SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT ALLOA

[2024] ALO 28

ALO-A20-23

JUDGMENT OF SHERIFF CHARLES LUGTON

in the cause

MANOJ MARWAHA

Pursuer

against

JOHN PETER DONALD JAMES MCALLISTER

Defender

Pursuer: McFarlane
Defender: Crook, Advocate

ALLOA, 4 March 2024

Judgment

The sheriff, having resumed consideration of the cause, Allows the defender's minute of amendment and the pursuer's answers to be received, allows the record to be opened up, amended in terms thereof and closed of new; Reserves the pursuer's first plea-in-law; Refuses the pursuer's motion for decree *de plano*; Repels the defender's first plea-in-law; and thereafter, Allows a proof before answer of the parties' averments; Reserves the question of expenses; Appoints a hearing for the determination of the question of expenses and for a date for a proof before answer to be assigned.

Sheriff Charles Lugton, Advocate

NOTE

Introduction

[1] In this action the pursuer seeks (i) declarator that the defender has no right or title to station and park vehicles on an area of / ground of which the pursuer is the heritable proprietor; and (ii) interdict prohibiting the defender from doing so.

[2] The defender avers that he has acquired a right of servitude to park vehicles on the area of ground by the operation of prescription.

[3] The case called for a diet of debate on both parties' pleas-in-law to relevancy and specification. In the event, only the pursuer's preliminary plea was insisted upon.

The factual background

[4] The parties are the owners of neighbouring properties.

[5] The pursuer's property is known as the Sauchie Shopping Centre. It is positioned beside Main Street, Sauchie. In fact, the pursuer is the joint owner of the property together with a company of which he is the sole director and principal shareholder, MKMM Properties Limited ("MKMM"). MKMM is not a party to the action. At the start of the debate the pursuer's agent highlighted this and offered to take steps to remedy the position, if necessary. Counsel for the defender confirmed that this was unnecessary and that no point would be taken in this regard. In the interests of brevity I will refer to the pursuer as being the owner of the property in the remainder of this opinion.

[6] The defender is the heritable proprietor of a residential dwelling house, known as The Bungalow, Main Street, Sauchie.

[7] The north-east boundary of the defender's subjects abuts the south-west boundary of the pursuer's subjects. The pursuer's subjects include an area of ground that leads from

Main Street and extends the length of the common boundary between the pursuer's subjects and the defender's subjects. The defender has an express servitude right of access and egress for pedestrians and vehicles over this area of ground. It is shown in brown on the Title Plan annexed to Title Sheet number CKL8774, which is the defender's subjects.

[8] In the pleadings, the area is described as "the access strip". I shall refer to it as such in this opinion. The access strip is the area with which this dispute is concerned. The defender has been parking vehicles on it. According to the pursuer he has no right to do so. The defender's position is that he has acquired a servitude right to park on the area via positive prescription.

[9] The pursuer avers that because the defender parks vehicles on the access strip, the pursuer's access to the south west-most gable of the shopping centre is obstructed. He alleges that this has had various adverse consequences. He requires to undertake maintenance work to the area, including the repair and replacement of various doors and the painting of the building, but he cannot do this while the access strip is blocked by the defender's vehicles. Further, the rear entry to unit one of his subjects is situated at this part of the building. Unit one is vacant. The pursuer has a verbal agreement with a prospective tenant, but this is contingent upon the replacement of the external doors offering access to the premises at ground and first floor levels. The work cannot be done as the defender is blocking the access strip with parked vehicles; and the pursuer is at risk of losing his prospective tenant. Finally, the pursuer's insurance brokers have suggested that if a claim should be made against his property insurers, this might not be honoured because the fire escapes on this part of the building are continually obstructed.

[10] The defender responds that these circumstances are not known and not admitted.

The legal background

Introduction

[11] The defender's case on record is that he has acquired a servitude right to park on the access strip by way of prescription. It should be emphasised that the defender claims to possess the servitude on this basis alone - he does not aver an entitlement to park on the access strip as an ancillary right to his express servitude right of access and egress over the access strip (while counsel for the defender responded to a question from me by making a fleeting suggestion that the defender might succeed on this basis after proof, the defender has neither a plea in law, nor supporting averments to support such a case).

Constitution of servitudes by prescription

[12] Section 3 of the Prescription and Limitation (Scotland) Act 1973 ("The 1973 Act") sets out the prescriptive regime for servitudes. Section 3(2) provides:

> "If a positive servitude over land has been possessed for a continuous period of 20 years, openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude, as so possessed, shall be exempt from challenge."

[13] This is a well-known provision but at the outset it is worth making a number of observations regarding its meaning and application, in order to put the discussion that follows in context:

(1) The prescriptive period is 20 years. While possession of the servitude must be continuous during the prescriptive period, it need not be exercised constantly. The requirement is that the right should be exercised sufficiently regularly to establish a pattern of continuous possession: "Prescription and Limitation" 2nd Edition 2012 by David Johnston, para 19.04(6).

(2) For the purposes of section 3(2) the term "possession" refers to any person in possession of the dominant tenement, as per section 3(2). There is no need for the possessor to have a recorded or registered title to the dominant tenement and a person may rely on civil possession of the servitude by others: David Johnston, paras 19.04(4) and (5).

(3) Such possession must be exercised openly, peaceably, and without judicial interruption.

(4) The words "as so possessed" indicate that the extent of the right claimed will be tested and determined by the nature and extent of the possession which is founded upon. Thus, the *maxim tantum prescriptum quantum possessum* is incorporated into the statutory regime.

(5) A servitude may only be acquired by positive prescription if it has the essential characteristics of a servitude known to Scots law. For present purposes, it is noteworthy that two of the essential characteristics of a servitude are that (i) there must be two tenements in separate ownership, one comprising the "dominant" tenement, and the other the "servient"; and (ii) a servitude is a praedial right, benefiting the dominant tenant and burdening the servient tenement: Cusine and Paisley, "Servitudes and Rights of Way" 2nd Ed., para 2.01.

(6) The claimed right must have been exercised not through tolerance of the servient proprietor but as of right, or by way of the assertion of a right.

(7) A servitude right must be exercised *civiliter*. As I shall come on to, the courts have given various definitions of the principle, but the formulation that I have been invited to accept is that a servitude must be exercised in the mode least disadvantageous to the servient tenement, consistently with its full enjoyment.

In this case an argument arose regarding whether the *civiliter* principle has any role to play in the initial constitution of a servitude, or whether its purpose is solely to regulate the manner in which the servitude is exercised.

