SHERIFF APPEAL COURT

[2017] SAC (Civ) 12
SAC/2017/PAI-A66-15

Sheriff Principal D L Murray(Chair)
Sheriff Principal M Lewis
Sheriff A L MacFadyen

OPINION OF THE COURT

Delivered by Sheriff Principal D L Murray

JOHN ERIC DUNLEA

and

LOUISE ROHAN

Pursuers/Appellants

V

JAMES EDWARD CASHWELL

and

ALYSON WENDY CASHWELL

Defenders/Respondents

29 March 2017

[1] The pursuers are owners of heritable property at Flax House, Calderbank Mill, Lochwinnoch ("Flax House subjects"). The title is registered in the Land Register of Scotland under Title Number REN 46779. The Flax House subjects are bounded to the east and south by the River Calder and to the west by Calderbank Mill, Lochwinnoch ("Mill House subjects"). The Mill House subjects are owned by the respondents and the title is

registered in the Land Register of Scotland under Title Number REN 128124. Both properties are separated from the public road and require to take access across, firstly a private road which is shared with other proprietors in the area, and thereafter a common access road which crosses over the Mill House subjects and part of the Flax House subjects. The title to the Flax House subjects provides for a servitude right of access for both pedestrian and vehicular traffic over the common access road crossing over the Mill House subjects. Maintenance of the common access road crossing over both subjects is shared equally between the proprietors of both properties. The Flax House subjects' title also provides that neither of the proprietors of these properties:

> "shall use the said common access road for any vehicles other than vehicles required in connection with normal residential use of the said plot or area of ground in this title, or the said subjects lying immediately to the west of the said plot or area of ground in this title."

The Flax House subjects have a separate servitude right of access over the Mill House subjects for the purpose of maintenance and repair of the Flax House subjects and a further, or separate pedestrianised right of access over another small area of ground. Burdens giving effect to the servitude rights are set out in the title to the Mill House subjects.

[2] The appellants as heritable proprietors of the Flax House subjects are benefited proprietors in relation to the right of servitude. The respondents as heritable proprietors of the Mill House subjects, are the burdened proprietors, the right of access existing over their subjects. In the earlier authorities they would be referred to respectively as the "dominant" and "servient" proprietors.

[3] On 12 March 2014 the appellants obtained planning consent from the local planning authority to develop a derelict mill building standing within the Flax House subjects, as a two-storey dwelling house with three parking spaces, entrance terraces and a garden area.

The appellants raised the present action with a view to clarifying the extent of the servitude right of access. The declarator sought by the appellants was amended at the debate and was further amended before this court. It is now sought in the following terms:

> "To Find and Declare that the pursuers as heritable proprietors of the Flax House Title Number REN 46779 and as the Benefited Proprietor the servitude rights over Title Number REN 128124 specified in craves number 2 and 3 hereof are entitled to exercise the said servitude rights as follows: by the pursuers' tradesmen and builders or their employees, together with their tools, plant & machinery, gear and effects having pedestrian and vehicular access to the Flax House Title Number REN 46779 over the access road or drive for the purposes of the development of the Flax House in accordance with the Renfrewshire Council planning consent reference number 13/0902/PP dated 20 March 2014."

The appeal turns on the correct interpretation to be given to the servitude which is stated as follows:

> 'A servitude right of access for both pedestrian and vehicular traffic over the part of the common access road tinted brown on the said plan; but declaring that the maintenance of the said common access road tinted brown and blue on the said plan shall be shared equally between the proprietor of the subjects in this title and the proprietor of the subjects lying immediately to the west of the said plot or area of ground in this title and further declaring that neither the proprietor of the subjects in this title nor the proprietor of the said subjects lying to the west of the said plot or area of ground shall use the said common access road for any vehicles other than vehicles required in connection with normal residential use of the said plot or area of ground in this title or the said subjects lying immediately to the west of the said plot or area of ground in this title.'"

The subjects "in this title" are the Flax House subjects and the subjects "lying immediately to the west of the said plot or area of ground in this title" are the Mill House subjects. The focus of the appeal is therefore whether the words:

> "for any vehicles other than vehicles required in connection with normal residential use of the said plot or area of ground in this title or the said subjects lying immediately to the west of the said plot or any of ground in this title."

correctly interpreted entitle the appellants to the amended declarator which they now seek.

