SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

[2022] SC DUN 5

DUN-A66-20

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

IAN MacALLAN AND ANOTHER

Pursuers

against

IAN ARBUCKLE AND OTHERS

Defenders

Pursuers: C MacColl, Advocate; Thorntons Law LLP
Defenders: Garrity, Advocate; TurcanConnell

Dundee, 23 March 2021

Introduction

[1] This dispute concerns whether a servitude right of pedestrian and vehicular access enjoyed by the pursuers over land belonging to the defenders also includes an ancillary right to use the "passing places" and verges of the roadway to the extent necessary to allow passing when two vehicles are using the single carriageway of road.

Background Facts and Circumstances

[2] The parties are neighbouring proprietors. The pursuers are the proprietors of Carphin House and the defenders are the proprietors of Lower Luthrie Farm. The disposition in favour of the pursuers dated 21 November 2016 (pursuers' production 2/1), which was incorporated into the pleadings, refers to a private access roadway coloured

green on plan no 1 and plan no 2 annexed and signed as relative to the disposition. On the west of the plans is Carphin House and on the east of the plans is Lower Luthrie Farm. Those plans show a roadway between the two properties coloured green within dotted lines, with white area on either side of those dotted lines.

[3] The pursuers seek declarator that they enjoy an ancillary right to use the "passing places" and the verges of the private access roadway over which they have a servitude right of access to the extent necessary to allow passing when two vehicles are using the single carriageway of road; and to interdict the defenders from obstructing the "passing places" and placing items likely to cause a hazard in the grass verges of the roadway. The defenders' position is that the pursuers have no rights outside the green area and the defenders seek their own declarator to prevent further litigation on this matter, which has already been the subject of a previous action.

Previous Action

[4] Some time ago, the pursuers raised an action for declarator and interdict against alleged interference of obstruction with their rights (DUN-A55-18). In that case, Sheriff Way held that the nature and extent of the pursuers' rights were established by the disposition in their favour and the mirror image deed that burdened the defenders' title. In the absence of any ambiguity or uncertainty, Sheriff Way held that there was no basis for examining past usage or other circumstantial evidence. The servitude right was restricted to the area coloured green on the plan.

[5] As far as ancillary rights were concerned, Sheriff Way accepted the defenders' submission that the leading authorities dealt with what a dominant tenement proprietor may do on part of the servient tenement properly subject to the servitude and were not

authority for invasive activity on adjacent land. In any event, Sheriff Way held that the pursuers' averments did not make out a relevant case for necessity or the lesser test of reasonably comfortable enjoyment.

[6] Consequently, Sheriff Way dismissed the action on 11 June 2019.

Current Action

[7] The initial writ in the present action was warranted on 28 February 2020. Due to the pandemic, it was not until 27 August 2020 that the record was closed and I appointed the cause to a debate. Again, due to the pandemic, the debate did not take place until 8 March 2021. In advance of the debate, both parties lodged full written submissions and a joint list of authorities, for which I am most grateful. Following a debate by WebEx on 8 March 2021, I made avizandum.

Authorities

[8] Parties lodged a joint list of authorities as follows:

- *Moncrieff* v *Jamieson* 2008 SC (HL) 1;
- *Stansfield* v *Findlay* 1998 SLT 784;
- *Alvis* v *Harrison* 1991 SLT 64;
- *Arnold* v *Britten* 2015 AC 1619;
- Lord *Burton* v *Mackay* 1995 SLT 507;
- *Ashtead Plant Hire* v *Granton Central Developments Limited* 2020 SC 244;
- *Johnston* v *Davidson* [2020] SAC (Civ) 22; and
- *Cusine and Paisley*, "Servitudes and Rights of Way" (1998), paragraphs 2.22, 2.47, 15.09 and 15.14.