(8) The burden of proof rests on the party seeking to establish that a right has been constituted through the operation of prescription: Walker and Walker "The Law of Evidence in Scotland" 5th edition, paragraphs 2.2.2 to 2.2.7; Cusine and Paisley, paragraph 10.13. This means that in the present case the burden proof lies on the defender to establish that he has acquired a prescriptive servitude right of parking.

Servitude right of parking

[14] The pursuer's agent took no issue with the proposition that Scots law recognises a servitude right of parking, albeit he described this as a right that had only recently been sprung into law.

[15] By way of background, in *Moncrieff* v *Jamieson* 2008 SC (HL) 1 (2007) a servitude right to park vehicles was recognised as being capable of existing in law as an ancillary right to a primary servitude right of access. A number of the law lords expressed the view that there was no reason in principle why a "freestanding" servitude right of parking should not also be recognised in Scots Law: Lord Rodger, paragraph [72]; Lord Scott, paragraph [47]; Lord Neuberger, paragraph [137]; (Lord Hope and Lord Mance reserved their opinions).

[16] Following this, *Johnson, Thomas and Thomas & Others* v *Thomas Smith & Others* [2016] GLA 50 was the first reported case to raise the question of whether a freestanding servitude right of parking was capable of being so recognised. After undertaking a comprehensive exposition of the law on the recognition of implied servitudes and of servitudes said to be

constituted by prescription, Sheriff Stuart Reid concluded that a freestanding servitude right of parking

> "can competently exist in Scots law because it is similar in nature to the type of servitude now 'known to the law' by virtue of Moncrieff … and to certain existing types of greater vintage" (paragraph [31]).

Of the *obiter dicta* contained in *Moncrieff*, Sheriff Reid said:

> "while I acknowledge that Moncrieff does not represent a strictly binding judicial recognition of the existence of a free-standing servitude right, in my judgment the debate on this narrow issue is ended for practical purposes by the overwhelming current of eminent obiter dicta in that case. It is futile to stand Canute-like against it. From Moncrieff it is but a short skip in logic to conclude, by analogy with the ancillary right recognised in that case, that an independent free-standing servitude right is, at least, similar nature thereto." (paragraph [33]).

Similarly, In *McCabe* v *Paterson* 2020 2 WLUK 494, Sheriff Aisha Anwar (as she then was) held that the law of Scotland now recognises a freestanding servitude of parking, under reference to *Moncrieff* and *Johnson*: paragraphs [71] - [74].

[17] In light of these authorities it appears that the pursuer's agent was correct to concede that a freestanding servitude right of parking is now recognised in Scots Law. In addition, he urged the court to proceed with caution given that the law in this area is in its infancy. No doubt it would be prudent to do so, but I would add that as a servitude right of parking must now be taken as being recognised in Scots Law, as with any servitude said to have been constituted by prescription, the court is not tasked with exercising a discretion, but must determine the question of whether the servitude has been so constituted with reference to the statutory requirements and common law principles that I have identified above.

The pleadings

[18] At the start of the debate the defender's averments regarding his supposed servitude right of parking were as follows:

> "Explained and averred that the defender has been heritable proprietor of the defender's subjects since 29 November 2000. The defender moved into the defender's subjects on or about that date. Since on or about that date, the defender has caused vehicles to be parked on the area shown tinted brown on the Title Plan annexed to Title Sheet number CKL8774 (hereinafter referred to as 'the access strip') and over which the defender's subjects benefit from an express servitude right of access and egress for pedestrians and vehicles. The vehicles which the defender has caused to be parked on the access strip have included a red Audi with the registration number LA06 YSW, a dark blue Range Rover and a 4 berth white caravan. A servitude right of parking on the access strip, which right encompasses the stationing and leaving of the vehicles so parked, has been created in favour of the defender's subjects through the possession of said servitude openly, peaceably and without judicial interruption for a continuous period of twenty years." (Ans 5)

[19] Rather unusually (and for reasons that are narrated below), the defender sought to amend after the hearing, in response to criticisms of his averments regarding the *terminus a quo* of the prescriptive period. His minute of amendment was in the following terms:

> "1. In the second line (of Answer 5) delete 'Explained and averred that the defender has been the heritable proprietor of the defender's subjects since 29 November 2000.' and replace with: 'The defender purchased the property with registered title CLK8774 4 ('The Bungalow') at auction. The disposition disponing The Bungalow to the defender shows a date of entry of 29 November 2000. The disposition was registered in the Land Register of Scotland on 18 October 2002. The pursuer's title was first registered in the Land Register of Scotland on 31 August 2001. There have accordingly been two separate tenements since 31 August 2001. The two separate tenements have been in separate ownership since at least 12 December 2001.'
> 2. In the third line delete the words 'that date' and replace with: '29 November 2000'.
> 3. On page 9 at line three by inserting the words 'in excess' before the word 'of' and inserting 'from the date at which the two separate tenements have been in separate ownership' between the word 'years' and the full stop."

The pursuer's agent did not oppose the amendment. On 15 February 2024 he lodged answers which read as follows:

> "In Article 5 of the Condescendence, immediately after the words 'and as a consequence thereof' where they occur in the pre-penultimate line thereof, by adding the words: 'Admitted that the disposition disponing the defender's subjects to the defender was registered in the Land Register of Scotland on 18 October 2002 and that the pursuer's title was first registered in the Land Register of Scotland on 31 August 2001. Further admitted that there have been two separate tenements in separate ownership since at least 12 December 2001. The disposition disponing the defender's subjects to him is referred to for its terms, beyond which no admission is made. Not known and not admitted that the defender purchased the property with registered number CLK8774 at auction. In any event, the defender is called upon to specify the terminus a quo of the period of prescription founded upon by him."

As discussed below, I allowed the amendment and answers, reserving the question of the expenses of the amendment procedure.

[20] In cond 5 the pursuer provides a detailed response to the defender's claim that he has acquired a servitude right of parking via prescription. The pursuer's averments are too lengthy to reproduce in full, but their salient points may be summarized as follows:

(a) The defender's parking of vehicles on the access strip has been sporadic rather than continuous;

(b) At times vehicles have been parked on a part of the access strip, such that they have not obstructed its use. At these times the presence of the vehicles has been tolerated by the pursuer, but they have not been positioned there by right;

(c) The pursuer believes and avers that no vehicles associated with the defender's subjects were parked on the access strip between around October 2003 and around November 2006; and again, between around January 2009 and February 2010. The pursuer believes and avers that the defender's subjects were empty during these periods;

(d) The defender has let his property to third parties for periods. He let his property to unknown tenants for a period prior to September 2013. Between September 2013 and March 2017 the property was let to a Mr and Mrs Russell Earhart.