[4] The sheriff's conclusion was that the words "normal residential use" impose a restriction on the appellants' right of access. He found that the proper construction of these

words does not extend to a right of access for construction traffic to redevelop the derelict mill into a new residential building which will subsequently provide for more residential traffic over the access road. He accordingly refused the appellants' crave for declarator. In doing so, he accepted the words "normal residential use" to be clear and unambiguous. The appellants and the respondents both agreed before this court that the words were clear and unambiguous although they disagree as to their interpretation. The parties do not therefore consider it is necessary to have regard to the surrounding circumstances and submit that the court should determine the case on whether the sheriff was correct in his interpretation of the words "normal residential use."

[5] The parties were also agreed that if the court concluded that there was ambiguity in the words used and regard did indeed have to be had to the factual background that a proof was not required as the following matters were agreed: the building the appellants propose to develop is an old mill, which has never been a residential property and has been derelict for many years; both the Mill House subjects and the Flax House subjects have been used for residential purposes since the 1970s; the servitude containing the words "normal residential use" was created as a burden over what is now the respondents' property (the Mill House subjects) by a disposition registered on 24 August 1987; at the time the servitude was created Flax House itself was used as a residential property and the mill was not; and the planning permission which was now granted in favour of the appellants was not in place in 1987.

Submissions for the appellants

[6] Under reference to *Alvis* v *Harrison* 1991 SLT 64, and *Hunter* v *Fox* 1964 SC (HL) 95 the appellants accepted that the question of construction is approached by asking whether a

reasonable man with a competent knowledge of the English language could have any real doubt about the meaning of the servitude. If the meaning is clearly apparent then that satisfies the test of strict construction. They further submitted that the scope for considering context is limited because conveyancing deeds are to be construed by their terms, as a succeeding owner has no knowledge of the intention of parties at the time of the creation of the burden and can only rely on the written record.

[7] The appellants submitted the phrase "in connection with normal residential use of the said plot or area of ground in this title, or the said subjects lying immediately to the west of the said plot or area of ground in this title" is not ambiguous in its meaning. The benefitted property is clearly identified as the whole extent of the Flax House subjects and is not restricted to the existing house. The expression "in connection with" means "linked to" or "related to" in terms of the definition in the Oxford English Dictionary. The wording permits and envisages access for vehicles, provided the use by those vehicles is linked or related to making "normal residential use" of the whole extent of the Flax House subjects. They submit the restriction; "normal residential use" is directed to the use of the subjects: that they be used for residential purposes. Such use being distinguished from commercial or industrial purposes. Access by many types of vehicle could be required for the normal residential use of the Flax House subjects such as: the owners' personal vehicles; large vehicles associated with a house move; a scaffolding truck required to allow a builder safe access to the roof; a cement lorry for the floor of a new stand-alone garage; a royal mail delivery vehicle, a fire engine, an ambulance. The appellants also submitted that the servitude permits access to carry out any repairs to any buildings on the subjects so long as that work is for the purpose of making normal residential use of the building. Further the construction of an additional residential property to replace the derelict mill falls within

normal residential use and access for construction traffic is ancillary to such use and is permitted by the terms of the servitude.

[8] If the court was to conclude, contrary to the decision of the sheriff, that the words were ambiguous the appellants submitted both the Flax House subjects and Mill House subjects obtain a benefit from the restriction to residential use. Given it was known when the servitude was granted that a derelict mill building remained within the Flax House subjects, it was reasonably foreseeable that this building (which is now the subject of the planning consent) would not be left to fall into disrepair and there was a potential for it to be redeveloped. The construction for which appellants argued, prevents the conversion of this property to any purpose other than for residential use, thereby maintaining the amenity of the Mill House subjects. The appellants submitted there is however nothing in the context when the servitude was granted to suggest it was intended to prevent any redevelopment whatsoever of the remaining mill building.

[9] The appellants proposed various scenarios: converting the existing Flax House into flats, building a granny flat, building an adjacent granny bungalow, rebuilding the Flax House if it were destroyed by fire. They submitted that for all of these developments the servitude would allow the access for which they seek declarator. Although the practical incidence of the burden is varied, this is not material because the true quality of the burden is not varied.

