SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2024] SC LIV 15

LIV-A57-22

JUDGMENT OF SHERIFF P ANDERSON

in the cause

LIAM DAVID DOOLAN AND LISA MARIE DOOLAN

Pursuers

against

HAMISH BROWNING DONALD AND MARGARET URSULA DONALD

Defenders

Pursuers: G Dunlop, Advocate; T Duncan Solicitors
Defenders: D Wilson, Solicitor; Ennova Solicitors

LIVINGSTON, 30th March 2023

The Sheriff having resumed consideration of the case:

a) Repels of consent pleas-in-law 1 and 4 for the Pursuers;

b) Repels pleas-in-law 5 and 6 for the Pursuers;

c) Reserves meantime plea-in-law 2 for the Pursuers;

d) Repels plea-in-law 1 for the Defenders; and

e) *Quoad ultra* allows Proof Before Answer of the parties averments; and

f) Appoints parties to be heard on questions of expenses on

_____2023.

NOTE

Introduction

[1] This case is a dispute about the meaning and operation of a servitude right of access along a driveway. The right was granted by the Defenders over a stretch of land otherwise owned by them and which is used for vehicle and pedestrian access by both the Pursuers and the Defenders to their respective properties. The original Servitude was established in 1990 and the terms were revised by the Defenders and the previous owner of the Pursuers' property in December 2009. The Defenders is the first property reached by the driveway. It then continues past the route into the Defenders' house, to the Pursuers' property. It is admitted that parking has taken place on the first stretch of road either by the Defenders themselves or by others with the Defenders' permission and perhaps some without anyone's authority. The frequency, materiality, extent and consequences of the vehicle parking on that stretch of driveway is in dispute. Although there are interesting questions of law which arise from the dispute, it is more than sad that neighbours who have been and will have to go on living adjacent to each other, could not find some mutually agreed means of resolving this. The action called before me on Tuesday 21 February 2023 for debate, particularly directed to pleas-in-law 5 and 6 for the Pursuers and plea-in-law 1 for the Defenders. Consideration also required to be given to pleas-in-law 1, 2 and 3 for the Pursuers as did the terms of any proposed interdict. This arose after scrutiny of Crave 2 for the Pursuers and correspondingly the terms of any proposed interdict following amendment of Crave 1. At the conclusion of the hearing, Counsel for the Pursuers sought leave to amend the wording of Crave 2 in the following terms:

> "To interdict the Defenders by themselves, himself or herself and by their or his or her servants and all others acting under their or his or her orders or at their or his or her direction or on their or his or her behalf from parking vehicles on the Servitude

> Area as defined in Title Sheet WLN43757 and to interdict the allowing of or causing or permitting the parking or overhanging of vehicles, or any part of a vehicle, on any part of the Servitude Area for a period exceeding 10 minutes".

This was not opposed and the amendment was allowed. The interim interdict was varied to adopt this amended wording. No questions of expenses arose.

[2] Both the Pursuers and Defenders' solicitors had lodged Notes or Argument in anticipation of this Debate. There are two Notes for the Pursuers (the second is termed "Reply by the Pursuers"), and also two Notes for the Defenders. These four Notes are an appendix to this Judgment and Note.

[3] At the risk of doing violence to the thoughtful and careful submissions for both parties, I think the issue for decision can be stated in short as follows:

> "Is the servitude right of access using the driveway, a right to use, without the presence of anything other than small objects, any and all of the whole width and length of the road at all times?"

with the consequence that the Defenders cannot park or allow parking on that stretch of road even although it would still be possible for vehicles to pass.

[4] The facts required to consider and answer this are not in dispute. The existence and wording of the Servitude and the diagram showing the road on the Title plan are agreed. It is admitted that from time to time the Defenders or one of their visitors will park on the Servitude Area. The significance of that and the frequency is in dispute. There are averments in article 6 of condescendence which suggest that "the Servitude Area is blocked by the Defenders on almost a daily basis" - "by parking vehicles thereon preventing the Pursuers from driving over the Servitude Area". This does suggest the obstruction can be so significant and substantial as to prevent any vehicle access being exercised by the Pursuers. The Defenders deny this. That is an area of factual dispute which would require to be resolved in a Proof Before Answer after the evidence is heard. But that level of blocking of

the access road was not part of the argument I required to consider in relation to the Pursuers' main proposition as summarised above. The averments at the end of Cond.5 about any necessary access for emergency vehicles also require consideration after Proof.

Submissions for the pursuers

[5] The Pursuers' Counsel, Mr Dunlop indicated that his submissions had four chapters as follows:

(i) The Pursuers' First Note or Argument;

(ii) The Pursuers' Reply Note;

(iii) A response to the Defenders' supplementary Note;

(iv) Five propositions in law.

