SHERIFF APPEAL COURT

[2022] SAC (Civ) 9
DUN-A66-20

Sheriff Principal M W Lewis
Appeal Sheriff F Tait
Appeal Sheriff T McCartney

OPINION OF THE COURT

in an appeal in the cause

delivered by SHERIFF PRINCIPAL M W LEWIS

in appeal by

IAN DAVID MACALLAN & RUTH NINA MACALLAN

Pursuers and Appellants

against

(FIRST) IAN ARBUCKLE, (SECOND) GRACE ARBUCKLE AND (THIRD) LAURA ARBUCKLE

Defenders and Respondents

Pursuers and Appellants: Ms C MacColl, advocate; Thorntons Law LLP
Defenders and Respondents: Mr Garrity, advocate; Turcan Connell

21 December 2021

Background

[1] Carphin Estate belonged to the Wemyss family for several generations. Carphin Mansion House lies to the west of Luthrie, Cupar. Access to the Mansion House, the gatehouse, estate cottages and estate farms from the public road in Luthrie was taken over a single track estate road. It mattered not that the estate road was single track because the

verges and farmlands on either side of it, which were often used to facilitate the passing of two or more vehicles, were part of the Estate.

[2] In 2016 Mr Tobin Wemyss, the then proprietor of Carphin Estate, decided that the estate should be sold and he did so by process of subdivision. In late 2016 Mr and Mrs MacAllan purchased the Mansion House, policies and land ("the subjects"). Their title was registered in the Land Register for Scotland under title number FFE114227. In early 2017 the Arbuckles purchased Lower Luthrie Farm. Their title was registered in the Land Register for Scotland under title number FFE115626.

[3] The process of subdivision required the creation of an express right and burden because the only means of pedestrian and vehicular access available to the appellants to the subjects is by way of the single track estate road ("the private road") part of which passes through Lower Luthrie Farm. The corresponding burden of servitude within the respondents' title is in mirror image terms.

[4] The servitude right is set out in the schedule to the disposition by Tobin Wemyss to the appellants dated 21 November 2016 and registered in the Land Register of Scotland on 6 December 2016. It grants to the appellants:

> "an unrestricted heritable and irredeemable servitude right of pedestrian and vehicular access by to and egress from the disponed property from the public road over the private access roadway coloured green on plan no 1 and plan no 2 annexed and signed as relative hereto which forms part of the retained property leading to the disponed property".

By deed of servitude dated 3 March 2017 Tobin Wemyss granted to the appellants "an unrestricted heritable and irredeemable servitude right of pedestrian and vehicular access over and across [the area tinted brown on the cadastral map]" which had been omitted from the disposition.

[5] On the cadastral plans no 1 and no 2 attached to the disposition the private road is delineated by dotted lines from the public road in Luthrie through the Lower Luthrie farmlands to the Mansion House. Where the private road passes through the farmlands owned by the respondents it is coloured green between the dotted lines. The white areas on either side of the dotted lines are verges and other field boundaries. The private road leaves the respondents' farmlands and continues to the Mansion House. It enters the subjects in the ownership of the appellants. The subjects are coloured pink on the plans. The dotted lines continue through the pink area clearly identifying the private road. There are no white areas on either side of the private road as it traverses the subjects. In essence the servitude right of access is over and across the private road in the ownership of the respondents and which forms part of their working farm.

[6] The appellants use the Mansion House for business purposes – as an events/wedding venue and for private rental. The business venture has resulted in an increase in volume of traffic using the private road which in turn led to a bitter dispute between the parties about the use of the verges to permit vehicles to pass.

[7] In 2018 the appellants raised an action for declarator and interdict against the respondents in which they made allegations of obstruction of their servitude right of access. The action proceeded to debate. The sheriff dismissed the action. He issued a comprehensive judgment determining that the nature and extent of the appellants' rights were established by the disposition in their favour and the mirror image deed that burdened the respondents' title. In the absence of any ambiguity or uncertainty in the deeds and plans, the sheriff held that there was no basis for examining the past use of the private road, the passing places and verges or other circumstantial evidence. He concluded that the servitude right was restricted to the area coloured green on cadastral plans no 1 and no 2.