(e) The pursuer avers that the Earharts parked vehicles close to or on part of the access strip adjacent to the south-westmost gate of the building erected on the pursuer's subjects. The presence of these vehicles was tolerated as they were so positioned as not to create a nuisance. The implication of these averments is that the tenants did not park on the access strip by right.

(f) The pursuer makes detailed averments regarding the periods during which the defender parked vehicles on the access strip and the action that he took in response. He avers that in around November 2006 he became aware of the defender parking vehicles, including a large caravan, on part of the access which is close to the south-most gable of the pursuer's property. He avers that he told the defender to remove the vehicles and that this was followed up by a solicitor's letter, sent on behalf M & A Properties Limited (being a company in which the pursuer had an interest and also his predecessor as heritable proprietor of his subjects).

(g) The pursuer makes averments regarding the period from summer 2021 to May 2023. He avers that at the beginning of this period he became aware that the defender was parking vehicles on the access strip, including a red Audi, a blue Range Rover and a caravan. The vehicles were parked for protracted periods of time. A solicitor's letter was sent to the defender on the pursuer's behalf on 29 July 2021. Following this the defender removed the caravan, though

> he subsequently returned it to the access strip, where it remained until May 2023. The pursuer avers that these vehicles were parked such as to obstruct access to the south westmost gable of the shopping centre.

[21] I shall consider the import of these averments in detail when I come on to address the parties' submissions regarding the relevance and specification of the defender's case. But at this stage it is worth highlighting that the pursuer's averments raise a number of questions, including when and how frequently vehicles were parked on the access strip, by whom they were parked, on what part of the access strip they were parked, whether the pursuer took objection to their presence on the access strip, how the defender responded to any such objections and whether they were parked on the access strip in the exercise of a right or by virtue of the pursuer's tolerance.

[22] The defender makes no substantive response to the pursuer's averments, instead meeting them with a blanket denial. The defences cannot have been drafted by counsel for the defender, who was instructed only shortly before the diet of debate.

Submissions

[23] In addition to making oral submissions at the hearing, both parties lodged detailed written submissions, copies of which may be found in the process. I will not repeat the contents of these in full, but a summary of the parties' positions is given below.

Pursuer's submission

[24] The pursuer's agent moved for decree *de plano* in terms of the pursuer's craves for declarator and interdict.

[25] He submitted that the onus was on the defender to establish that he had acquired a servitude right of parking. He characterised the defender's pleadings as being meagre and evasive. In addition, the defender had failed to respond to the pursuer's detailed averments. He submitted that the defender's averments were so lacking in candour that when the court came to consider issues of relevancy and specification, the benefit of any doubt should go to the pursuer rather than to the defender.

[26] The pursuer's agent made two related criticisms of the defender's position on record regarding *the terminus a quo* of the prescriptive period. First, the defender had made inconsistent averments regarding the date on which he had become the heritable proprietor of his subjects. The defender averred that he had been the proprietor since 29 November 2000. But the defender also incorporated the titles to his subjects into the pleadings. Section B of the title sheet to his subjects revealed that the defender's title was registered on 18 October 2002. Second, the defender had failed to aver that two distinct and identifiable tenements existed throughout the prescriptive period. This was a fundamental requirement. The titles to the pursuer's subjects were first registered on 31 August 2001. But the respective title sheets did not reveal whether and to what extent the parties' properties existed as separate tenements and in different ownership before the respective date of registration. Thus, he did not offer to prove that the two subjects were in separate ownership throughout the prescriptive period.

[27] The pursuer's agent submitted that the defender failed to make averments in support of the proposition that he parked vehicles on the access strip by right rather than as a result of the tolerance of the putative servient proprietor. The defender averred that he had "caused" certain vehicles to be parked on the access strip, but failed to specify the type of vehicles involved or to aver when, for how long and by whom the vehicles had been parked

on the access strip. The pursuer had averred that the property had been let to tenants for periods, but the defender had met these averments with a denial. He had also denied that the tenants were in the habit of parking on part of the access strip. In the circumstances, the defender had failed to aver a relevant case in support of the creation of a right to park on the access strip. Short of this, the defender's averments were so lacking in specification that they should not be admitted to probation.

[28] The pursuer's agent submitted that the defender had not made out a relevant case that the defender's supposed right to park on the access strip was a praedial right. The stationing of a caravan on the access trip could hardly be said to benefit a residential dwelling house.

[29] The pursuer's agent submitted that the defender had failed to specify the part or parts of the access strip on which he claimed to have a right to park. It was ludicrous to suggest that the defender had a right to park on every part of the access strip, given that this would entitle him to block the pursuer's access to part of his subjects. The pursuer's agent submitted that averments of this nature were critical in light of the principle that the extent of the prescriptive right must be determined by the nature and extent of the possession founded on to establish that right: *maxim tantum prescriptum quantum possessum*.

[30] Finally, the pursuer's agent submitted that the putative servitude was not capable of being exercised consistently with the *civiliter* principle. The access strip was used by the pursuer to take access to parts of his premises. The effect of the defender's supposed right to park on it would be to sterilize the access strip for its intended use as a route of access. It followed that if the purported right to park were to be exercised consistently with the *civiliter* principle, then in effect the servitude right could not be exercised at all.

Defender's submission

[31] Counsel for the defender moved the court to repel the pursuer's preliminary plea and to fix a proof before answer.

[32] He submitted that the defender's pleadings gave fair notice of his case. Under reference to *Heather Capital Ltd* v *Levy & Macrae* [2017] CSIH 19, 2017 SLT 376 counsel submitted that the purpose of pleadings was to give fair notice of the facts sought to be established as well as to identify the essential propositions of law on which the party founded. What was necessary was to plead the bare bones of the case, whereas evidence should not be pled. Pleadings should not be subjected to the careful and meticulous scrutiny devoted to a conveyancing deed, but should be looked at broadly with a view to ascertaining whether fair notice had been given: *McNemeny* v *James Dougal & Sons Ltd* 1960 SLT (Notes) 84. A case should not be dismissed unless it was bound to fail if all of the party's averments were proved: *Jamieson* v *Jamieson* 1952 SC (HL) 44.