[6] Counsel adopted all of the propositions set out in his principal Note of Argument and the Reply. It was submitted that the Pursuers' case requires interpretation of the wording of the specific Servitude Deed in question and that any of the decided cases whether Scots or English and which are referred to in the Notes of Argument for the Defenders should be disregarded. The wording of the Deed is key. The legal principles with the two challenges that the Pursuers make to the Defenders' case are:

a) That the Pursuers must be free to use any part of the access driveway at any time and the presence of parked vehicles denies them that freedom; they should not have to navigate any items on the driveway in order to exercise their Servitude Right; and there is no right for either party to park on the shared driveway area;

b) If those submissions were not upheld then in any event the Defenders' pleadings lack specification.

[7] Production 1 is the Date of First Registration 23 December 2009 Title Sheet WLN43757 for 46 Whitburn Road, Bathgate, EH48 2RA. Page D7 of that Production –

[8] D. Burdens Section Part 1 The Servitude Right declares:

> "The following Servitude Right is imposed on the Benefited Property in favour of the Burdened property:
>
> > A. Servitude Right of access to and egress from the Benefited Property at all times and for all purposes for pedestrians and vehicles over and across the Servitude Area…"

Page D3 in the definition section 1.1 confirms "Benefited Property" means 46 Whitburn Road, Bathgate; the same section on the next page D4 defines "Burdened Property" means 44 Whitburn Road. "Servitude Area" means the access driveway tinted brown on the Title plan and forming part of the Burdened Property". "Servitude Right" means the Servitude Right set out in Part 1 of the Schedule." Page D7 is the Schedule referred to as quoted earlier. The Title plan is page 2 of Production 1 and does show a stretch of an apparent road tinted brown leading to the red area which is the Pursuers' property and passing on its left hand side the property owned by the Defenders.

[9] Page D5 explains that the Deed was required because of some earlier uncertainty. It goes on:

> "2. Purpose of Deed
>
> Considering that a Servitude Right of access to and egress from the Benefited Property over the Burdened Property was purported to have been constituted in the Titles thereto, but that it has been represented that said Servitude may be defective in its terms and that the actual route of the driveway over which said Servitude was stated to be exercisable may differ from that provided for in the Titles to the properties, it has been agreed by the parties that these presents shall be entered into in order to clarify the route of the Servitude Right in favour of the Benefited Property over the Burdened Property and to record other matters as now agreed between the parties;"

The Deed at page D6 grants the Servitude Right "with reference only to the Benefited Property and the Benefited owner and for exercise by the Benefited owner only…"

[10] Clause 2 indicates that if the Defenders who were party to the grant of the Servitude had thought that part of the lack of clarity was in relation to parking on the access driveway they had the opportunity to re-draft that grant and to reserve rights of parking for themselves, but they had not done so.

[11] The wording of the Servitude Right at Schedule D7 Part 1 refers back to the area tinted brown. Emphasis should be placed on the expression in line 2 of the Servitude Rights "all times and for all purposes for …vehicles".

[12] Production 4 is a plan submitted as part of a planning application in 2020 by the Defenders which was refused. This plan appears to show that the Defenders have a total of six spaces for parking on their own grounds, but with a further four spaces shown on the shared access. This was not directly relevant to the issues in dispute, but was in the submission for the Pursuer an indicator that any use of the driveway for parking was either or both excessive and unnecessary.

[13] Paragraph 8 of the Defenders' case - a defence which is irrelevant so that Decree should be granted in favour of the Pursuers. The Defenders' irrelevant defence is:

> "(i) that the Servitude Right of access permits the Burdened property parking vehicles on the driveway; and (ii) that the Servitude permits such parking providing the remaining space is sufficient to allow the Pursuers to access the Pursuers' property".

There can be no relevant defence which suggests some use by the Defenders of the driveway which interferes with the Pursuers' claimed right to use all of it whenever they want - the only exception being some minor insignificant or *de minimis* interference. By excluding this

line of defence, Pursuers' Counsel was in effect moving that Decree de *Plano* should be granted in favour of the Pursuers without further evidence or proof being necessary.

[14] The interpretation of the agreement must be done from the wording itself rather than through the application of prior decided cases. Accordingly, it was not open for the Defenders to say that they always meant to reserve parking on the driveway as available for themselves, but may have forgotten to include that in the Deed. It was not for the Court to rescue the Defenders from a "bad bargain".

