FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 46
A88/10

Lord President
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

MAREN ANN MURCHIE RUDDIMAN

Pursuer and Respondent

against

IAIN COLIN CRAIG HAWTHORNE AND OTHERS

Defenders and Reclaimers

Pursuer and Respondent: Lindsay QC; Addleshaw Goddard LLP
Defenders and Reclaimers: Sandison QC; Brodies LLP

11 August 2020

Introduction

[1] The pursuer owns Bieldside House, North Deeside Road, Aberdeen. Her title covers the area coloured red[1] on the title plan annexed to this opinion, together with the horseshoe shaped access driveway leading from the road and both hatched and tinted blue on the plan.

[1] It appears pink as reproduced.

The first and second defenders are the owners of Bieldside Lodge, which is tinted yellow on the plan. For reasons which will become clear, the yellow area is known as Site 1. The first and second defenders have a right of access over the driveway to reach Site 1. The third to fifth defenders own an area of vacant ground, which is tinted brown[2] on the plan. This area is known as Site 2.

[2] The action concerns whether the pursuer is entitled to a declarator that the right of access is restricted to one for the benefit of the first and second defenders and their successors in title of Site 1 and is to be exercised by them only in so far as is necessary for access to and egress from that Site. The pursuer also seeks interdict against all the defenders from using the driveway as a means of access to Site 2 or for any purpose other than is necessary for access to and egress from Site 1 and otherwise from trespassing on the red area (Bieldside House) for the purpose of accessing Site 2. At a Procedure Roll debate, the defenders attempted to have the action dismissed. The Lord Ordinary rejected that motion in favour of allowing a proof before answer. The question is whether she was correct to do so.

The Titles

[3] In 1990 the first defender purchased Bieldside House and took title to the property in the name of himself and his wife, who is the second defender. At that time the House consisted of all the areas of land now under consideration; that is to say those areas which are now tinted red, blue, yellow (Site 1) and brown (Site 2) on the title plan. Access to the House from North Deeside Road was taken along the horseshoe shaped driveway. There

[2] It appears red as reproduced.

was a smaller access lane, known as Mill Drive, which is also hatched and tinted blue on the plan and which leads from the Road to a garage. This access is used by the owners of two other properties. A third access was by a garden gate on the south side leading from the Deeside public walkway, which is a former railway line. This gate now spans the boundary between Sites 1 and 2.

[4] Shortly after the purchase, the first and second defenders sold the red area, which includes the House, to the pursuer's predecessors in title. They retained ownership of the remaining ground which was divided into Sites 1 and 2. They built Bieldside Lodge on Site 1 and moved into it in 1993. The disposition to the purchasers of the House contained a reservation:

> "In favour of ourselves [ie the first and second defenders] and our successors in title to the … subjects marked 'Site 1' on the … plan … a right of pedestrian and vehicular access over the driveway leading to Bieldside House … shown coloured blue on the … plan … in so far as necessary for access to and egress from Site 1 …".

[5] There was no right over the driveway to access Site 2; there being the alternative routes *via* Mill Road and, for pedestrians only, by the southern gate.

Dispute background

[6] From 1995 onwards, the first and second defenders lodged a number of applications for planning permission for a residential development on Site 2. These were initially unsuccessful. Meantime, the pursuer had bought the House in 2004. In 2005, Site 2 was conveyed by the first and second defenders to their children, namely the third to fifth defenders. The first defender raised an action against his solicitors for negligence based on

the absence of an appropriate access to Site 2 (*Hawthorne* v *Anderson* [2014] CSOH 65). This too was unsuccessful.

[7] The present action was raised as long ago as February 2010. It was sisted the following month "for negotiations". In the same month, the defenders made a further application for planning permission; this time proposing access along the driveway into Site 1 and from there to Site 2. This application was again unsuccessful. A further application in 2012 proposed the same access and a semi-subterranean house on Site 2. In July 2012 outline planning permission for this was granted.