[33] Counsel for the defender rejected the proposition that the defender had failed to set out a relevant case. The defender offered to prove that he had parked on the access strip for a continuous period of 20 years peaceably and without judicial interruption. He did not require to aver which particular vehicles were parked on which part of the access strip at any particular time, as such specification would be both impossible and beyond what could reasonably be required. The defender's pleadings made clear that he claimed to have a servitude right to park on the access strip. There was no need for the defender to make averments about the praedial nature of his right, as it was tolerably obvious that this would benefit the dominant tenement. This was true of the parking of a car, but equally true of the parking of a van or a caravan.

[34] The defender's position was that he was entitled to park on the entire access strip, as was perfectly clear from the pleadings. In any case, should the defender be unable to prove that he had parked on the whole strip during the prescriptive period, his right would extend over the area of the parking strip on which he had been found to have parked.

[35] Insofar as the pursuer's submission regarding the identification of the prescriptive period was concerned, counsel for the defender submitted that no prior notice had been given of this in the pursuer's Rule 22 Note. He indicated that he required time to consider his position. He did, however, proffer the provisional view that as the pursuer's title had been registered on 12 December 2001 there must have been two separate tenements since at least this date; and that the defender should still be able to establish that the necessary conditions had been present for the requisite 20-year prescriptive period.

Post-hearing written submissions

[36] Following the hearing, I invited counsel for the defender to lodge a brief supplementary submission in writing, in response to the pursuer's criticisms of the defender's averments regarding the commencement of the prescriptive period. I also indicated that within seven days of receipt of this I would be prepared to receive a written submission from the pursuer's agent in response. Both parties duly lodged written submissions.

[37] Read short, the defender's primary position was that the court should not entertain the pursuer's argument as regards the commencement of the prescriptive period because no prior notice had been given in the pursuer's Rule 22 Note. Counsel referred to OCR 22.1(4) under which at a debate a party may raise matters in addition to those set out in the note

"on cause shown". He submitted that cause had not been shown. No explanation had been given as to why the argument has been advanced so late in the day.

[38] Notwithstanding this, counsel went on to provide a summary of the history of the parties' respective titles. He explained that the two tenements had been in separate ownership since at least 12 December 2001. He indicated that he wished to move a minute of amendment in the terms that are set out at paragraph [18], above. Counsel submitted that the expenses of the amendment procedure should be in the cause in view of the late stage at which the argument had been raised and the absence of prior notice.

[39] In his written response, the pursuer's agent rejected the suggestion that the defender had not been given notice of the argument in advance - the issue was to some extent foreshadowed both in his Rule 22 Note and in the pursuer's pleadings.

[40] In any case, insofar as OCR 22 was concerned, a party required to intimate a note that set out the basis on which a preliminary plea was insisted on, but there was no requirement for a full-blown note of argument to be produced. The primary purpose of such a note was to enable the sheriff to decide whether there was merit in sending the matter to debate. Its secondary purpose was to afford a measure of notice of the arguments that might be made at debate, but the nature and degree of the notice that was reasonably to be expected would vary from case to case. OCR 22.1(4) was concerned with situations in which the legal basis of a party's challenge might be said to have materially changed. Looking at the wording of the rule, the term "matter" was consistent with this interpretation as it indicated something more significant than the introduction of a new "argument". Such situations were distinct from a situation in which arguments developed out of the pre-existing legal basis of a challenge, as in the present case.

[41] The pursuer's agent confirmed that he did not oppose the defender's minute of amendment. He did, however, seek an award of expenses as occasioned by the defenders' supplementary note of argument and minute of amendment.

[42] On 15 February 2024 the pursuer's agent lodged an addendum to his written response, which contained answers to the defender's minute of amendment. These are reproduced at paragraph [18], above.

Analysis and decision

Introduction

[43] The various arguments that were advanced at debate are capable of being distilled into the following five issues:

(a) Does the defender make relevant averments identifying the prescriptive period?

(b) Does the defender relevantly aver that during the prescriptive period parking took place on the access strip as of right, rather than due to the tolerance of the putative servient proprietor?

(c) Are relevant averments made in support of the praedial nature of the purported right?

(d) Does the defender adequately specify the area of land to which the purported right relates?

(e) Would the putative servitude be capable of being exercised consistently with the *civiliter* principle?

I will address these issues in turn.

(a) The prescriptive period

[44] The starting point for discussion of this issue is that the defender has lodged a minute of amendment in order to address the pursuer's criticisms. While the defender's position is that the court should not take account of those criticisms as no prior notice of them was given, his offer to amend is not, as I understand it, contingent upon my decision on this point.

[45] As indicated above, the minute of amendment is unopposed, and I shall allow it along with the pursuer's answers. The amendment's effect is that the defender now offers to prove that: (i) there have been two separate tenements since 31 August 2001; (ii) the two tenements have been in separate ownership since 12 December 2001; (iii) the disposition disponing the defender's property to him was registered on 18 October 2002; and (iv) the defender moved into the property on or about 29 November 2000, being the date of entry.

[46] These averments appear to constitute a relevant case as regards the *terminus a quo* of the prescriptive period, as their combined effect is that from 12 December 2001 two separate tenements were in existence and separately owned, of which the defender had possession of one.

[47] As the defender has now remedied this aspect of his case the various arguments advanced by the parties regarding fair notice and the requirements of OCR 22.1(4) remain relevant only insofar as they bear on the issue of expenses. While parties have outlined their positions on the question expenses in their written submissions, in my view it would be sensible to decide this issue at the same time as dealing with the expenses occasioned by the debate generally. As stated below, I propose to fix a hearing for this purpose.

(b) Parking by right or by tolerance

[48] The next issue to be determined is whether the defender has relevantly averred that he exercised a right to park on the access strip during the prescriptive period, rather than benefiting from the tolerance of the pursuer.

[49] The burden of proof rests on the defender to establish that he has acquired the disputed right and accordingly he requires to set out a relevant case in support of his position. The material averments are reproduced in full above, but in summary the defender avers that he has "caused vehicles to be parked" on the access strip since he moved into the property. He also provides details of three vehicles which he claims to have parked on the access strip. The defender goes on to aver expressly that a servitude right of parking on the access strip has been created by positive prescription.

[50] The first criticism that the pursuer makes of these averments is that the defender fails to specify the periods during which vehicles were parked on the access strip. The defender responds that there is no requirement to specify the precise dates and times of parking. He submits that his averments are intended to convey that parking took place regularly on the access strip during the prescriptive period.