He did not find favour with the submission that the appellants enjoy certain rights ancillary to the servitude of access on the basis that the averments did not make out a relevant case for either necessity or for the reasonably comfortable enjoyment. No appeal was taken against that decision.

The outcome of the present proceedings

[8] The appellants then raised a second action in which they seek declarator that they enjoy an ancillary right to use passing places and the verges of the private road over which they have a servitude right of access to the extent necessary to allow passing where two vehicles are using the single carriageway of that road. The passing places are coloured yellow on a plan produced with the initial writ. The plan appears to have been prepared for this litigation – it is not the title plan. They also seek to interdict the respondents and others acting on their authority or behalf from obstructing the passing places and the verges. The respondents counterclaim for declarator that the appellants have no right or title to use the respondents' land beyond the defined rights. The respondents consider it necessary to seek such a declarator to prevent the appellants from raising further actions in respect of the same subject matter.

[9] The action proceeded to debate on the respondents' first, third and fourth preliminary pleas in the principal action and their second and third preliminary pleas in the counterclaim. The appellants' position at debate was that a proof before answer was required on the correct interpretation of the servitude whereas the respondents argued that the appellants' pleadings disclosed no basis for a declarator of an ancillary right which in reality is an expanded servitude right of access onto parts of the respondents' property that are not presently burdened by the servitude right.

[10] The sheriff dismissed the principal action and granted decree in the counterclaim. She considered that the pleadings were not relevant for inquiry. She concluded that the servitude right as defined in the appellants' title sheet and mirrored in the respondents' title sheet is clear and unambiguous and that there was no scope for extending the servitude to include the passing places and verges.

[11] The sheriff rejected the submission that it was necessary to hear evidence at a proof before answer about the character of possession and the use of the servitude at the time of the express grant because that is of no consequence, the nature of the grant being clear and unambiguous. The sheriff observed that a consideration of ancillary rights necessary for the comfortable enjoyment of a servitude depends on the particular facts and circumstances in each case and normally would require a proof before answer. However she considered that what the appellants are seeking are ancillary rights which are not truly ancillary to the servitude but which are an extension of the geographical extent of the servitude itself and thus it would be meaningless to hear evidence about the level of comfort that would come from using areas beyond the servitude area.

[12] The appellants seek to have the sheriff's interlocutor recalled and the action and counterclaim remitted to a proof before answer.

Grounds of appeal

[13] Put briefly, counsel for the appellants contended that the sheriff erred in her entire approach to the issues of fact, the issues of law, and the pleadings.

[14] The sheriff ought not to have applied the two stage process in *Johnston* v *Davidson* [2020] SAC (Civ) 22 because the terms of the grant are unambiguous and the route of the servitude is clearly defined in the cadastral plans. By following that process the sheriff was

drawn into assessing what the intentions of the contracting parties were as to the extent of the servitude right and where they intended the appellants to have access.

[15] The sheriff acknowledged, with reference to the authorities, that to determine what rights are ancillary to the servitude, it is necessary to interpret the grant following the canons of interpretation and having regard to the surrounding circumstances at the time of the grant. She accepted that such an approach would normally require the hearing of evidence, but then declined to appoint the action to a proof before answer. As a result, the sheriff has erred in prejudging the issue of the parties' intentions by deciding not to apply the test where the ancillary rights claimed affects land outwith that burdened by the route of the servitude.

[16] The sheriff erred in distinguishing this case from *Moncrieff* v *Jamieson* 2008 SC (HL) 1 and *Johnston*. These two cases considered claimed ancillary rights of parking within burdened property. What the appellants seek is the exercise of an ancillary right to use adjacent land owned by the burdened proprietors. The sheriff ought to have concluded that although the route of the servitude is burdened by the servitude, ancillary rights are permissible over land adjacent to it.

[17] The sheriff erred in concluding that the appellants' pleadings are irrelevant. At the heart of this dispute is the right to have vehicular access to the Mansion House: not simply the right to use the access road. A vehicle which cannot make progress along the roadway in face of oncoming traffic because it must reverse all the way back to the start instead of back only to the most recent passing place is not enjoying such a right. The appellants offered to prove that a right to move onto a passing place or onto the verges to allow other vehicles to pass is necessary for the comfortable use and enjoyment of the servitude in the

way contemplated by the parties at the time of grant. By refusing proof, the right of access has effectively been defeated.