[15] If there was any ambiguity, then the wording in question fell to be interpreted against the interests of the Defenders who had been a party to the Deed of Servitude and proposed it - an application of the *contra proferentem* rule of construction. The Court should not interpret a Servitude differently from the wording of any other agreement because the parties were bound by the terms of it even although the Pursuers had not been the party involved in the original document. That was no different from a situation of assignation of lease or sale of leased property where the new owner becomes landlord on the tenant with existing terms. There are similar comparisons with employment contracts and any unused balance of a manufacturer's warranty.

[16] So far as the interpretation of Servitude is concerned, there are no universal rules and that the wording of the Deed itself must prevail. Counsel then drew attention to the decision of the Sheriff in *Raymond Dorricott & Another* v *Bruce Plant Limited*, Stonehaven 25 October 1994 (Unreported), a copy of which decision was provided to me, page 20, paragraph 3 which says:

> "Working on that principle, it seemed to me that where the Servitude right was stated to exist over the 'whole area', then that was not a very difficult matter of construction. I took that to mean precisely and literally what it said i.e. 'the whole area'. Accordingly, if as was admitted by the Defenders to be the case here, a series of metal posts or stakes set in concrete and linked with tapes or chains across that

> area had been erected, then it could no longer be said that the Pursuers were able to enjoy a free right of access and egress over 'the whole area'".

[17] The Sheriff went on to observe at paragraph 6 on page 20:

> "I suppose it is all a matter of degree and for example it would be absurd to suggest that had the particular courtyard been the size of, for example, Murrayfield Rugby Pitch, it would be ludicrous for the Pursuer to have raised the present action on the basis that the Defenders had one teaspoon lying in one corner of that area. That would very clearly be a matter which would fall to be regarded as de minimis."

Parking on the access road in the present case could not be regarded as teaspoon *de minimis*.

[18] *Munro* v *McClintock* 1996 SLT (Sh.Ct) 97 and in particular at pages 99 to 100, was relied upon as an example of a right given over a whole area and indicating that even where it was possible to get around an obstruction, that was not regarded as a defence. By reference to page 99 C-D and H-I - there did not need to be evidence of inconvenience for the servient tenement user - further expressed at 99 J-K and page 100 A-C. By reference to the decision in *Moyes* v *McDiarmid* (1900) 2F918, it was further submitted that there did not need to be any demonstration of malice on the part of the intruding tenement and that the requirement was for unrestricted access.

[19] Referring to the Defenders' use of the doctrine of *civiliter* - the requirement on the user/holder of the dominant tenement to operate that reasonably and with minimum burden for the servient tenement, it was accepted that this doctrine applies, but only in relation to those rights which the Pursuers were entitled to exercise. A two stage test operates:

1) What are the rights of the dominant tenement holder?

2) Then apply the rules of *civiliter.*

This is said expressly by Lord Rodger of Earlsferry in the House of Lords in *Moncrieff* v *Jamieson* 2008 SC(HL) 1 at paragraph 95 when he observed that "…the *civiliter* doctrine does not itself determine the extent of the Servitude Right; it only comes into play in order to

regulate how that right may be exercised." As an example, it was accepted that it would not be open to the Pursuers to exercise the right of access by driving up and down the road all day.

[20] Relevancy and specification - the Pursuers' submissions in the Note were expressly adopted without further elaboration in oral argument.

[21] Chapter 2 of the submissions, was brief, since the issues were dealt with earlier and in adoption of the Reply Note. In a short additional submission in relation to the position adopted by the Defenders in their Notes of Argument, it was submitted that the cases relied upon should, in effect, be disregarded since they are decisions of the Courts of England and Wales and derived from the English concept of private rights of way whereas the Scots law on Servitude Rights are derived from Roman law. In brief submissions commenting upon each of the cases relied upon by the Defenders, Counsel suggested that in effect they supported the Pursuers' position at least so far as to indicate that the wording must be paramount.

[22] Chapter 3 of the submissions was covered substantially in the earlier submissions and any reliance on English authorities still leads to the proposition that the starting and decisive point must be the terms of any Deed and its wordings.

[23] Chapter 4 - Five propositions:

1) The proper interpretation of the Deed is paramount. It needs consideration of the words used and any restrictions on use of the Servitude Right.

2) The Court should look at the extent of the rights without regard to the *civiliter* doctrine. *Civiliter* is about how those rights are to be exercised and does not define the rights.

3) When interpreting the wording of the Deed, the intention or intentions of the parties should be ignored.

4) Where one party is the author of the Deed and if any ambiguity arises, then that ambiguity should be construed *contra proferentem*.

5) The Court should take the view that each Servitude Right is different. That then means that any decisions in other cases are of limited assistance. They do not entitle the Court to find that there is a right to park if there is no obstruction.