[10] In relation to the word "normal" the appellants submitted this refers to an ordinary conventional use of the benefitted property for residential use, rather than for example, as a residential care home or bed and breakfast business which would not be "normal" in the sense of being typical or standard, residential use. They also submitted the words "in connection with normal residential use" do not mean that the use has to be incidental to

residential use as they submitted this imposes a further restriction which is not on the face of the deed.

[11] Finally, they contended that the sheriff confused uses which are genuinely ancillary to normal residential use and that his discussion is inconsistent, contradictory and incorrect in so far as he suggests that the benefitted property is only the existing house.

Submissions for the respondent

[12] The respondents submitted that the development of the derelict mill building will have the effect of increasing the burden on the servient tenement and referred to Bell's *Principles* para. 986 quoted in *Keith* v *Texaco Limited* 1997 SLT (Lands Tr) 16 at 18:

> "The benefit of servitude is limited to the dominant tenement; and is confined to the necessary use of that tenement as fairly in contemplation of the parties in creating the servitude"

and then in paragraph 988:

> "Nor can the owner of the dominant [tenement] enlarge his use so as to increase the burden on the servient, unless in so far as such change of use may have become necessary in order to make the servitude effectual to the extent originally granted."

Therefore what the sheriff has correctly taken from the authorities is the proposition that where an express servitude is created for a purpose which the granter had in mind at the time, the servitude is restricted to that purpose, and anything else is an increase on the burden which the burdened property is not bound to accept.

[12] The respondents contended that the sheriff is correct in his interpretation and that normal residential use extends only to the usual activities undertaken on a day to day basis by persons residing upon a property, and their visitors and guests. The construction traffic going to and from the appellants' subjects for the purpose of construction of a residential property not previously in existence does not fall within the confines of normal residential

use. The word "normal" is not ambiguous and supports the interpretation they seek, for the reasons set out by the sheriff.

[13] In the event the court considered there to be an ambiguity, they submitted that having regard to the situation on the ground at the time the burden was established also supported this interpretation, as normal is used in assessing the volume of usage anticipated at the time of grant and is not compatible with permitting access for construction traffic to form a building which did not exist at the time. Similarly, they submitted that "normal residential use" relates to the residential use in place at the time of the grant of the servitude.

Discussion and decision

[14] The court is required to interpret the express words of the grant of servitude which is set out in full in paragraph 3. We conclude that the authorities dealing with servitudes acquired by prescription to be of less assistance in that exercise. However in *Carstairs* v *Spence* 1924 SC 380 which involved a right established by prescription Lord Blackburn states at 394: "where a servitude is constituted by express grant … the words of the grant provide the measure of the right granted." In *Alvis* v *Harrison* 1991 SLT 64 Lord Jauncey stated at page 67:

> "It must be borne in mind that the issue to be decided depends first and foremost upon the construction of the grant of servitude upon which the appellant relies. It may be that in order to determine the true construction of an express grant it is necessary to have regard to the surrounding circumstances prevailing at the time, but 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."

Commenting on this passage in *Servitudes and Rights of Way* at 15.09 Cusine and Paisley note this fails to take account of the possibility that subsequent exercise of the servitude which is tolerated by the servient proprietor may constitute a variation of the legally-implied

servitude conditions. In the instant case however there is no suggestion of such action and the matter is to be dealt with as one of interpretation. The professors at 15.14 also discuss the difference in construction where there is ambiguity: they suggest this will not render the deed invalid, but the construction to be preferred is that which is least burdensome to the servient tenant. In cases where there is no ambiguity they suggest that the principle of strict construction does not mean the most strict and narrow construction possible is put on the words used by the grant of servitude, so that the normal meaning of the words is unnaturally constricted. Rather the words should be given a reasonable and fair construction.

[15] In *Hunter* v *Fox 1964 SC (HL) 95* Lord Reid, although dealing with the creation of a negative servitude at page) 99 says:

> "there arises the question of what is meant by a strict construction. I can think of no stricter method of construction – and none was suggested in argument – than to ask whether a reasonable man with competent knowledge of the English language could have any real doubt about the meaning of the provision read in the context of the disposition."