Defenders' Submissions

[9] Counsel for the defenders adopted his note of basis of preliminary pleas and written submissions in full. This was not truly a question of ancillary rights of a servitude but rather an extension of a servitude right. The pursuers were simply unhappy with the disposition in their favour and there was no scope for extending the servitude beyond the area coloured green on the plans. The court did not have the power to do so.

[10] Cases dealing with parking as an ancillary right ought to be distinguished. In those cases, the ancillary right of parking was exercised within the extent of the servitude itself, ie on the burdened/servient area of the property. There was no authority for the proposition that ancillary rights could exist and be exercised in relation to areas unspecified outwith the extent of the burdened/servient area of the property, otherwise there was no certainty as to how much of the property was burdened.

[11] The Inner House held in *Stansfield* v *Finlay* 1998 SLT 784 that there was no authority for the proposition that, as a matter of law, the track over which the access is to be provided must be construed as including its verges.

[12] The cases of *Arnold* v *Britten* and *Ashtead* v *Granton* relied upon by the pursuers did not offer any assistance in interpreting a servitude right in a disposition. Those cases related to the interpretation of commercial contracts rather than property deeds. Section 14 of the Title Conditions (Scotland) Act 2003 indicated that real burdens should be construed in the same manner as other provisions of deeds which relate to land. That statutory provision took matters back to the case of *Alvis* v *Harrison*.

[13] The titles were clear and unambiguous. There was no question of the court requiring to hear any evidence of an alternative construction. Even if there were an ambiguity, that

would fall to be construed in favour of the defenders in order to narrow the scope of the servitude - *Cusine and Paisley* at paragraph 2.22.

[14] The case of *Davidson* v *Johnston* involved a servitude which was agreed to be unclear and ambiguous. It was found there was an ancillary right to park on the servient tenement. A two-stage exercise was indicated, namely: interpret the grant first and then the ancillary rights. That approach should be followed in this case.

[15] Although there was a common law right to maintain and possibly improve, that did not carry with it a right to access land outwith the servient tenement. It was not the only way that traffic could progress in both directions. At most, if the parties met exactly in the middle, then one had to reverse 300 metres. It was within judicial knowledge that if two cars could not pass on the road then one must reverse. It was the same on all single track roads. That did not mean that they must pass in an immediately adjacent area. On a long straight road, people allow others to pass before going on to the road.

Pursuers' Submissions

[16] Counsel for the pursuers submitted that the entire matter required to go to a proof before answer and the case pled was relevant for inquiry. This was an express grant so it needed to be interpreted like a contract and general principles of contract law applied, as seen in *Arnold* v *Britten* and *Ashtead* v *Granton*. Language was inherently ambiguous and it was necessary to look at the surrounding circumstances. In this case, the surrounding circumstances were that the defenders took great exception to the pursuers using Carphin House for weddings, particularly in the summer months prior to coronavirus.

[17] It was necessary to consider the overall purpose of the servitude, which was to allow access with a vehicle, not simply permission to be on land with a vehicle. If there was not an

ancillary right to use the passing places and verges, then there was no more than a right to be present on the road. To be a servitude right of access, it was necessary to be able to make progress by giving way to traffic. The facts and circumstances known at the time that the servitude was granted included that these areas were used as passing places. Evidence needed to be led about how to make progress down the road and use the passing places and whether six hundred metres was too far to reverse a car.

[18] Counsel for the pursuers submitted that it was possible to go beyond the area coloured green on the plans. It was similar to the right to support and maintenance. The pursuers sought to use the free land at the side of the road. It could not be used for storing metal barriers that obstructed the passing places because there was an ancillary right to move into those areas. The road in question was a single carriageway. It only worked if cars could pass each other. The nature of the road, its width and its length made it necessary for comfortable use and enjoyment to have passing places.

[19] The case of *Stansfield* was a very different case, where the parties were changing the routes of access. That was not being done here.