[24] Finally, the wording in the present Deed, although it does not use the words "whole area" does use wording which necessarily means use of the whole area. It does that because full use of the land shaded brown is evident - ie all of the brown area is included in the Servitude Right. Parking is not part of the ordinary use. This is an access drive to the Defenders' property - see page 7 of the Title. There is no other access to the Defenders' property and the road is therefore defined as access to that property - a clear provision of a right and therefore clearly different from parking since the Defender has extensive parking available on ground outwith the driveway. Even if the wording of the Servitude is to be regarded as "standard" (for which the Defenders argue), that is not relevant to the interpretation of this particular Servitude Right.

Oral Submissions for the defenders

[25] The Defenders' solicitor, Mr Wilson adopted all of the Note of Argument and Supplementary Note of Argument. In his submission, the Pursuers' primary case should be refused, but even if the Pursuers were successful, there would still need to be proof as to the extent of any alleged breach of the Servitude and to determine whether or not any such breach justified interdict. There would inevitably be questions about what was happening

on each of the alleged occasions to bring about parking and the length/duration of it and whether it was eg for deliveries.

[26] In large measure, the Defenders' solicitor restated what had been said in the written Notes of Argument. From the speeches of Lord Rodger of Earlsferry and Lord Scott of Foscote in *Moncrieff* v *Jamieson* (supra) the application of the doctrine of *civiliter* as explained by Lord Rodger of Earlsferry at paragraph 95 and relied upon by the Pursuers was accepted. The decision in *Moncrieff* was not relied upon as defining the nature and extent of the Servitude. Nevertheless, *civiliter* is relevant because the converse of the principle would have no substance if the Servitude sterilised the servient owner's rights to use his own land. The whole point of *civiliter* is to cause minimum disruption to the servient owner's use of his own land. The views of Lord Scott of Foscote in *Moncrieff* (supra) at paragraph 45 explained that:

> "the converse of the principle (of civiliter) is that an interference by the servient owner with the dominant owner's exercise of the Servitude will not be an actionable interference unless it prevents the dominant owner from making a reasonable use of the Servitude. Thus, for example, the erection by the Servitude owner of a building that encroached by say one foot onto a ten foot wide domestic driveway would not constitute an actionable interference with a right of way over the driveway".

[27] As a matter of construction and interpretation, there is nothing in the wording of the Deed of Servitude or in background circumstances to make this different from any other express grant of Servitude for an area marked on a plan. No words had been used to create a specialty. This was standard wording for an area defined by a plan, and similar to the grants as commented on in the cases of *Pettey* v *Parsons* (referred to in *Moncrieff* v *Jamieson* at paragraph 45); *Keefe* v *Amor* 1965 1QB334; and *West* v *Sharp* 1999 79PCR327, so the wording in the present case could not be distinguished from the wording which was subject of

consideration in these three cases or as commented upon by Lord Scott of Foscote in *Moncrieff*.

[28] *Dorricott & Another* v *Bruce Plant Limited* 1994 is a good example that everything depends on the wording. In *Dorricott*, the wording made reference to "whole area" - which was treated as significant by the Sheriff - not just the route typically used to cross the Servitude Area - and this underpinned the decision. There is no such wording in the present case.

[29] So far as any suggestion of a "bad bargain" and the absence of an express reservation for parking for the servient tenement, in the Defenders' solicitor's submission the Pursuers' argument was wrong. There was no express reservation for the Defenders to use the road for access, but there could be no objection to the Defenders doing so since the ownership of the property remained theirs. Accordingly, in Mr Wilson's submission, there was no need to make express reservation because it is unnecessary. It is a basic right for the owner to do so, parking their own vehicle on their own land and similarly, granting to them the right to allow someone else to do so. This is an incident of ownership. The Defenders had not be deprived or denuded of ownership of the property, but had retained all of the rights of ownership provided they used them in a way that created no material interference in the exercise of the Servitude.

[30] So far as the Pursuers five propositions were concerned:-

1) The importance of interpretation of the wording in the Deed was accepted, but in the present case, this referred to standard wording for access over an area of ground defined by a plan. So there was nothing to distinguish it from the result in *Moncrieff* as explained by Lord Scott of Foscote.

2) *Civiliter*. It was agreed this did not define the extent of the Servitude Right, but it is the proper converse that use by the dominant tenement must be *civiliter* because the servient tenement has use of the dominant's property.

3) This is agreed and not significant here.

4) The *contra proferentem* issue does not arise because there is no ambiguity. In the present case, the proferens is not the author of the possibly ambiguous term which requires to be construed. Rather, the proferens is the party seeking to rely on the wording - in this case, the Pursuers.

5) It is correct to say that each Servitude Right is different, but each case helps to explain and interpret another except insofar as distinctions are identified.