[8] On 13 November 2015 the pursuer secured *interim* interdict. In January 2016 the action was again sisted, this time to explore settlement. On 13 January 2017 the first defender applied for detailed planning permission for the house, but this was refused. An appeal to the Scottish Ministers followed. This was not successful, partly because the proposed method of construction might have affected the historic boundary wall and gazebo of Bieldside House. In March 2019 the first defender excavated inspection trenches with a view to exposing the foundations of the wall to see whether it might be safeguarded in any future development proposal. A further application for planning permission was refused on 18 November 2019. The appeal against that refusal is extant.

[9] The pursuer avers that she is reasonably apprehensive that the defenders are planning to develop Site 2 and to use the driveway as an access to it through Site 1. She maintains that any such development could only take place if there were access and egress using the driveway. The planning proposals included car parking, apparently for the use of Site 2, on Site 1. The pursuer's apprehension stemmed from the continued efforts by the

defenders to develop Site 2, having already applied for planning permission on five separate occasions and relatively recently excavated the inspection trenches.

[10] The defenders accept that they intend to develop Site 2 for residential purposes. They accept also that the purpose of the excavation was as averred by the pursuer. In resisting the conclusions, the defenders point to the absence of any existing planning permission. The pursuer therefore had no basis for any apprehension that development would occur in the foreseeable future. The defenders' answers continue:

> "If the proposed dwelling house were to be constructed, no vehicular access would be taken over the Access Drive, through the 'Yellow Area' and into the 'Brown Area'. All vehicular access taken over the Access Drive would, as at present, be for the purpose of parking on the 'Yellow Area'. The servitude right … does not prevent any person, having driven over the Access Drive in order to arrive at and park on the 'Yellow Area', from thereafter proceeding on foot to the 'Brown Area'. The respective owners of the 'yellow area' and the 'brown area' are free, as an incident of their respective rights of ownership, to permit free passage to and from those areas to whomsoever they choose. For the avoidance of doubt, the defenders accept … that the Access Drive could not lawfully be used for the purpose of facilitating the construction of any development on the 'Brown Area', even if permission for any such development existed, and thereby judicially undertake not to make any such use of it."

The Lord Ordinary's opinion

[11] The Lord Ordinary observed that there was no real divergence of view on the applicable law; that depending upon the principle set out in *Irvine Knitters* v *North Ayrshire Co-operative Society* 1978 SC 109. This was that a dominant tenement cannot increase the burden upon a servient tenement and, in particular, communicate the benefit of a servitude to a non-dominant tenement. The pursuer was entitled to rely on certain inferences which could be drawn if the facts pled by her were proved. First, the defenders' desire to build on Site 2 remained undiminished. The site had no obvious access route for the purposes of

construction other than by using the driveway. In these circumstances, it could be inferred that the defenders propose to use the driveway for construction purposes; that is to form a bridge from the driveway to Site 2, contrary to the principle in *Irvine Knitters*. The defenders' averments suggested that their view of a lawful use of the driveway included construction vehicles being brought onto Site 1 by means of the driveway and materials and personnel being transferred to Site 2 as and when required.

Submissions

Defenders

[12] The defenders' fundamental proposition was that, in terms of the *Irvine Knitters* principle, there was no excessive use of the servitude if the defenders used the driveway to access Site 1 for a lawful purpose and then moved from Site 1 to Site 2. They were entitled to use Site 1 as a car park for Site 2, because the use of the site as a car park would not be a breach of the principle. The terms of the interdict sought were therefore inept. The formulation which was used by the pursuer wrongly suggested that it was impermissible under any circumstances for someone who has used the driveway to go to Site 1 to progress to Site 2. In relation to trespassing upon the red area of Bieldside House, there were no averments upon which a reasonable apprehension could be founded (*Inverurie Magistrates* v *Sorrie* 1956 SC 175 at 179, 181, 183 and 184-5).