[51] First and foremost the questions of when and how frequently parking took place on the access strip will be relevant to the issue of whether such parking was "continuous" for the purposes of section 3(2), which is not a matter that is raised by the pursuer at debate. But the pursuer's agent is correct to identify that these questions are also relevant to the issue of whether or not such parking occurred as of right rather than as a result of the tolerance of the proprietor of the land. While much will depend on the circumstances of the case, it is likely to be easier to establish that parking has been carried out by right where it has occurred either frequently or in accordance with an identifiable pattern. Conversely, if

there has been no such parking for periods of years, or if parking has taken place sporadically, it may be more difficult to establish the existence of a right. But it does not necessarily follow that a party seeking to establish a servitude right of parking is required to specify the precise dates and times of each instance of parking that is said to have taken place over a 20-year period, as to do so may be infeasible; and, in any case, this risks falling foul of the rule against pleading evidence.

[52] The defender's averments on this critical issue are thin. Far from providing exact dates and times, he does not even give the outline of a pattern of parking in his pleadings. However, taking the combination of the defender's averments that (i) he has caused vehicles to be parked on the access strip since taking entry to the property (and by extension since the start of the prescriptive period, which seems to have begun later - see above); (ii) these vehicles include the three specific vehicles to which he refers; and (iii) he has been in possession of a servitude right of parking openly, peaceably and without judicial interruption for a continuous period of 20 years, it appears that he offers to prove that parking took place on the access strip with a degree of regularity. In other words his position seems to be that such parking amounted to an ongoing activity, albeit of unspecified frequency. While these averments are hardly fulsome, on balance, I am not persuaded that they are sufficiently lacking in specification that they should be excluded from probation. Nor can they be said to be irrelevant at this stage, as if the defender were to establish that parking on the access strip was an ongoing activity, the court might be prepared to infer the existence of a right on the basis of this: the question could only be determined after evidence had been led.

[53] The second criticism that the pursuer makes of the defender's averments is that he fails to specify who parked vehicles on the access strip during the prescriptive period. The

pursuer's agent argues that the phrase "caused vehicles to be parked" is evasive, as it implies that the vehicles were parked by a third party, without identifying them. On a related point, the pursuer highlights that the defender denies his averments that tenants occupied the defender's premises for a period and that they parked on a specific part of the access strip as a result of the pursuer's tolerance. The defender responds that the phrase is intended to convey that as a result of the defender's ownership of the property, cars were parked on the access strip by people who occupied the property during the prescriptive period. The defender contends that parking by the tenants would contribute to the creation of the servitude by prescription, and argues that the phrase "caused vehicles to be parked" would allow him to lead evidence of such parking by the tenants.

[54] The words "has caused vehicles to be parked" are vague and ambiguous, begging the question: parked by whom? In my opinion, contrary to the submission advanced for the pursuer, the phrase is capable of meaning that the defender parked vehicles on the access strip himself. It is also consistent with the notion that other individuals parked vehicles on the access strip on the defender's behalf or as instructed to do so by him. But nothing in the wording hints at the involvement of tenants and if this is the defender's position, he does not give fair notice of it. A further difficulty with interpreting the phrase as carrying this meaning is that the defender denies the pursuer's averments that the property was tenanted (as well as denying that the tenants parked on a specific part of the access strip as a result of the pursuer's tolerance). Accordingly, I reject the defender's submission that he is entitled to rely on the actions of his tenants for the purposes of prescription on the strength of his current pleadings.

[55] But this is not necessarily fatal to the defender's contention that parking took place on the access strip by right during the prescriptive period. Even if one assumes the removal

from the equation of any periods during which the defender's property was occupied by tenants, after hearing evidence the court might still be prepared to find that the defender parked on the access strip at other times during the prescriptive period with sufficient regularity to support the conclusion that he did so by right. Again, this is a matter for proof.

[56] So far I have focussed on the defender's positive averments, but it is necessary also to consider the defender's blanket denial of the pursuer's averments, as these raise a number of points that are potentially relevant to the question of whether parking took place on the access strip by right.

[57] The first of these is the point that I have just considered: the pursuer avers that for a period of years during the prescriptive period the defender's property was let out to tenants, whose parking on a specific part of the access strip was tolerated because it did not cause a nuisance. Second, the pursuer avers that on two occasions the defender was instructed to remove vehicles from the access strip. In particular, (i) in November 2006 he told the defender to remove vehicles from the access strip and this was followed up with a solicitor's letter; and (ii) in July 2021 a solicitor's letter was sent to the defender, following which the defender removed a caravan from the access strip, although he subsequently returned it to its position there. Third, the pursuer avers that for periods of years the defender's property was empty and no parking took place on the access strip - in particular, October 2003 to November 2006 and January 2009 to February 2010.

[58] These averments raise the question of whether the defender had a right to park on the access strip. While it was (correctly) submitted for defender that it is wrong to plead evidence, this would not have prevented him from admitting or denying the pursuer's averments on these salient points. Similarly, the defender should not have needed to plead evidence to offer a substantive response in the form of positive averments. Instead the

defender chooses to shelter under the blanket of a general denial. This amounts to a lack of candour.

[59] What are the consequences of this? The pursuer's agent submits that the court should take account of the defender's lack of candour when testing the relevance and specification of his pleadings. The benefit of any doubt should go to the pursuer. No authority was cited in support of this submission, but the pursuer's agent must have had in mind the well-known line of authorities on uncandid defences: *Ellon Castle Estates Co Ltd* v *Macdonald* 1975 SLT(Notes) 66; *Foxley* v *Dunn* 1978 SLT(Notes) 35; *Urquhart* v *Sweeney* 2006 SC 591; and *Crerar Hotel Group Limited* v *Oban Management Limited* [2023] SAC (Civ) 22. These cases vouch the proposition that decree *de plano* may be granted where a pursuer asserts a right which appears to be indisputable, and of which the defender must have knowledge, but the defender meets this with a bare denial (or little more than this). In such stark cases the courts have been prepared to construe skeleton defences strictly against a defender - or to refuse the defender the benefit of the doubt, as the pursuer's agent put it. This is a scenario that is perhaps more commonly encountered in a motion for summary decree, in which the question is whether the pleadings disclose any defence (eg *Urquhart*), than in a debate on the relevancy and specification of a defender's pleadings.

[60] The present case does not fall within this paradigm. The position is not that the pursuer asserts a right, but that the defender claims to possess the right on which the argument centres, being a servitude right of parking. The defender makes positive averments in support of this position. As I have already observed, these averments may be terse but they are not sufficiently lacking in specification that they should be excluded from probation. The pursuer makes various factual averments which, if proved, would put the existence of the right in doubt, to which the defender responds with a lack of candour. It

follows that this is not a situation in which a seemingly indisputable right is met with a bare denial: instead the pleadings disclose the outline of a factual dispute in which one party sets out his position in very brief and general terms and the other party meets this with a detailed and robust response. Accordingly, this is not a case in which the defender's lack of candour should result in the pronouncement of decree *de plano*, however unsatisfactory his pleadings may be.

