use at the time of the grant or thereafter is of no consequence. The grantee may make as much or as little use of his right as he pleases…"

In my view the terms of the grant in this case are clear and unambiguous. Accordingly from the time of registration of the grant the defender has been entitled to exercise access, subject to the requirements to do so for lawful purposes and *civiliter*. The reference to the servitude right being "sufficient to allow such residential development… for which planning permission may be granted" simply anticipates a potential *increase* on the use of the servitude over and above that which otherwise might reasonably be anticipated in the absence of such a reference. It is the amount of that potential increase which is dependent on the planning decision, not the servitude right itself. Absent any increase for this reason (for example, had planning permission been refused) the defender would still have been entitled to exercise access subject to the requirements just mentioned.

[57] Nor do I consider that the fact that the precise amount of the potential increase in use could not be known at the time of the making of the grant, and is dependent on the decision of a planning authority rather than the proprietors of the tenements, gives rise to such uncertainty and imprecision that the servitude itself is of no legal effect. The extent of use of a servitude in the future following its grant can never be predicted with certainty. The

more important question is as to the extent of use which can reasonably be anticipated. If the use goes beyond this, and places an undue burden on the servient tenement, then the remedy for the servient proprietor is interdict on this ground, not reduction of the grant of servitude for want of precision.

[58] As to the alleged imprecision in the phrase "shall allow the accommodation of all necessary site/works traffic for the whole of any construction period", I agree with Mr Wilson that the questions raised by Mr Campbell are ones for the court to determine. And I consider that the meaning of the phrase is tolerably clear. It means that the servient proprietors can anticipate that the right of access will be used by such vehicles as are required for the purpose of constructing such residential development on the Paddock as may be permitted by the local authority. I agree with Mr Wilson that it is clear that it is the servitude which 'allows' this. The 'whole of the construction period' means what it says. It is necessarily imprecise, but the legal protection for the pursuers is that to prolong this period beyond what could reasonably have been anticipated might in principle be to place an unfair and undue burden on the servitude, restrainable by interdict. As to 'accommodation', to my mind this anticipates an exceptional arrangement involving use of the access by construction traffic of a volume and type beyond what might ordinarily be envisaged merely by a right of 'vehicular' access. It cannot sensibly mean 'accommodate' in the sense of 'providing housing for', and nor do I consider that it can include a right to park any construction vehicles on the access road – the circumstances are quite different from those in *Moncrieff* v *Jamieson*.

[59] Turning to the repair and maintenance aspect of the development clause, Mr Campbell criticised the reference to this being "based on user". In my view this means simply that the amount of repair and maintenance which is to be carried out to the access

road is to be determined by the nature and extent of the traffic using the access. It anticipates that the greater the traffic, due to development, the greater the need for repair and maintenance. It means that the access road must be maintained to a reasonable standard sufficient to accommodate the nature and volume of traffic that is using it. I do not consider that greater precision is necessary or realistic in practical terms. True, the grant is silent as to whom is to be responsible for this repair and maintenance, but the consequence of this is that the responsibility will fall on the proprietor of the dominant tenement. Should he fail to maintain the access road in the condition just mentioned the servient proprietors would, in my view, be entitled to enforce compliance. It would then be for the court to decide, as matters of fact, the state of the road, the nature and extent of user, and whether the defender has carried out repairs and maintenance to the requisite standard.

[60] As to that part of the clause which refers to widening and upgrading of the road, what seems to me to be anticipated is that the local authority might, as a requirement of the grant of planning permission for residential development on the Paddock, stipulate that the access road should be improved ("…widening and/or upgrading of the Servitude Area is required at the instance of the Local Authority to facilitate any such development.") This is not, contrary to Mr Campbell's submission, giving a third party a right to widen the road. Any right to do so remains with the dominant proprietor. If anything, what the clause does is to *limit* this right beyond the broad constraints described in *Alvis* v *Harrison* by making any widening conditional on the local authority requiring it in order to facilitate development on the Paddock. And further, it might be said that the clause obliging the servient proprietors to agree ("…then the Burdened Owner shall agree thereto…") is similarly limited, that is, that absent a local authority requirement to widen and/or upgrade the road the servient proprietors are *not* required to agree to such works by the dominant

proprietor. Of course, it is hard to know on what basis the local authority could make such a requirement, particularly in circumstances where the road is a private road, and not subject to its control as a roads authority. But that is not a difficulty which requires an answer in the present case.

[61] Beyond this, the widening of the road would clearly involve it covering a greater part of the pursuers' land than at present. But it is clear from *Alvis* v *Harrison* and *Moncrieff* v *Jamieson* that this is not inconsistent with the existence of a servitude right of access, albeit that the extent of any alterations will be subject to there not being a resulting unfair and undue burden on the servitude. If therefore the local authority were, for example, to stipulate that it was a requirement of planning permission that the road be doubled in width, then I very much doubt that this would be permissible in terms of the servitude. However this is not a matter which I have to decide.

[62] As to the question of what are the "proper costs" arising from any upgrading ("…the proper costs or [sic] any upgrading and/or widening of the Servitude Area and any damage resulting therefrom shall be paid for by the Benefited Owner"), this ultimately would be a matter for the court to determine in an appropriately framed action, should dispute arise. However, if there is imprecision in the expression, then on the face of it this is liable to be construed against the interest of the dominant proprietor. It would clearly cover all the costs of construction directly involved in widening or upgrading the road, that is, the charges rendered by any contractors for carrying out this work, including any alteration to services or utilities. But the reference to "damage" may also be seen as covering pecuniary and/or non-pecuniary losses to the servient proprietors arising directly from the work, for example, compensation for loss of the use of a portion of their land, damage or alterations to boundary hedges or fences, and/or inconvenience arising from the carrying out of the works.

I stress again, however, that the precise scope of what might fall within the 'proper costs' of the work do not fall for determination in this case, any imprecision in the expression itself not being such as to render the servitude right itself void or of no legal effect. Put another way, and as Mr Campbell anticipated, I do consider that a common sense view of these matters suggests that some degree of flexibility and imprecision is to be anticipated.

Conclusion

[63] For all these reasons I will sustain the first plea in law for the defender and dismiss the action. I am conscious that this result will be disappointing to the pursuers who no doubt regard with antipathy the creation of a new housing development next door, together with the attendant increase in traffic past their homes both during and after construction. However in the end I consider that the robust approach of Lord Rodger at paragraph 86 of *Moncrieff v Jamieson* is the correct one. The pursuers, competently advised, must have anticipated in purchasing their properties, from a plain reading of the words of the grant, that some residential development of the Paddock might take place in the future. They must also have anticipated that this was dependent on a decision of the planning authority, but that any decision to permit development would likely lead to an increase in the use of the servitude. They must also have anticipated that any question of such an increase leading to undue burden on the servitude would have to be considered in the light of this, should the issue arise. If they were unhappy with any of this, they should have purchased elsewhere. If they were not made aware of it, it is to their legal advisers that they must look for redress. But none of this gives grounds for reduction of the servitude as sought in the present action.

Expenses

[64] There is no good reason not to apply the usual rule as regards expenses. The defender has been successful in this action and is entitled to the whole expenses of process, as agreed or taxed.