In *Carstairs* v *Spence* 1924 SC 380 the Lord President observes at page 386:

> "Private ways constituted by writing may undoubtedly be made subject to close restriction with reference to the purposes of the traffic which is carried by them. Such restrictions are rigorously enforced – *Cronin* v *Sutherland* (1900) 2 F. 217"

There the right of passage was:

> "limited to the use thereof by carts drawn by horses and laden with fuel or manure allenarly for the use of the possessors of the dominant tenement and that as for an access to the dominant tenement."

The court rejected that the servitude gave right to remove the contents of an ash pit in terms of the servitude.

[16] The sheriff here determined that he could accede to the parties' submissions that the case could be resolved at debate because it turns on construction rather than the establishment of a factual matrix. He also noted that parties had agreed sufficient factual

information relevant to the question of the interpretation of the servitude should the terms of the servitude be read as being ambiguous. Having referred to *Hunter* v *Fox* and *Alvis* v *Harrison* he identified the question to be asked looking at the words to be interpreted is

> "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".

The sheriff required to establish whether the phrase

> "shall use the said common access road for any vehicles other than vehicles required in connection with normal residential use of the said plot or area of ground in this title"

entitles the appellants to the declarator which they sought, which they amended before this court. The sheriff at para. 27 under reference to the speech of Lord Jauncey in Alvis v Harrison 1991 SLT 64 stated:

> "The natural reading of that statement of the law is that where a right of access is granted with restrictions the rights may only be exercised within the confines of those restrictions."

We agree with that proposition. The sheriff then discussed the use of the word "normal" in the context of "residential use." He narrated the definition in the Shorter Oxford English Dictionary:

> "constituting or conforming to a type or standard; regular usual, typical; ordinary, conventional."

He then continued:

> " In my view it is that definition which a reasonable man with a competent knowledge of the English language would bring to a construction of the meaning of the provision read in the context of the titles to the respective properties..."

He concluded:

> "However in this case there is the qualification of the word "normal". This causes a person with competent English, relying on the dictionary definition of "normal", to reflect that that precludes the use of the residential property for development purposes."

He further explained that he found the restriction arising from the use of the word "normal" to exclude the suggestion that the development is ancillary to a residential occupation in the sense which that was used in *Colquhoun's CB* v *Glen's Trustee* 1920 SC 737. We agree with the sheriff when he determined that use *civiliter* does not arise directly in this case where the question to be answered is the extent of the servitude.

[17] The critical finding of the sheriff is in paragraph 45 where he stated:

> "It seems to me a proper reading that 'normal residential use' means use of the residential property which was in existence at that time and the granter of rights could not have contemplated the use which the pursuers now propose. I see force in the defender's contention that "normal residential use" could not mean for the construction of a property which did not exist at the time of the creation of the servitude, nor use by persons who might reside in non-existent property once the property was created. Accordingly, in accordance with the principal of strict construction and the presumption in favour of freedom of the burdened property, then if the title deeds were to provide for this then they ought to have said it,"

[18] We conclude for reasons we shall explain that the sheriff was in error when he found that the words were not ambiguous and a strict construction fell to be applied.

[19] The sheriff, explained at para. 45, that if he was wrong to conclude that there is no ambiguity in the words used, having regard to the factual matters which were agreed by the parties he would have reached the same view; namely that a proper reading of "normal residential use" means the use of the residential property which was in existence at the time and the granter of the rights could not have contemplated the use which the pursuer now proposes.

[20] Simply looking at the definition which the sheriff quotes from the Shorter Oxford English dictionary, there is a doubt as to which of the definitions of "normal" is to be applied, or indeed, what any of these definitions add to the words "residential use". We also hypothesise whether the addition of "normal" is but infelicitous use by the draftsman as

with the use of "present" in *Hunter* v *Fox*. In these circumstances we cannot accept the view of the parties and of the sheriff that there is an absence of ambiguity. Accordingly we do not accept that it is possible to resolve the interpretive question by a strict construction of the words "normal residential use". Rather consideration must be given to the surrounding circumstances. With some hesitation, given the parties' joint position that the matter can be resolved without proof on the basis that the factual matrix is agreed, we propose to determine the appeal taking these matters into account. The factual matters being agreed are as we set out in paragraph 5.