(c) The praedial nature of the purported right

[61] The next issue that falls to be determined is whether the defender's pleadings are lacking in relevant averments regarding the praedial nature of the asserted right - ie averments specifying in what respect the right exists for the benefit of the putative dominant tenement, rather than for the personal convenience of the proprietor or occupant of the subjects.

[62] The pursuer's position is that averments of this kind are essential but absent from the defender's pleadings. The defender would have to specify who parked vehicles on the access strip and for what purpose, before conclusions could be drawn as to whether such parking took place in the exercise of a praedial interest over the dominant tenement. By way of example, the pursuer's agent suggests that if the defender allowed friends of his to park on the access strip this would not constitute use in furtherance of a praedial right and could make no contribution to the creation of a servitude right of parking during the prescriptive period. Similarly, he submits that it is difficult to see how it could benefit the defender's residential dwelling house to station a caravan on the access strip, as is averred in the present case. The pursuer's agent submits that in the cases of *McCabe* and *Johnson* averments were made that specified the praedial nature of the purported right.

[63] Conversely, counsel for the defender submits that it is unnecessary to make averments about the praedial nature of the parking. It is tolerably obvious that the right to park cars on the access strip will benefit the dominant tenement. The same can be said of the parking of a caravan. In the case of a servitude right of access there is no basis for differentiating between the different sorts of vehicles that might make use of the access: *Ferguson* v *Gregors* [2023] SAC (Civ) 24 (paragraphs [51] - [54]); *Carstairs* v *Spence* 1924 SC 380 (pages 385 - 386). Counsel submits that the same is true of a servitude right of parking - a right to park is general rather than relating to particular types of vehicle: *Johnson* (paragraphs [53] - [56]).

[64] In my opinion the pursuer's agent is correct to identify that in order to establish that a prescriptive servitude right of parking has been constituted, a party must prove that during the prescriptive period vehicles were parked on the servient tenement in the exercise of a praedial interest in the putative dominant tenement. In other words, the parking involved must have taken place in furtherance of the enjoyment of the dominant tenement, rather than for the personal convenience of whoever happens to occupy it. In *Moncrieff*, Lord Rodger explained the praedial requirement in this way:

> "Of course, like any other servitude, it would have to benefit the dominant proprietor in his enjoyment of the dominant tenement. One possible example would be a case, like the present, where he enjoys a servitude of vehicular access to his land but has nowhere to park his car there. The proprietor of the servient tenement could grant him a separate servitude right to park which would contribute to the dominant proprietor's enjoyment of his servitude of access . . . By contrast, for example, the owner of a house and garden could not acquire a servitude right to park cars on his neighbour's land in connection with a business which he ran elsewhere since this would have nothing to do with his enjoyment of his house and garden." (paragraph [75])

It follows from this that depending on the circumstances of the case it may be necessary to ascertain for what reason vehicles have been parked on the relevant area, or to identify the type of vehicles involved, in order to determine whether the praedial requirement is met.

[65] The passages from the authorities on which the defender relies do not touch on this issue. They vouch the proposition that a servitude right of vehicular access (*Ferguson; Carstairs*) or of parking (*Johnson*) is "general" in the sense that once it has been constituted it is not limited to specific types of vehicles. But nothing that is said in these cases obviates the requirement to establish the praedial nature of the right at the point of seeking to establish that the servitude has been constituted. As I have already explained, the questions of what types of vehicle were parked on the relevant area and for what purpose during the prescriptive period may be relevant to ascertaining whether such parking took place in the exercise of a praedial interest in the dominant land.

[66] Precisely what must be averred to support the existence of a praedial right inevitably depends on the circumstances of the case, but it may be worth beginning by considering the two cases on which the pursuer relies. In *McCabe* the material averments appear to have been in short compass, as summarised by Sheriff Anwar at paragraph [74]. The defenders averred that (i) vehicles had been parked on the relevant area on a daily basis for a length of time well in excess of the prescriptive period; (ii) coaches parked on the area for 80 years before they acquired their property; and (iii) their right to park on the area was in the exercise of a praedial interest over their land and furthered their enjoyment of their land. Importantly, while the defenders in *McCabe* undoubtedly provided greater specification of the pattern and frequency of parking than the present defender, and while they asserted the existence of a praedial right, they do *not* appear to have specified the purpose of such parking or to have stipulated in what sense the parking of vehicles in the area operated to

the praedial benefit of the property. The court appears to have proceeded on the basis that this was unnecessary in the circumstances of the case; and that after evidence had been led on the basis of the existing averments it might be possible to infer that the parking had taken place for the praedial use of the dominant tenement.

[67] In *Johnson* the pursuers made far more detailed averments, in which they identified the vehicles that had been parked on the area over which a servitude right of parking was claimed, by whom they had been parked and for what purpose (paragraph [7]). Sheriff Reid concluded that the question of whether the alleged use was for the praedial benefit of the supposed dominant tenement would have to be determined after evidence had been led. But the level of detail in the pleadings seems to have been a product of the novel circumstances of the case. The putative dominant tenement was a showmen's residence and the adjacent putative servient tenement was alleged to be the only area on which large vehicles with limited manoeuvrability could be parked for the purposes of storing and repairing amusement arcade rides and equipment. As a matter of common sense, these special and unusual circumstances required to be set out in the pleadings.

[68] The present case is mundane by comparison and demands less by way of explanation. The context (which is not in dispute) is that the defender owns a residential property to which the access strip is adjacent. As I have already observed, the defender's averments regarding parking on the access strip are brief; but I am not persuaded that his pleadings are rendered irrelevant by the absence of express averments concerning the praedial benefit that is derived from such parking. As explained above, the averment "has caused vehicles to be parked" seems to connote either that the defender has parked vehicles on the access strip himself or that this has been done on his behalf. After hearing evidence led on the basis of the defender's averments the court might be prepared to infer that his

ability to park on an area next to his residential property furthers his enjoyment of it and thereby operates for the subjects' praedial benefit. In some respects the scenario might be thought to be analogous to the first of the two examples that Lord Rodger gives in the passage that is quoted at the start of this section (although he may have had in mind an ancillary right to a servitude of access, as opposed to a freestanding right of parking).

