SHERIFF APPEAL COURT

[2024] SAC (Civ) 30
ELG-A27-19

Sheriff Principal N A Ross
Sheriff Principal G A Wade KC
Appeal Sheriff D O'Carroll

OPINION OF THE COURT

delivered by APPEAL SHERIFF O'CARROLL

in the appeal in the cause

WILLIAM BEATON

Pursuer and Respondent

against

WILLIAM HENDRY

Defender and Appellant

Defender and Appellant: J Barne KC, D Anderson; R & R Urquhart LLP
Pursuer and Respondent: G MacColl KC, D Logan; Stronachs LLP

12 July 2024

Introduction

[1] The respondent, Mr Beaton, owns Angus House Farm, Longmorn. Access to Angus House Farm is taken via a track ("the track") which runs from the U130E unclassified public road (running from Longmorn to Braehead Farm) to Angus House Farm. The track crosses Ordhill Farm, Longmorn, which is owned by the appellant, Mr Hendry. Mr Beaton is able

to use the track by virtue of a servitude granted in a disposition by the Duke of Fife in favour of Robert Paterson Watt recorded in the Division of the General Register of Sasines for the County of Moray on 19 July 1961 ("the 1961 disposition"). It granted to Mr Watt and his successors in title, including the respondent:

> "…(one) the right to use for all usual purposes all existing private roads and ways forming part of any other portions of the lands of which the subjects hereby disponed form part which are at present so used...which rights are declared to be servitudes and real burdens in favour of the said subjects…"

[2] Mr Watt sold Angus House Farm to the Dean family in 1991. Between 1991 and 2003, the respondent occupied Angus House Farm as the Dean family's tenant. He farmed its land and ran an agricultural business from it. The respondent subsequently purchased the land from the Dean family on 9 November 2018.

[3] Until the purchase of Angus House Farm was discovered by the appellant no issue arose in relation to the use of the track by the respondent or his predecessors in title; however, following his discovery of the purchase of Angus House Farm by the respondent, the appellant placed obstacles encroaching onto the track or close to its edge. The obstacles he placed ranged from stones and large items to the parking of vehicles along the edge of the track. These obstacles narrowed the bell mouth or entry to the track and prevented or hindered vehicular access to Angus House Farm, in particular vehicles used for agricultural purposes.

[4] In response, in 2019 the respondent raised this action for declarator and interdict against the appellant to stop his obstructing the track, including obstructing of the verges. The sheriff fixed a proof before answer, reserving all preliminary pleas.

[5] Following the proof before answer, in terms of a judgment and interlocutor dated 20 December 2023, the sheriff found in favour of the respondent, sustaining for the most

part his pleas-in-law and repelling for the most part the appellant's pleas-in-law. She granted declarator that the respondent and his invitees had by virtue of the servitude, the right

> "for all usual purposes (to include pedestrian access, vehicular access, commercial vehicle access and agricultural vehicle access) for the existing private road including the verge"

over the appellant's land. She also granted interdict against the appellant and his employees etc from

> "placing or leaving any vehicle, implement or other object on the existing private road and way including the verge… so as to impede or obstruct the [respondent], his employees… in their access to Angus House Farm aforesaid".

Interdict was also granted in similar terms forbidding the appellant from "removing hardcore material intended to bolster the said roadway or by doing any similar act." Attached to the interlocutor was a plan said to show the route of the track referred to in the declarator and interdicts "delineated in black and coloured blue". That plan was incorporated by reference in those orders.

[6] It is against that determination by the sheriff that the appellant appeals.

Submissions for the appellant

[7] Senior counsel submitted that the sheriff should have considered the physical extent of the access track as it existed in 1961 and any other relevant surrounding circumstances. The sheriff did not do so and, as a result, fell into error. The sheriff did not approach the proper construction of the servitude in the correct manner by making relevant findings and correctly applying the law. The language contained in the 1961 disposition was clear and unambiguous. The extent of the servitude granted was the extent of the existing private road as at 1961 but no findings of fact of that kind were made. A grant in such terms did

not extend to the verges. It should be construed as granting a right of access over the track alone: *Alvis* v *Harrison* 1991 SLT 64; *Stansfield* v *Findlay* 1998 SLT 784; and *Thomas* v *Allan* 2004 SC 393.