[31] By reference to the Pursuers' argument as expressed in the Reply Note, paragraphs 10 and 11 are wrong, and fly in the face of the cases and relied upon by the Defenders. The servient tenement still has the right to use the access so long as there is no material obstruction and therefore the right is not impeded. The English cases are of use. See *Moncrieff* – Lord Hope of Craighead at paragraph 24 - fortified by the English law analysis. See also Lord Neuberger at paragraph 111 which acknowledges that the two legal systems have separate developments, but have "come to be consistent". So it is necessary to respect and have regard to the persuasive effect of the English cases.

Relevancy and Specification

[32] The points advanced for the Pursuers do not establish any material difficulties or breaches of required pleading. Any complaint about measurements or related matters is not important and require undue detail for the purpose of pleadings. See Lord Hope of Craighead at paragraph 41 of *Moncrieff* (supra). No detailed precision of limits and

dimensions is required - see paragraphs 39 and 40 of *Moncrieff* (supra). What would be actionable is material interruption of the rights of access. "Material" does not need detailed allegations or specification.

Decision and reasons

[33] In law and in logic, the proper starting point for interpretation and understanding of rights created in a document must be the wording itself. Although the Pursuers and Defenders might be thought to take differing positions about that, it seems to me that they are effectively agreed that it is the wording of the Servitude Right which must be explained and then applied. The Pursuers' Counsel argued for that based on the wording itself and related expressions, albeit then asking for an interpretation with which I do not agree. The Defenders explained the opposite meaning should apply to what was described as "standard wording" on the basis of the series of cases to which reference was made and which it was argued, mean that the Pursuers' interpretation must be inconsistent with the explanation of Servitude Rights set out in those cases. This argument did not start from the wording itself, but in reality, both approaches come down to this: "What does the Servitude Right say – and what it does it mean by that?"

[34] I do not accept the zero tolerance interpretation of the Servitude Right for which the Pursuers' Counsel argued. The wording of the Servitude Right is expressed in Production 1 – Title Number WLN43757 - the Title Sheet Land Register Extract for the Pursuers' property at 46 Whitburn Road, Bathgate. Page A1 states "…together with a pedestrian and vehicular Servitude Right of access to the subjects in this Title by way of a driveway tinted brown on the said plan…". The Deed of Servitude was registered 23 December 2009 between the present Defenders and Margaret Ann Ferguson and, as I

noted previously as is said at page D5, Section 2 "…to clarify the route of the Servitude Right in favour of the Benefitted property over the Burdened property…".

[35] I find significance in the use of the word "route" which in ordinary language points to the location and layout of something, but not its dimensions. It also seems to me to be of significance that in this description there is no measurement or dimension given to the stretch of driveway which is in question. Those two factors point to the general purpose of the right being created rather than trying to establish specifics for the ground over which the right is to be exercised.

[36] The Servitude Right itself is to be found at page D7 - D. Burdened section:

> "This is the Schedule referred to in the foregoing Agreement and Deed of Servitude and Real Burdens
> Part 1
> The Servitude Right
> A Servitude Right of access to and egress from the Benefitted property at all times and for all purposes for pedestrians and vehicles over and across the Servitude Area…".

[37] It is significant that the Servitude Right is a "…right of access…and egress from the Benefitted property…" That expression in turn informs and explains the reference which follows - "…at all times and all purposes for pedestrians and vehicles over and across the Servitude Area". That wording is pointing to the purpose of the right - for access and egress - but no more than that. So, the right does not remove or restrict ownership rights provided use of those rights does not disrupt or prevent access/egress over the designated area. That interpretation is consistent with the words of clause 2, delete "purpose of Deed" at D. Burdened section (page D5) that the purpose of the Deed was "to clarify the route of the Servitude Right".

[38] The "Servitude Right" is defined as meaning the right set out in Part 1 of the Schedule. (Part 4 paragraph 1.1, page D4).

[39] The only reference to the plan and the brown area marked on it is to be found in the "description" at Part A Property Section (page A1) of the Title extract. That is as it says a "description" and refers to the "Servitude Right of access to the subjects in this Title by way of a driveway tinted brown on the said plan". The expression "by way of a driveway" seems to me also to point to the purpose - access and not to create some extensive rights to the whole of that area tinted brown.

[40] I conclude therefore that the Servitude Right which is created is the right of access and egress which is to be exercised over the route of the area tinted brown on the plan, the driveway. Provided access is not blocked or substantially impeded, there is nothing in the Servitude Right which deprives the owners of the Burdened property (the servient tenement) - ie the Defenders, from using that access road in the way which is consistent with their ownership rights. In the context of this case therefore, I do not read the grant of Servitude as preventing parking on the route tinted brown on the plan for access/egress on the driveway provided that parking does not obstruct or materially diminish the right of access and egress, including for vehicles for the Pursuers. The brown coloration indicates the area in which the primary activity of access/egress may take place. There is almost invariably, some tolerance at the margins of areas shown on plans attached to conveyancing documents, particularly where, as here, there is no reference to the plan being taxative or binding and there are no dimensions given. There are inherent inaccuracies requiring tolerances in plans attached to Deeds.