Decision

[20] The correct approach to the interpretation of the terms of an express servitude and the rights which stem therefrom was recently set out by the Sheriff Appeal Court in *Davidson* v *Johnston*. Sheriff Principal D L Murray explained that the correct approach is a two-stage process: (i) determine the nature of the right conferred by the express grant; and (ii) determine what ancillary rights are necessary for the comfortable enjoyment of the servitude.

[21] As far as the first stage of the process is concerned, 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 (*Alvis* v *Harrison* at p 67G).

[22] In this particular case, I am of the view that the title deeds clearly and unambiguously show that the servitude right does not extend beyond the area coloured green on the plans to the "passing places" or the verges of the road not so coloured. The plans show a roadway between the two properties coloured green within dotted lines, with white area on either side of those dotted lines. On the west of the plan, the green roadway joins a pink area. In that area, the whole of the roadway is coloured pink, rather than just the area between the dotted lines. There is a clear distinction between the areas of the roadway coloured green and pink in the plans. To paraphrase Lord Macfadyen in *Stansfield* v *Finlay* (p 788C), it is difficult to see how that can have been other than intentional: if it was intended that the pursuers should have access across the whole width of the roadway, including the "passing places" and the verges, then there would have been no point in indicating a narrower track coloured green. Applying *Alvis* v *Harrison*, in the absence of ambiguity, it is not necessary to hear evidence at a proof before answer about the character of possession and use of the servitude at the time of the express grant because it is of no consequence.

[23] Moving on to the second stage of the process, I accept that a consideration of the ancillary rights necessary for the comfortable enjoyment of a servitude will depend on the particular facts and circumstances in each case and therefore would normally require a proof before answer. However, I consider that this case is different to the cases where ancillary rights have been explored.

[24] In both *Moncrieff* v *Jamieson* and *Davidson* v *Johnston*, the ancillary rights were exercised within the geographical area benefitted by the servitude itself. By contrast, in this case, the pursuers seek to move their vehicles off the geographical area benefitted by the servitude and on to other areas of land belonging to the defenders which are not burdened by the servitude. I am in agreement with the defenders that the pursuers are seeking ancillary rights which are not truly ancillary to their servitude, but which are, in reality, an extension of the geographical extent of the servitude itself.

[25] In *Moncrieff* v *Jamieson*, Lord Scott indicated at paragraph 57:

> "The servient land in relation to a servitude or easement is surely the land over which the servitude or easement is enjoyed, not the totality of the surrounding land of which the servient owner happens to be the owner. If there is an easement of way over a 100 yard roadway on a 1,000 acre estate, or an easement to use for storage a small shed on the estate access to which is gained via the 100 yard roadway, it would be fairly meaningless in relation either easement to speak of the whole estate as the servient land."

[26] Applying Lord Scott's reasoning to this case, where the title deeds clearly and unambiguously show that the servitude right does not extend beyond the area coloured green, it would be fairly meaningless to hear evidence at proof before answer about the level of comfort that would come from using areas beyond the area coloured green on the plans and into the "passing places" or the verges of the road not so coloured. Consequently, I consider that the pursuer's averments are irrelevant insofar as they are directed towards ancillary rights.

Further Procedure

[27] Counsel for the defenders invited me to uphold the defenders' first and second pleas-in-law in the counterclaim; repel the pursuers' pleas-in-law in the counterclaim; grant decree as craved in the counterclaim; sustain the defenders' first and third pleas-in-law in

the principal action; repel the pursuers' pleas in law in the principal action; and dismiss the principal action. However, the pursuers' counsel indicated that whatever the outcome of the debate, there were other matters in dispute between the parties, which may be capable of resolution, and requested that a procedural hearing be fixed in due course.

[28] The interlocutor of 27 August 2020 narrates that the cause was appointed to a debate on a date to be afterwards fixed on the defenders' first, third and fourth preliminary pleas in the principal action and their second and third preliminary pleas in the counterclaim. This does not correlate with the defenders' submissions. In light of the confusion, I will therefore fix a procedural hearing to determine further procedure.