[69] The court might be more reluctant to draw such an inference where the vehicle in question is a caravan rather than a car, but the defender refers to having parked vehicles of both types on the access strip. Accordingly, I consider that the question of what conclusions can properly be drawn as regards whether the defender's parking involved the exercise of a praedial interest over his property will have to await enquiry into the facts.

(d) The extent of possession

[70] The next issue that must be addressed is whether the defender has made sufficiently specific averments regarding where parking took place on the access strip during the prescriptive period; and, by extension, whether the geographical limits of the asserted right to park are adequately defined.

[71] It is submitted for the pursuer that the defender requires to provide such specification because the extent of his possession would determine the extent of the putative servitude. This is an application of the maxim *tantum prescriptum quantum possessum,* which is encapsulated in the words "as so possessed" within the terms of section 3(2) of the 1973 Act. The pursuer's agent relies on the cases of *Johnson* and *Johnston* v *Davidson* [2020] SAC (Civ) 22, in which substantial details were given of the areas over which a right to park was claimed, in the form of craves for declarator, supporting factual averments and plans of the relevant areas.

[72] He submits that no such specification is provided in the present case. As there is no crave setting out the exact terms of the supposed servitude, it is incumbent upon the defender to provide adequate specification in his averments of fact. To do otherwise would be to invite uncertainty in the future. But the defender fails to aver on what part or parts of the access strip he is entitled to park. The pursuer's agent submits that the notion that the defender has a right to park on the entirety of the access strip is ludicrous, as this would amount to an entitlement to block the access of vehicles to the south west-most gable of the shopping centre, with the consequences which are summarised in paragraph [9], above.

[73] In response, counsel for the defender submits that the defender's position is that he has parked vehicles, including two cars and a caravan, on the access strip. Accordingly, his prescriptive right to park extends to the entire access strip. If the defender is unable to prove that he has parked on all of the access strip then his right will extend to the area over which he is able to establish that he parked during the prescriptive period.

[74] In my judgment the defender's submission is to be preferred. He avers that during the prescriptive period he "has caused vehicles to be parked on the area shown brown on the Title Plan annexed to Title Sheet number CKL8774 (hereafter referred to as 'the access strip'" (ans 5). This averment is consistent with counsel's submission that the defender offers to prove that he has parked on the access strip as a whole and that his prescriptive right extends to its entirety. There is no uncertainty over the dimensions of the access strip, as they are delineated in the plan to which the defender refers, which is incorporated into the pleadings.

[75] The defender's suggestion that, short of establishing a right to park on the whole access strip, he might prove an entitlement to park on part of it, might give rise to difficulties in accurately identifying the area in question. But this is not the defender's primary

position. In any case, it would be premature to dispose of what is at present a hypothetical question without enquiry into the facts, as whether such an area could be identified with sufficient precision to allow the court to find that a prescribed servitude right of parking had been constituted would depend on the content of the evidence.

[76] What underlies the pursuer's submission on this issue is a sense of incredulity at the idea that the defender should be entitled to park wherever he chooses on the access strip. According to the pursuer the result of this would be to block his access to part of his shopping centre, making it impossible to undertake maintenance to the building, meaning that the fire escapes would be obstructed and frustrating the pursuer's attempts conclude a lease with prospective tenants for a unit that is situated in this part of the building. He submits that in these circumstances the suggestion that the defender has a prescriptive right to park on the entire access strip is ludicrous. If proved, these averred circumstances will be relevant to the question of whether the defender can satisfy the various requirements of section 3(2) of the 1973 Act. They represent the pursuer's side of a factual dispute in which he may go on to prevail. But at this stage the court is not entitled to dispose of what are at least in part factual questions without first hearing evidence.

(e) The civiliter principle

[77] The final argument with which I must deal concerns the import of the *civiliter* principle and the question of whether it has any role to play in the constitution of a prescriptive servitude.

[78] The pursuer's position is that at the point of determining whether a servitude right has been created, the court should consider whether it is capable of being exercised *civiliter*. His agent explained that the *civiliter* principle reflects a thread that runs through

conveyancing practice, which is the idea that heritable property should be free from burdens and restrictions: Cusine and Paisley, paragraphs 12.181 - 12.183.

[79] The pursuer's agent submits that in the present case the defender's supposed prescriptive right to park over the whole access strip is incapable of being exercised *civiliter* because it would serve to sterilize the access strip's intended purpose as a route to the parties' respective properties. Put simply, the path would be blocked by the presence of parked vehicles. This would amount to a clash of rights. The pursuer's agent describes the present case as unique and seeks to distinguish its facts from those of the cases of *Moncrieff* and *Johnson*: in neither case did the prospect arise of the claimed right to park blocking a route of access, as it arises here. According to the pursuer's agent it follows that if the supposed right to park were to be exercised consistently with the *civiliter* principle then it could not be exercised at all. The defender fails to confront this in his pleadings, or to aver how his putative right of parking could be exercised without impinging on the pursuer's right to take access to his premises via the access strip. In the course of advancing this submission, the pursuer's agent explained that he did not seek to argue that the defender's claimed right was repugnant with the pursuer's ownership of the access strip: this was "a lost cause" following the decisions in *Moncrieff* and *Johnson.*

[80] Counsel for the defender submits that the role of the *civiliter* principle is to regulate the manner in which a servitude right is exercised, not to determine whether a servitude should be constituted or to define the extent of the servitude at the outset. In support of this proposition he relies on *Johnson*, paragraphs [53] - [56].

[81] As the parties' arguments revolve around the scope and application of the *civiliter* principle, it is necessary to start by considering the principle's definition. The courts have expressed the *civiliter* principle in a variety of forms, as Cusine and Paisley explain at

paragraphs 12.181 - 12.183. But the formulation that they commend is taken from Lord Jauncey's opinion in *Alvis* v *Harrison* 1991 SLT 64: "(the right of servitude) must be exercised in the mode least disadvantageous to the servient tenement, consistently with full enjoyment." They explain that the principle is underpinned by first, the equitable balancing act that must be carried out to reconcile conflicts between the interests of the dominant and servient proprietors; and second, the presumption in favour of freedom of property from burdens: para 12.182. But having identified this as the principle's underlying rationale, they reject the proposition that a dominant proprietor must go so far as to refrain from exercising the servitude in order to avoid inconveniencing the servient owner. Instead, the proper operation of the principle presupposes the reasonable exercise of the servitude. This is encapsulated in the form of words set out above: the idea is not that the servitude must not be fully exercised, but that it must be exercised in a manner that least inconveniences the servient tenement.