[41] It follows from this conclusion that I reject the arguments and submissions for the Pursuers about the construction of the Agreement. I cannot find in its wording support for the view that the Pursuers as Benefitted owners (dominant tenement) are entitled to use every inch of the access driveway or road at any time they choose and that any object,

notably a parked vehicle which is occupying a part of that driveway they might have elected to use, but did not require to use for access or egress because an alternative area of the driveway was available for that purpose, is infringing the Servitude Right. The definition at paragraph 4 - 1.1 (page D4) "…the access driveway tinted brown…" does not give some unrestricted right to use all of the area tinted brown as the Pursuers might choose at any time, but rather it seems to me to be part of a description of the area over which the Pursuers are granted the right to take access - access being the point and purpose of the right.

[42] I have already set out why I disagree with the approach urged on me by Counsel for the Pursuers. I found no assistance from the decision in *Dorricott* v *Bruce Plant Hire Limited* 1994 (unreported). Sheriff Warner's decision did seem to me to turn on the wording of the Servitude Right which was significantly different from that which exists in this case. It made reference to "the whole area" and Sheriff Warner expressly relied upon that in the passage at page 20 of his Note which is quoted above. Insofar as the decision of Sheriff JR Smith *in Munro* v *McLintock* 1996 SLT (SH.CT.) 97 is relevant, again, it seems to me that that decision turns on its own facts and on the wording of the Servitude Right in question.

[43] Given the decision I have reached on the main issue of interpretation of the Servitude Right, I do not consider it necessary to deal in any detail with the series of cases relied upon by the Defenders. They do not displace the requirement to interpret the specific wording of the Servitude Right in issue. The cases referred to do in my judgment confirm that although from very different roots, the legal system of Scotland and that of England and Wales have largely coincided in their treatment of Servitude Rights - easements and rights of way as they are known in England. Pausing to consider briefly the decision in *Keefe* v *Amor* 1965 1QB334, it seems to me that the passage relied upon by the Defenders at page 11 of the copy of the decision provided from Russell LJ does tend to confirm the English law

position as being the equivalent of that which I take to be the position of the law of Scotland, and the passage referred to and relied upon by the Pursuers does not contradict that, but is related to the wording of the "order as drawn between the solicitors on each side" in relation to whether or not an "unconditional right of way" had been created. It does not seem to me there was validity or justification for the submission from the Pursuers that the English cases should be dismissed simply because they were English. But they are not fundamental to my decision.

[44] The Defenders did advance an argument that the approach being adopted by the Pursuers in their interpretation and use of the Servitude Right offends against the principle of *civiliter*. Insofar as the Defenders were seeking to argue that the Pursuers' approach to interpretation and use of the Servitude Right was an interference with the servient owners' use of his property, then that is an approach with which I agree. Fundamentally, that is because as I have indicated, the servient tenement owner does not renounce the fundamental rights of ownership just because a Servitude is in place over part of his lands.

[45] In my approach to the decision in this case, since I did not find any ambiguity in the wording of the Servide Right, the Pursuers' Counsel's argument in relation to the application of the *contra proferentem* rule does not arise for consideration. Even if there is ambiguity, which I do not consider arises, then I doubt if it can be said readily that the rule necessarily applies in just the same way in this case as it does in many contract situations. Although the 2009 Deed of Servitude was granted by the present Defenders, it seems to me much more would need to be known about the circumstances in which that grant came to be made and the terms and conditions which were sought by the beneficiary, the dominant tenement owner at the time of that grant. It is entirely possible that the Deed itself was

drafted by or for the dominant tenement owner rather than the Defenders as servient tenement owner. That would require proof if the point was to be insisted upon.

[46] The Pursuers' approach to the present dispute does create the impression - which I accept may be ill founded and forms no part of my decision - that they think of their Servitude Right as being something akin to the creation of joint ownership of the access driveway. If that is part of their thinking, then it is quite wrong. They do not share ownership. What they have is a permission to use the road which rests on land owned by the Defenders. Situations like this call for mutual respect, recognition and understanding of the needs of the other party to the arrangement and although I have heard no evidence and have no view on the background circumstances, there are clear suggestions in the allegations, denials and counter allegations that there has been an absence of mutual understanding and an absence of mutual respect. That is very regrettable.