Decision

[18] The essence of a servitude is that it exists for the reasonable and comfortable enjoyment of the dominant tenement. A servitude right is a limited one and may be used for the purpose and to the extent allowed by the grant or prescription. This case involves an express grant. The terms of the grant are set out in paragraph [4] above.

[19] Based on the pleadings, the productions and the direction of the arguments at debate, the sheriff had to determine the nature of the express grant and the rights which stem therefrom. She examined the grant and interpreted it. She examined the cadastral plans and construed them. By doing so, she followed the clear authoritative guidance contained in *Moncrieff* v *Jamieson* 2008 SC (HL) 1, and *Johnston* v *Davidson.* In the latter case, the court reinforced the approach to be taken to determining the nature of an express grant and identified a two stage process *(paras [26], [28], [29])*: (1) to determine what is meant by the express grant by ascertaining the correct interpretation of the grant and if the terms are ambiguous, by having regard to the surrounding circumstances; and having done so, (2) to determine what ancillary rights are necessary for the comfortable enjoyment of the servitude.

[20] There is no dispute between the parties that servitudes expressly granted originate in contract and that the principles of interpretation involve determining what a reasonable person with the background knowledge available to the parties would have understood them to have meant by the language used in the contract. The relevant authorities for that

purpose are *Moncrieff*; *Arnold* v *Britton* [2015] AC 1619; *Ashstead Plant Hire Co Limited* v *Granton Central Developments Limited* 2020 SC 244.

[21] The sheriff concluded that the grant was clear and unambiguous. We support her decision in that regard. The words used in the grant are precise and free from ambiguity – the benefited and burdened subjects are identified; a recognised servitude right of pedestrian and vehicular access is specified; and the route is described. The route is identified in the cadastral plans no 1 and no 2; and it was a single track private road at the time of creation of the servitude right. Despite what may or not have been said at debate, counsel for the appellants confirmed to us that she agreed with the foregoing assessment. She acknowledged that the linear area coloured green marks out the route of the private road but insisted that does not determine the extent of the private road which should be available to the appellants to exercise their right as is necessary for the comfortable enjoyment of the servitude, a point reiterated during the hearing.

[22] We endorse the sheriff's conclusion that there is no need for evidence to be led regarding the character of possession and the use of the servitude at the time of the grant in regard to the nature of the right because they are of no relevance to the construction of the grant. The precision in the deeds and the cadastral plans identify clearly the extent of the geographical area benefitted and burdened by the servitude. Needless to say parties remain in dispute as to whether this area includes the passing places and verges over which the appellants seek ancillary rights.

[23] The criticism levelled at the sheriff for following the two stage process set out in *Johnston* is completely unjustified. *Johnston* is the latest in a line of authorities dealing with a methodology for determining the extent of ancillary rights flowing from an express grant.

We have already concluded that there was no error in the sheriff's application of that methodology.

[24] Further the appellants submitted at debate and before us that language is inherently ambiguous: although the words in the grant are precise, they are not governed by the cadastral plans, and the route is not constrained to the linear area coloured green. We cannot accept that proposition nor do we accept the proposition that by examining the grant and the cadastral plans in depth the sheriff was drawn, in error, into assessing what the intentions of the contracting parties were as to the geographical extent of the servitude right. The restriction of the private road to the linear area coloured green as it passes through the respondents' farm lands is absolutely clear. The green colouring reflects the extent of the appellants' rights on the ground whereas the area coloured pink reflects the extent of their land ownership.

[25] Having determined that the grant was free from ambiguity, the next step was for the sheriff to determine what ancillary rights are necessary for the comfortable enjoyment of the servitude. In that regard she was invited to consider whether the defined servitude right of pedestrian and vehicular access includes an ancillary right to use passing places and verges which are outwith the servitude right to the extent necessary to allow passing when two or more vehicles are using the private road. The appellants contend that they require to use the passing places and verges to render their servitude effectual whereas the respondents maintain that the servitude is already effectual and the appellants are simply seeking to increase the burden on the servient tenement. Relying upon *Stansfield* v *Findlay* 1998 SLT 784, counsel for the respondents submitted that when considering an express grant there is no presumption that the verges should be included.