[13] A proof would serve no purpose. The inference that the defenders wished to build on Site 2 was a matter of admission. The suggestion that the defenders' desire to build, coupled with an inability to do so other than by using the driveway for construction traffic, was insupportable in that it did not establish the defenders' intention. There was no extant

planning permission and the defenders had undertaken not to use the servitude right "for the purpose of facilitating the construction of any development on Site 2". The conclusion for declarator simply stated the scope of the servitude right and served to resolve no live practical issue. It was thus incompetent (*Macnaughton* v *Macnaughton's Trustees* 1953 SC 387 at 392). It was not for the court to rewrite the pursuer's conclusions. A proof could achieve nothing other than delay and expense.

Pursuer

[14] The pursuer countered that the terms of the interdict were no wider than could properly be granted according to *Irvine Knitters* v *North Ayrshire Co-operative Society* (*supra*). It was clear from *Irvine Knitters* (at 117, 120-122) that the defenders were not entitled to use the access to the dominant tenement (Site 1) to obtain access to other subjects (eg Site 2). They could not increase the scope of the right of access and use it to secure access for persons or goods going to subjects contiguous to the dominant tenement "by using the dominant tenement merely as a bridge between the end of the lane and the non-dominant subjects". The interdict, which was sought by the pursuer, did not prevent the defenders from using the driveway for the *bona fide* purpose of access to and egress from Site 1, which was necessary for the reasonable and legitimate enjoyment of that area. However, all artificial expedients that used Site 1 as a means of accessing Site 2 were prohibited, because their purpose would be to gain access to Site 2, when that was not necessary for access to and egress from Site 1. The interdicts would prevent the defenders from using Site 1 as a mere "bridge" for the purposes of securing access to Site 2. This would include prohibiting the use of the driveway for the transportation of construction materials and personnel.

[15] If there was a difficulty about the precise terms of the interdict, that could be adjusted after proof (*Retail Parks Investments* v *Royal Bank of Scotland* 1995 SLT 1156 at 1160; *Webster* v *Lord Advocate* 1985 SC 173 at 187; *Esso Petroleum Co* v *Hall Russell & Co* 1988 SLT 874 at 886).

[16] In order to establish reasonable apprehension, it was sufficient that there was a threat of excessive use in the future (Burn-Murdoch: *Interdict* at 86; *Allseas UK* v *Greenpeace* 2001 SC 844 at 846). The undertaking offered by the defenders was of limited scope and did not adequately address the pursuer's apprehension. The undertaking was that the defenders would not make any unlawful use of the driveway, but there was a dispute as to what was a lawful use.

[17] There was a relevant case not only in relation to interdict but also in support of the conclusion for declarator. The question was whether the declarator was designed to achieve some practical result (*Wightman* v *Secretary of State for Exiting the EU* 2019 SC 111 at para [22]). The court was not being asked to determine a hypothetical or academic question. There was a dispute between the parties and the declarator was designed to achieve the same practical result as the interdict. Once again, if a problem arose, the terms of the declarator could be adjusted after proof.

Decision

[18] The use of the driveway to access a car park, which was built on Site 1, with a view to onward travel to Site 2 is an excessive, and thus unlawful, use of the servitude right of access.

[19] The facts in *Irvine Knitters* v *North Ayrshire Co-op* 1978 SC 109 are somewhat different from those presently under consideration. Nevertheless, the opinions of the Lord President (Emslie) and Lord Cameron, with both of whom Lord Johnston agreed, set out the law with customary clarity. The Lord President said (at 117):

> "… the defenders as proprietors of the dominant tenement are entitled to use the lane for traffic of all kinds which is intended to serve, and which in fact serves, any lawful purpose to which they may choose to devote the dominant subjects. …[T]he defenders are entitled to obtain access to the dominant tenement in connection with the purposes for which they elect to use it and to facilitate the carrying on of those purposes. What they may not do, however, is to use the way, or permit its use by others, to obtain access to subjects other than the dominant tenement, whether or not they happen to be heritable proprietors of those other subjects. They may not, in short, increase the scope of the right of access, and in particular they may not use the way for the purpose of securing access for persons or goods to subjects contiguous to the dominant tenement by using the dominant tenement merely as a bridge between the end of the lane and the non-dominant subjects. …[A] right of access in favour of one heritable subject may not be used to secure access, *via* that dominant tenement, to a contiguous subject in the same or different ownership in order to serve the purposes of that contiguous subject."