Relevancy and specification

[47] Counsel for the Pursuer, in the event that I did not sustain his principal position, maintained, without further elaboration, chapter 18 of the Pursuers' First Note and the attacks on Relevancy and Specification and alleged gaps in the Defenders' pleadings. I am not satisfied that any of these challenges are sufficient to lead to dismissal of the action or separately to exclusion from proof of any of the matters which are made the subject of attack. For easy reference, I set out here each of the Pursuers' criticisms and then provide my decision on them:

i) "18(a)(i). In Answer 5 the Defenders baldy state that parking on the Servitude Area is 'permissible' provided it does not obstruct the Pursuers' exercise of the Servitude. The Defenders fail to specify the basis for such an assertion. It appears that the Defenders are asserting in their Rule 22 Note that this is a legal principle rather than an express right in the agreed terms of the Servitude."

This is criticism of the Defenders' averment in Answer 5 that parking on the Servitude Area is permissible provided it does not obstruct the Pursuers' exercise of the Servitude. The averment which is challenged is however at the centre of the continuing dispute and on my judgment expresses in very brief terms the basis of the defence, although in less than specific terms. But I think the meaning is clear enough from the overall context of all of the pleadings. It is to the effect that what now remains in issue is whether there is "material" obstruction - which requires consideration after evidence. Parking a car can be one way of causing a "material" obstruction to the Servitude. No doubt attention will be given, if this dispute continues, to *Simpson* v *Head*, Lanark Sheriff Court, 11 May 1990 (unreported) and other cases noted by Professors Paisley and Cusine in their textbook - Cusine and Paisley, *Servitudes and Rights of Way*, 1991 SULI, paragraph 12.94, pages 444 to 445. The application of the test depends on the facts and in this type of case therefore, usually also the width of the access route available - with consideration also as to whether or not any "material" obstruction is moved on request in a reasonable time.

ii "18(a)(ii). There is no specification as to where parking may be exercised or by what types of vehicles and whether it is a right that is personal to the proprietors or wider under the terms of the Servitude i.e. may be exercised by third parties. If so then there is no notice of the rights of third parties."

This is a criticism that there is no specification as to where parking may be exercised or by what types of vehicle or whether it is a right personal to the proprietors or wider. Again, this criticism is largely answered by the decision I have reached on the main dispute in the debate and also my statement of the law of residual ownership rights and that what is or is not a "material" obstruction will require to be considered after evidence. It does not seem to me to arise from the Defenders' pleadings that there is any suggestion that some additional Third Party rights have been created and if that was to be suggested at a Proof, then no

doubt valid objection could be taken. It seems to me clear that the reference to parking is by reference to the Defenders' rights of ownership and there is no need to specify that further nor in particular to state what type of vehicle. As I have indicated, the parking must be carried out in such a way as not to cause obstruction to the Pursuers exercising their rights of access.

iii "18(a)(iii). The Defenders also offer to prove that there have been no obstructions to access 'by foot or car'. That is irrelevant. The Pursuers' access rights are absolute. The access is not restricted to navigating a route through parked vehicles. *Et separatim* the averments by 'foot or car' is also irrelevant. The Pursuer is entitled to vehicular access. Such access could include a caravan, a motorhome, a car towing a trailer or boat etc. The Servitude does not restrict the type of vehicle and accordingly does not restrict the width and length of a vehicle."

This is a challenge to the Defenders' averments that there has been no obstruction to access by foot or car. Given my decision on the main issue in this case, that remains relevant and is, if proved, an answer to the interdict. The proper and full exercise of the Servitude is very closely linked to the benefit received by the dominant tenement when access is taken. What amounts to a "material" obstruction of the Servitude is to be judged in that light. So, if there is sufficient space to drive past a parked vehicle enabling passage to visit the dominant tenement, this would seem unlikely to be regarded as a "material obstruction" to the exercise of the Servitude Right of access. Strictly speaking, the reference to "by foot" may well be irrelevant since the Servitude Right is vehicle access and the greater will always subsume the lesser, but I do not wish to tinker with the pleadings on that small point.

iv "18(a)(iv). In Answer 5 and 6 of the Defenders state that they have no control over third parties. It is unclear what positions the Defenders are adopting given the restrictive terms of crave two which only seeks to interdict third parties acting under the Defenders. These averments are accordingly irrelevant."