[26] The sheriff recognised that a benefitted proprietor may have such ancillary rights as are necessary for the comfortable use and enjoyment of the servitude and that to establish whether there is an ancillary right, it is necessary to interpret the grant having regard to the surrounding circumstances at the time of the grant.

[27] Put short, what counsel for the appellants seeks to do in this interpretative exercise, is to ignore the cadastral plans or to suggest that the green coloured line is no more than an indication of the direction of travel. She recognised the novelty of such a proposition, however she was unable to direct us to any authoritative supportive for such an expansive approach to the determination of the existence and extent of an ancillary right.

[28] The drafting involved in the disposition may have caused or contributed to the ongoing dispute because the grant makes no reference to a right to move onto and to use passing places and verges which are on adjacent land to enable other vehicles to pass. There is no provision as to rights and obligations in relation to the volume of traffic and the regulation of the flow of traffic through the use of passing places and verges. The route on the cadastral plans does not include passing places and verges. The appellants had lodged along with the initial writ a plan on which the passing places are marked yellow and the verges are identified. As counsel for the respondents noted the appellants are seeking rights by reference to a plan which differs from their title sheet: the verges and passing places do not form part of the servitude.

[29] We reject the contention that the sheriff misdirected herself in drawing a distinction between the present case and the cases of *Moncrieff* and *Johnston* on the basis that the vehicles in this case would move out of the burdened area to enable a passing manoeuvre to take place, whereas in those cases the vehicles were permitted to be parked within the burdened area. There is nothing in these authorities supportive of the contention that a

right of servitude might carry with it ancillary rights to use land other than the burdened property. *Moncrieff* and *Johnston* consider what a benefitted proprietor may do on part of the burdened property properly subject to the servitude – but they are not authority for the intrusive type of activity envisaged by the appellants on adjoining land.

[30] Counsel for the appellants submitted that the right craved in the principal action is analogous with the right to park a vehicle within the burdened property (*Moncrieff* and *Johnston)*. We disagree. The facts are different – the extent of the burdened property in these proceedings does not include the areas over which the ancillary right is claimed. The consequences are different. A right of passage (to travel over and across) is not analogous with a right to park (to stop and remain without limit of time).

[31] We reject the appellants' submissions in relation to the relevance of their pleadings for the purposes of a proof before answer on the correct interpretation of the servitude. It would have been obvious to any purchaser of the Mansion House that the access road is the old estate road, is single track, and part of it runs through the respondents' farm. The practical outcome of a single track road is that only one vehicle at a time may use it to travel from the village to the Mansion House. Prior to the division of the estate the passing places, the verges and farmlands on either side of it were often used to facilitate the passing of two or more vehicles. If the private road were to be widened along the length as it passes through the respondents' farm lands, then neither the appellants nor the respondents would encounter any difficulty in passing vehicles travelling in the opposite direction. Similarly if passing places were to be provided along that length of the private road, passing manoeuvres would be much easier. As it is, the land required for widening and for passing places belongs to the respondents. It is not part of the burdened property.

[32] The appellants maintain that the ancillary right is to have vehicular access to the Mansion House: not simply the right to use the access road. That is not what they acquired through the grant. We acknowledge that a vehicle which cannot make progress along the roadway in face of oncoming traffic because it must reverse all the way back to the start instead of back only to the most recent passing place is inconvenienced – and no doubt sometimes significantly so – but we do not accept in light of the authorities that a right to move onto a passing place or onto the verges which lie out with the burdened area to allow other vehicles to pass is necessary for the comfortable use and enjoyment of the servitude. For the foregoing reasons, we do not find favour with the submission that the sheriff erred in refusing to appoint a proof before answer to permit the leading of extrinsic evidence on past use of the verges and passing places. We fail to see how such evidence would assist in interpreting the grant and the cadastral plans.

Expenses

[33] The respondents, having been successful, are entitled to their expenses and we find the cause suitable for the employment of counsel.