[8] The sheriff's interlocutor of 20 December 2023 was unclear as to whether the area delineated on the plan included the verge or whether the verge was external to that area. The extent of the verge was unspecified. The interlocutor did not identify the physical extent of the servitude. It was ambiguous. The appellant was left in real doubt as to the extent of the interdict granted against him and the extent to which he could deal with his own land.

[9] The sheriff failed to deal with the appellant's seventh plea-in-law. The plea was to the relevancy and specification of the respondent's averments about what were contended to be "verges". The evidential hearing before the sheriff was a proof before answer that included consideration of that preliminary plea. The failure to sustain or repel that plea was indicative of an absence of analysis to deal with the key issue in the case. Had she correctly embarked on the exercise of determining the precise boundaries of the track and verges, based on the evidence led, the sheriff ought to have sustained the seventh plea-in-law. In not so doing, she erred in law.

[10] There were other instances where the sheriff had failed to resolve factual disputes between the parties or had wrongly understood the evidence and come to the wrong conclusions. Those disputes concerned a number of live issues in the proof before answer such as the former location of the strainer post, the dimensions of the bell mouth over time and the conclusion that the bell mouth had not been widened. The reference in the sheriff's interlocutor of 20 December 2023 to a plan which itself was only created in 2018 effectively renewed the grant of the servitude but in different terms, which was impermissible.

Submissions for the respondent

[11] Senior counsel submitted that the determination of the dispute simply required the express grant in the 1961 disposition to be construed. The law on construction of such grants was set out succinctly by Lord Hope of Craighead in *Moncrieff* v *Jamieson* 2008 SC (HL) 1 at para [7]. Such an approach was consistent with that set down in *Alvis* v *Harrison*. The servitude created in the 1961 disposition sets out what was intended by the granter and it was in sufficient detail to allow it to function. Following the approach recommended in *Moncrieff*, the next step is to construe what was meant by the phrases: (i) "all usual purposes"; and (ii) "all existing private roads and ways". Both of those terms needed to be construed together. As at 1961, based on the evidence led at the proof before answer, "all usual purposes" was a reference to the transit of agricultural machinery, including the use of threshing maws and combine harvesters. "All existing private roads and ways" was self-explanatory. The sheriff was correct to hold that the express grant in the 1961 disposition included both the track and the verges running alongside it. The route of the track was agreed by the parties and was not in issue. The plan referred to by the sheriff in her interlocutor of 20 December 2023 was for illustrative purposes only. The grant was comprehensible and so were the terms of the sheriff's declarator and interdicts. The remaining complaints of the appellant in his grounds of appeal amounted to little more than sterile pleading points. If the court refused the appeal, then the cross-appeal need not be advanced and no arguments about that would be presented for the moment.

Decision

[12] The starting point for analysis is the terms of the grant of the servitude. All such cases turn on their own facts after consideration of the principles of law concerned. The terms of the grant made in 1961 are noted at paragraph [1] above and are not in dispute. The terms of the express servitude are in general terms and not restricted to any particular road, track or way. There was no attempt to further define which roads and ways were encompassed by the grant, whether by means of a plan, a map or further description related to dimensions or otherwise. Neither did there need to be. The grant was perfectly competent. Until the change in ownership of the dominant tenement took place in 2018, the operation of the servitude over this track appeared to have been uncontentious.

[13] The identification of the route of the servitude is not in dispute. The term "private road" used in the interlocutor of 20 December 2023 appears to be used interchangeably with the term "track" in the sheriff's judgement. However, nothing turns on that difference in terminology. Both parties and the sheriff were concerned with the same route forming the servitude. The true issue concerns the permitted use of the track and whether that permitted use included use of the verges.

[14] The House of Lords in *Moncreiff* v *Jamieson* 2008 SC (HL) 1 provides an authoritative starting point for construing servitudes of this type. At paragraph [7] Lord Hope said:

> "Consideration of the extent of a servitude right of access and of any rights that are accessory to it must begin, in the case of an express grant, with the terms of the grant itself… The meaning and effect of those words must be determined by examining the facts which were observable on the ground at the time of the grant. Account may also be taken of the use to which the dominant tenement might then reasonably have been expected to be put in the future."