This is a reference to Answers 5 and 6 where the Defenders state they have no control over Third Parties. Firstly, that must be a matter of fact. There must be circumstances where the

Defenders would have control over Third Parties who park. The averments are not irrelevant, but do require explanation at Proof to determine their ultimate validity and relevance.

v "18(a)(v). The Defenders admit that delivery lorries attending the Defenders' property have parked in a manner that has prevented the Pursuer from accessing the Pursuers' property using the access driveway. Those averments are entirely at odds with the assertion that the Defenders are entitled to park vehicles when parking vehicles over a particular size would prevent access. In the event that the Defenders are relying on the averments of 'short' periods of time in Answer 6. Those averments are irrelevant and lacking in specification. There is no specification of what is meant by a 'short' period. The averments are also irrelevant as the Defenders do not offer to prove that temporary restrictions to access are lawful in accordance with the Servitude."

This is an attack on the Defenders' averments about parking by delivery lorries allegedly preventing the Pursuers from gaining access to their property. The criticisms do not affect the basic issues of the proper interpretation of the Servitude Right and any actings for which the Defenders are responsible which cause infringement of that right. Deciding what is or is not an obstruction and what is or is not a short period or its relevance are all matters which require evidence.

vi "18(a)(vi). The Defenders aver in Answer 6 that despite parked vehicles on the Servitude Area that there is 'sufficient' space provided for the Pursuers. This is a matter for proof if the Court finds that the Pursuers are not entitled to access over the whole Servitude Area. However the Pursuers are entitled to know what is meant by 'sufficient' particularly in circumstances where the Pursuers aver that access is being restricted i.e. the space is insufficient."

This is a challenge to the meaning of "sufficient space" left by parked vehicles. It is agreed that it is a matter for Proof given my decision on the main point in this case. "Sufficient" can be further explored in evidence and does not require averments.

vii "18(a)(vii). In Answer 8 the Defenders aver that they measured the width of a vehicle without specifying the width. Furthermore the Defenders do not specify the remaining width which could not be calculated without knowing the particular location of the parked vehicle as the Servitude Area is not of uniform dimensions and tapers."

This is a challenge to measurements of the width of a vehicle which is not specified. Again, these are matters which do not require detailed averment in my view, but can be explored at Proof. Vehicle dimensions are readily found with limited enquiry. I note also that there would seem to be good reason to try to establish agreed measurements of the access driveway itself and any verges.

viii "18(a)(viii). In conclusion the Pursuers are entitled to fair notice of any relevant case and the absence of the notice prejudices the Pursuers in the event that the cause proceeds to a Proof Before Answer."

I consider that the Pursuers do have fair notice of the relevant case which is used as a defence to this action - that parking on the access road is available for the Defenders provided they do not cause material obstruction of the access of the Pursuers and their vehicle.

Effect of decision on the pleadings

[48] In the course of the Debate, Counsel for the Pursuer agreed that the Declarator in Crave 1 was not an essential for the interdict sought in Crave 2. Ultimately, he indicated that he was no longer insisting in Crave for Declarator and therefore, of consent, plea-in-law 1 for the Pursuers is repelled. Similarly, as I understood it, the Pursuers no longer insist in plea-in-law 4, which seeks to ordain removal of vehicles as this would be unnecessary if interdict is justified. Accordingly, plea-in-law 4 is also repelled.

Plea-in-law 5 of the Pursuers argues that the Defenders' averments are irrelevant and seeks Decree as craved. Standing my views on the proper interpretation of the Servitude Right, and that to the contrary, there can be a relevant defence which as I have explained is sufficiently pled if not in great detail, then plea-in-law 5 is repelled. Plea-in-law 6 for the

Pursuers which says that the averments about parking are irrelevant falls to be treated in the same way. I find that standing my views on the interpretation of the Servitude Right, the averments about parking are potentially relevant and therefore this plea in law is repelled. That means that the only remaining issue in this case as presently pled is plea-in-law 2 for the Pursuers and a decision on that requires Proof Before Answer. Plea-in-law 1 for the Defenders is the traditional plea to the relevance of the Pursuers' case. No argument was advanced in support of that beyond the principal issue of interpretation of the Servitude Right. Although I have answered that in the Defenders' favour, the Pursuers' averments in relation to breach of the Servitude Right by creating material obstruction are relevant and require Proof. So, the Defenders' attempt to have the action dismissed fails and plea-in-law 1 for the Defenders is repelled.

[49] I did consider the sentences in Cond 5, line 5 for the Pursuers which states:

> "denied that the Servitude does not prohibit the Defenders or visitors to their property from parking on the Servitude area. Denied that parking is permissible provided it does not obstruct the Pursuers' exercise of the Servitude".

Those averments standing the decision I have reached in relation to the interpretation of the Servitude are no longer relevant, but since they do not amount to anything more than denials of the Pursuers' position, I do not need to deal with the averments expressly.

[50] In consequence of the findings, I have allowed Proof Before Answer which will deal with the outstanding issues of whether or not obstruction to a materially degree of the access driveway took place and whether or not that is activity which justifies and requires interdict.