[21] Having found there to be ambiguity we recognise that that it follows that in interpreting the words this must be done in the manner least burdensome to the burdened property. *Robson* v *Chalmers Property Investment Company Limited* 1965 SLT 381 at 385 following *Cronin* v *Sutherland* (1900) 2 F 217 at 219. We have reached the view that the use of "normal" adds nothing to the meaning, and, like "present" in *Hunter v Fox*, is superfluous. Had "current" been used instead of "normal" that would have much more positively supported the respondents' argument that regard should be had to the situation on the ground when the servitude was granted. The word "normal "does not in our view restrict matters to the position at the time of the grant; rather, it is open to permit variations as to what is considered to be "normal" in the sense of "usual" at different periods of time. Having said this, we doubt there can be said to be any variation from what is meant by "residential use" at the time the servitude was granted and now. We see some merit in the appellants' submission that "normal residential" is not to be interpreted as having a restricted component in the sense of volume of use. This is an express servitude and *prima facie* it permits all use associated with "normal residential purposes." We reject the submission that there is to be found a restriction in the quality of use. Following that

through, we are not prepared to conclude that the words "normal residential use" should be restricted to the use of The Flax House itself as a residential property, but is rather a restriction against commercial or industrial use of the subjects, and limits the use of the whole subjects for use as residential purpose.

[22] The next question to be determined is therefore whether the allowance of access for builders and their vehicles is permitted in terms of the words used. Cusine and Paisley approve the English decision in *Jones* v *Pritchard* [1908] 1 Ch 630 and accept it is as being a statement of the position under Scots Law. There Parker J. said "The grant of an easement is *prima facie* the grant of such ancillary rights as are reasonably necessary to its exercise and enjoyment". Thus the question is whether the right to allow construction traffic to build an additional dwelling house on the subjects is provided for by the terms of the servitude. The professors state at 12.124 "It is clear that a dominant proprietor may carry out such actions as are absolutely necessary to render a servitude capable of exercise in the first instance."

[23] In addition to these contextual factual matters, on which the parties are agreed, we consider interpretation is aided by another matter to which the sheriff makes reference, the terms of the other servitude rights which are granted. It is to be remembered that in *Arnold* v *Britton* [2015] AC 1619 the second factor which Lord Neuberger identified to be taken account of in undertaking an interpretation exercise was any other relevant provisions of the lease. Thus given the ambiguity we identify it is relevant to have regard to the other servitude provisions, within the deed, and in particular the provision which provides a right of access for repair and maintenance. We consider that specification of this right decreases the scope to expand what may be thought to be ancillary to normal residential use, for we consider it must be appropriate to look at the words in the context of other provisions granted alongside the servitude in question. We conclude that the fact of a specific

servitude being granted for maintenance and repair suggests that that is not included within the rights under the provision for "normal residential use". If the deed makes specific reference to a separate servitude to allow access for repair and maintenance we do not accept that an access right related to "normal residential use" can be interpreted to permit access for construction traffic to develop an additional residential property on the subjects, even accepting as we do that the servitude relates to the whole subjects. While we note there is no precise restriction to one dwelling house, as was the case in *Keith v Texaco*(*supra*.) we are unable to accept that the terms of the servitude entitle the appellants' to the amended declarator they seek. We do not accept that the terms of the servitude, looked at alongside the specific servitude right granted for access for repair and maintenance, allows for exercise of access as sought in terms of the amended crave for declarator. We do not accept that it permits access for construction traffic to develop the derelict mill into a residential property in terms of the planning consent. This conclusion is also supported as it reflects an interpretation which is less burdensome to the burdened proprietor.

[24] When read together, and in light of the factual matrix at the time of their creation, the two servitudes limit the extent of the burden on the burdened property to that suggested by the respondents.

[25] For these reasons we therefore agree with the conclusion of the sheriff, but as narrated, for different reasons. Accordingly, we shall refuse the appeal and adhere to the sheriff's interlocutor which achieves the correct outcome, albeit we reached that result for different reasons. In these circumstances the normal rules shall apply, with expenses following success and parties were agreed that the case was suitable for sanction for Junior Counsel, and we shall so certify.