Lord Hope also observed at para [12] that there was Institutional authority to the effect that:

> "…where the grant of a servitude is indefinite as to the exact route, the dominant proprietor may chose [sic] the route over which the servitude is exercisable 'in any place most commodious for him, but not invidiously to the other's detriment'".

[15] In *Alvis* v *Harrison* 1991 SLT 64, 67I, Lord Jauncey giving the principal speech said:

> "Before turning to the facts of this case it may be convenient to state certain general principles applicable to servitude rights of access and their use:
>
> (1) Where a right of access is granted in general terms the owner of the dominant tenant 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. The law of Scotland was clearly stated in *Irvine Knitters Ltd v North Ayrshire Co-operative Society Ltd* by the Lord President (Emslie) when he said, at 1978 SLT *p. 109*: 'It follows, and this is not in dispute either, that 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. Putting the matter in another way, the 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'; and by Lord Cameron, who said, at p. 112: 'In the deed of constitution of this servitude there is nothing which places any limit on the purposes to which the subjects may be put, and therefore it can be said that not only is there no limit on the extent of user but also no limit on the purpose which the proprietors of the dominant tenement as such proprietors may lawfully pursue within the subjects or for which they may use them…
>
> (2) The right must be exercised *civiliter*, that is to say, reasonably and in a manner least burdensome to the servient tenement. As it is put in Rankine, *Land-ownership in Scotland* (4th ed.), p. 417: 'It must be exercised in the mode least disadvantageous to the servient tenement, consistently with full enjoyment.'
>
> (3) For the better enjoyment of his right the dominant owner may improve the ground over which that right extends provided that he does not substantially alter the nature of the road nor otherwise prejudice the servient tenement. In *Stevenson and Others v Biggart* at p.187, Lord President McNeill said: 'The laying metal on it with a view to make it a better road is the very thing which I think he was entitled to do, to put it in repair, so long as he did nothing prejudicial to the benefice'".

[16] It seems to us that the sheriff correctly directed herself in line with the authorities.

As regards the history of the servitude created in 1961, it is common ground that the

servitude was created following a split off disposition of land in that area. The grant in those terms was perfectly competent and common, as the parties accepted. The sheriff found in fact that Angus House Farm had always operated as a farm and that was the case in 1961. The appellant also operates a farm. The area is agricultural. The appellant in evidence accepted that Angus House Farm had been in existence for at least 100 years. The appellant accepted too that the track was used to service the farms requiring the passage of various types of vehicles, that the service requirements for a farm changed from time to time and that the respondent's farm was mixed arable and livestock. The sheriff found in fact that contractors and workers used the track from 1991 and continued to do so. The vehicles used are various farming vehicles, large lorries, with and without trailers and motor cars. Thus, it is evident that at the time of the grant in 1961 the track was used for access by vehicles of all kinds for agriculture-related purposes to service the dominant tenement, that the vehicle types and uses would have changed over time and that the track continued to be used for such purposes. These included the running of an agricultural business from 1991 in addition to farming. That additional purpose, as well as access for farming purposes, is clearly encompassed within the broadly expressed terms of the grant of servitude and is permitted as a matter of principle: see *Alvis, supra.* It was not part of the appellant's case that the respondent had been using the track for unusual purposes, not encompassed by the grant.

[17] As regards the encroachment on the verges (meaning the land on either side of the track) by those vehicles when exercising the right of access by the track, the sheriff found as a matter of law at finding 25 that the respondent had that right, "where necessary for the passage of farm vehicles"; by which is obviously meant any vehicles exercising access or egress over the dominant tenement for "usual purposes". In so finding, the sheriff plainly

founded on the evidence concerning the necessity for some vehicles to use the verges to some extent in order to exercise the servitude rights of access and egress. The sheriff found in fact that the actions of the appellant in placing obstructions either onto the track or at the verge had the effect of preventing or hindering the safe passage of vehicles. She found also that some vehicles on occasion, due to their size, encroached on the verges of the track. There was ample evidence entitling her to make those findings. That evidence included the respondent himself (whose evidence she found to be credible and reliable in all material respects, in contrast to that of the appellant), Mark Garrick (an impressive witness according to the sheriff), John Paterson, and Gordon Noble, an independent surveyor whose evidence was undisputed. Importantly, the sheriff herself carried out a site inspection twice: once before the proof and once afterwards. She had a very detailed understanding of the terrain. Thus, the sheriff had before her a wealth of evidence supporting the general proposition that in order for some vehicles to use the track "for all usual purposes" it was necessary to make some use of the verges from time to time at some points, including the bell mouth. That interpretation is entirely consistent with the terms of the grant, with the facts and with principle.