[20] Lord Cameron echoed this (at 121) by agreeing with the pursuers that:

> "…the proprietor of a dominant tenement cannot at his own hand increase the burden laid upon the servient tenement and in particular "communicate the benefit" of the servitude to a non-dominant tenement so as to extend the right to the non-dominant tenement."

He adopted the *dictum* in *Williams* v *James* (1867) LR 2 CP 577 (Bovill CJ at 580) that:

> "… where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a *bona fide* or a mere colourable use of the right of way."

Lord Cameron cited *Harris* v *Flower* (1904) 74 LJ Ch 127 in which it was said (Vaughan Williams LJ at 132) that:

> "... a right of way of this sort restricts the owner of the dominant tenement to the legitimate use of his right; and the Court will not allow that which is in its nature a

> burthen on the owner of the servient tenement to be increased without his consent and beyond the terms of his Grant. The burthen imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of the Grant."

The dominant tenement cannot, in Lord Cameron's view, be used as a bridge over which persons could pass, as of right, across the servient tenement with the intention of going to somewhere other than the dominant tenement.

[21] The defenders' use of the dominant tenement (Site 1) as a means of allowing persons or goods, which are destined for Site 2, to pass over the driveway on the servient tenement (the red area) is not permitted under the principle set out in *Irvine Knitters*. The use of a device, whereby a car park is created on the dominant tenement and to which the persons or goods would initially be going, does not alter matters. The dominant tenement would still be being used as a bridge to a non-dominant tenement. The question is: at the point when the persons or goods enter the driveway, are they destined *in bona fide* for the dominant tenement (Site 1) or a non-dominant tenement (eg Site 2)? If it is the latter, the use of the servitude is unlawful because it increases the burden on the servient tenement, whereby its owners are not merely allowing access across their land to the dominant tenement but to a third tenement beyond it and which has no equivalent right.