[82] This analysis recognizes that in some circumstances the reasonable exercise of a servitude right *will* prove inconvenient or disadvantageous to a servient proprietor. Also implicit to this formulation of the *civiliter* principle is that it is concerned with the regulation of a servitude once constituted, rather than playing a role in its creation.

[83] More recently, the *civiliter* principle was considered by Lord Rodger, Lord Hope and Lord Scott in *Moncrieff*. Their treatment of the principle is not identical. Lord Rodger writes that the doctrine "only comes into play once the scope of the servitude has been determined"; and expresses the principle in markedly similar terms to Cusine and Paisley:

> "once the servitude right and its scope are established, it 'must be rendered as little burdensome to the servient tenement as is consistent with its fair exercise' (Sutherland v Thomson, per Lord Gifford, p 495) or it must be exercised 'so as to impose the least possible burden on the servient tenement, consistently with

> the fair enjoyment of this right by the dominant proprietor (Hill v Maclaren, per Lord Justice-Clerk Moncrieff, p1366)." (paragraph [95]).

[84] Lord Hope articulates the principle differently: "in Bankton's words, the servitude right must not be used 'invidiously to the other's detriment' (II, vii, 19)" (paragraph [39]). This phrase does not include the caveat that any constraint in the exercise of the right must be consistent with its full enjoyment, but this seems to be implicit, as elsewhere in his speech Lord Hope acknowledges that in some circumstances a servitude will have the effect of excluding a servient proprietor from part of his property (paragraph [24]). Lord Hope's discussion of *civiliter* is brief in its terms, but he too appears to treat the principle as being applicable to the exercise of a servitude rather than to its constitution: "questions of how and precisely where the right to park is to be exercised . . . can, if necessary, be decided under reference to the rule that the servitude right must be used *civiliter*" (paragraph [39]).

[85] The Scottish law lords both reject a separate argument advanced in relation to the so called "repugnancy with ownership" principle, under which a servitude right must not be so extensive or invasive as to be repugnant with the servient proprietor's ownership of the land. They hold that the fact that parking a car on the servient tenement would prevent the servient proprietor from using the land cannot be a conclusive objection to the existence of the servitude, since many well-known servitudes involve structures being erected or objects being placed on the servient land: Lord Rodger, paragraph [75]; Lord Hope, paragraph [24]. Critically for present purposes, both Lord Rodger and Lord Hope treat the repugnancy argument and the *civiliter* principle as discrete points. The conceptual distinction is that the former is concerned with the constitution of a servitude, whereas the latter regulates its operation.

[86] Lord Scott describes the *civiliter* principle as "a Scottish law principle which regulates the manner in which a servitude may be exercised" (paragraph [45]). He cites with approval the passage from Lord Rodger's speech to which I have referred above. But he goes on to say the following about the relationship between *civiliter* principle and the "ouster" principle (the English equivalent of the repugnancy with ownership principle):

> "An essential qualification of the above stated proposition, a qualification that I would derive from the all-important civiliter principle, is that the right must be such that a reasonable use thereof by the owner of the dominant land would not be inconsistent with the beneficial ownership of the servient land by the servient owner. I must later examine the so-called 'ouster' principle, the principle which, it is said, prevents the creation of a servitude if the servitude contended for would prevent any reasonable use being made of the servient land, and some of the authorities relating to that principle. To the extent, however, that the 'ouster' principle is asserting that a servitude must not be inconsistent with the continued beneficial ownership of the servient land by the servient owner, I would unreservedly accept it. If, for example, the nature of the purported servitude were to place the dominant owner in such occupation of the servient land as to bar the servient owner from possession or control of the land I would find it very difficult to accept that the right could constitute a servitude." (paragraph [47])

His eventual conclusion is that the purported servitude right of parking does not fall foul of the ouster principle because the servient proprietor retains possession and control of the land. Lord Scott's analysis differs from the reasoning of Lord Rodger and Lord Hope, as he seems to elide the *civiliter* principle with the ouster principle, in the sense that the latter is said to be derived from the former. On this approach the *civiliter* principle might be said to be relevant to the creation of a servitude, but only insofar as it dovetails with the ouster principle. Critically, Lord Scott does not propose any freestanding role for the *civiliter* principle in determining whether a servitude has been constituted that is distinct from the ouster and repugnancy with ownership principles.

[87] The pursuer's agent invited me to adopt Cusine and Paisley's preferred formulation of the *civiliter* principle. I am prepared to do so as their reasoning is compelling

(summarized at paragraphs [80] to [81]) and appears to be consistent with what Lord Rodger and Lord Hope say in *Moncrieff.* But on this interpretation of the *civiliter* principle the pursuer's argument is bound to fail for two reasons.

[88] First, if the requirement is that the right must be exercised in the mode least disadvantageous to the servient tenement "consistently with full enjoyment", then the pursuer's contention that a purported right of servitude is incapable of being exercised *civiliter* because of potential prejudice to the servient proprietor, is a non sequitur. This is because there is no breach of the principle if prejudice to the servient proprietor is a necessary consequence of the dominant proprietor's full enjoyment of the right.

[89] Second, as I have already observed, it is implicit to this conception of the *civiliter* principle that it is concerned with the regulation of the exercise of a servitude rather than with its constitution.

[90] Only on Lord Scott's alternative analysis is there any suggestion that the *civiliter* principle may be relevant to the question of whether a servitude should be constituted; and any relevance that it may have is coterminous with the application of the ouster and repugnancy with ownership principles. In this case the pursuer's agent confirmed that he was not advancing an argument based on those principles. The corollary of this is that, even on Lord Scott's interpretation of the *civiliter* principle, the pursuer's submission based on the *civiliter* principle would fall to be rejected.

[91] Where does this leave the pursuer's suggestion that the effect of the purported servitude would be to sterilize the use of the access strip as a route of access? At risk of repetition, in order to establish the existence of the servitude the defender will have to prove that he has parked on the contested area of ground by right, and in the furtherance of the enjoyment of his property, for a continuous period of 20 years, openly, peaceably

and without judicial interruption. The pursuer pleads a detailed rebuttal of this. Ultimately, the controversy will have to be resolved after evidence has been led.

Disposal

[92] For the foregoing reasons, I shall allow a proof before answer, reserving the first plea-in-law for the pursuer. I shall repel the defender's first plea-in-law for want of insistence.

[93] I shall fix a hearing on the questions of the expenses occasioned by the diet of debate and by the defender's Minute of Amendment.