[18] Accordingly, the servitude includes use of the verges on the appellant's land where reasonably necessary for the exercise of those usual purposes. If those vehicles did not have that right, the respondent would be unable to use the track for "all usual purposes" and the grant would be defeated. That clearly was not and could not have been intended by the parties to the 1961 grant.

[19] Having correctly made that determination, and having also found that the appellant had, on a number of occasions, deliberately obstructed the passage of vehicles along the track by the placing of obstacles on or by the track, the sheriff did not err in granting

interdict as craved second. Further, having found in fact that the appellant had removed construction materials intended by the respondent to repair the track (the respondent being entitled to maintain: see *Alvis, supra)*, she was entitled to grant interdict as craved third.

[20] We therefore reject the contention that grant of the servitude did not permit the use where necessary of the verges (meaning any of the appellant's land bordering the track itself). The use of the verges by vehicles is allowed, where necessary, to permit the very right granted by the servitude to be exercised. That conclusion did not involve imposing a burden on the servient tenement more heavy than the necessary consequence of the grant: *Cronin* v *Sutherland* (1900) 2 F 217.

[21] The appellant submitted that it was necessary that he be told precisely where the servitude right ended. The submission criticised the sheriff for failing to make detailed findings in fact in order to specify the precise extent and location of the verges, use of which was permitted. We do not agree. It was not the task of the sheriff, or in her power, to convert by decree the simply expressed grant of servitude (which was in its own terms perfectly comprehensible) into a detailed analysis of the precise dimensions of the track and verges. The approach of the appellant is to demand of the court that it rewrite the terms of the 1961 grant: that it cannot do. Similarly, the sheriff was not obliged to make detailed findings as to the "disputed plan". The servitude was not defined by any plan. The sheriff's task was to construe the extent of the grant, and determine the disputes between the parties and that is what she did.

[22] The appellant submitted that, without detailed specification in the interlocutor of the precise extent of the right to use verges, he is unable to know exactly what parts of his land he is forbidden to use. The answer is that he is entitled to make whatever use of his land he wishes so long as that use does not interfere with or obstruct the use by the respondent

of the track for all usual purposes. That right of course must be exercised *civiliter*: see *Alvis*, *supra.* If the appellant's use of his land on either side of the track (including the bell mouth) would interfere with the respondent's servitude rights, for example by preventing or obstructing vehicles from entering or turning into or turning on the track, he knows that is an impermissible use. The servitude is limited not by dimensions but by character of use.

[23] The appellant submitted that the interlocutor of 20 December 2023 was "fatally undermined" in that the interlocutor is expressed by reference to the "disputed plan" created in 2018 and therefore the sheriff had innovated on the original grant by transforming that plan into taxative form without sufficient findings in fact. It is evident, however, that the plan was provided as no more than an illustration of the track. The reference and plan does not redefine or refine the extent of the servitude rights.

[24] The appellant also submitted that the sheriff failed to consider the appellant's seventh plea-in-law which reads:

> "The pursuer's averments anent what are contended to be 'verges' being irrelevant and lacking in specification, should be refused probation, and the action should be dismissed".

We disagree. The sheriff dealt with the matter at paragraph [153] of her Note. In any event, probation of the pleadings having been allowed and having taken place, it was too late to found on a plea-in-law directed to refusing probation to certain averments. The plea was redundant and required no comment.

[25] The respondent in this appeal has cross-appealed against the decision of the sheriff not to determine the respondent's case, in the alternative, of prescriptive possession. It was agreed at the commencement of this appeal that this court need only deal with that question if we were to allow the appeal. In the event therefore, it is unnecessary to do so.

Disposal

[26] The appeal is refused. The interlocutors of 20 December 2023 and 2 February 2024 concerning expenses are adhered to. The cross-appeal is dismissed. Parties agreed that expenses should be reserved. We do so. The parties are invited to agree the matter of expenses and advise the clerk of their position. Should that not be possible within 21 days of the date hereof, the clerk will arrange further procedure.