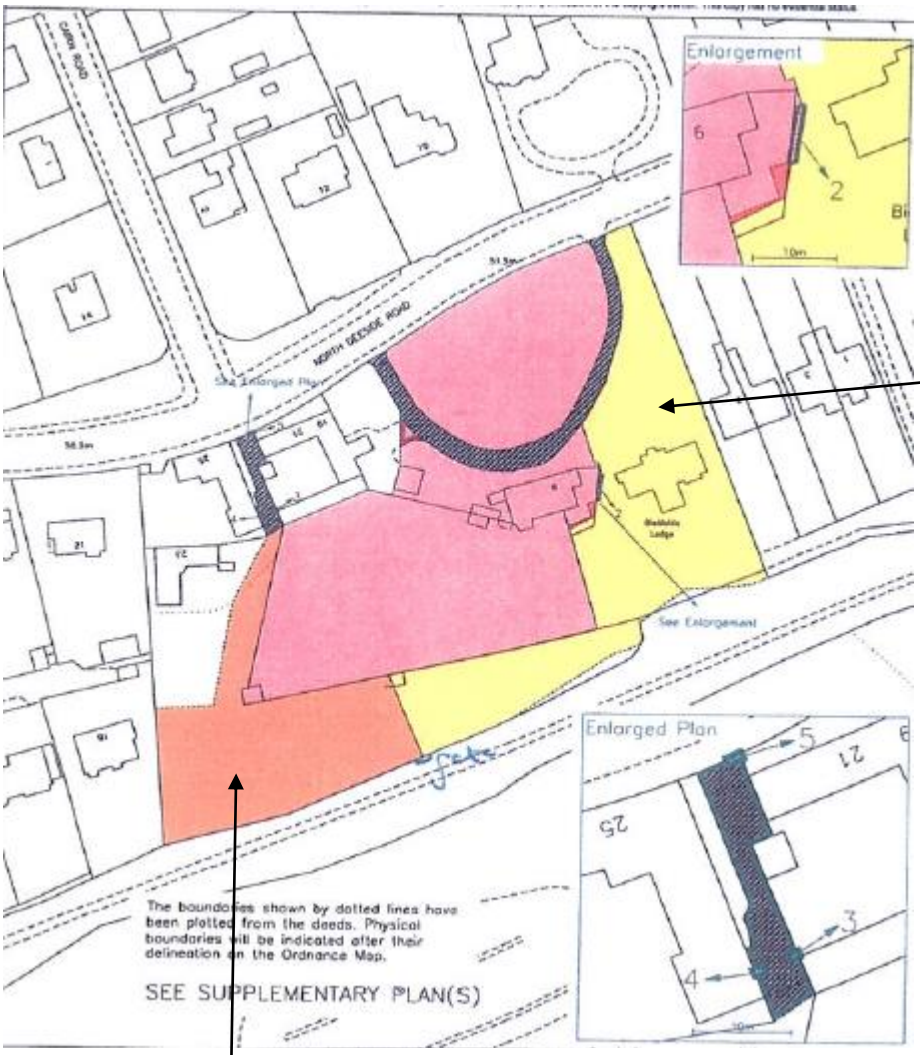
[22] The pursuer's conclusions appear apt to cover the situation envisaged by her averments. She is seeking a declarator that the use of the driveway is restricted to pedestrian and vehicular access for the benefit only of the dominant tenement and is exercisable only by it or those who, with the dominant tenement's consent, seek access to, or egress from, the dominant tenement. The interdict seeks to protect the pursuer's property in so far as the defenders may attempt to use the driveway for access to Site 2. The meaning of

the interdict is clear. It would prohibit the defenders' apparent planned use. If, after the proof before answer, the Lord Ordinary considered that a more limited declarator or interdict were appropriate, the precise terms of the decree could be adjusted by the court (*Webster* v *Lord Advocate* 1985 SC 173, LJC (Wheatley) at 187; *Esso Petroleum Co* v *Hall Russell & Co* 1988 SLT 874, Lord Jauncey at 886).

[23] The pursuer's reasonable apprehension is amply vouched by the defenders' repeated planning applications which propose access to Site 2 by using, *inter alia*, access over the driveway (including for construction purposes) and taking steps to remedy the problem which was identified in the previous planning process (ie the threat to the boundary wall). The defenders' undertaking does not assist. It is carefully drafted in such a manner as does not resolve the real issue between the parties; *viz*, the scope of lawful use of the servitude right. It merely states that the defenders will not make any unlawful use of the driveway, but it does not accept that the use, which they appear to be envisaging is unlawful.

[24] The court agrees that a proof may serve little purpose. That is not because the issue is academic or hypothetical. It is because, on the admitted facts, it is difficult to see what valid defence there is to decree in terms of the conclusions. However, the pursuer did not at the Procedure Roll move the court to sustain her first plea-in-law and to grant decree *de plano*. Now, in the absence of a motion for summary decree, the case must proceed to the appointed diet of proof.

[25] The reclaiming motion is refused.


Enlargement
6
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NORTH DEESIDE ROAD
See Enlarged Plan
See Enlargement
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5
21
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The boundaries shown by dotted lines have been plotted from the deeds. Physical boundaries will be indicated after their delineation on the Ordnance Map.
SEE SUPPLEMENTARY PLAN(S)

Site 1

Site 2