FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 48
A138/18

Lord President
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

by

MAJOR DOUGLAS BOWRING SOULSBY

Pursuer and Reclaimer

against

RICHARD JAMES JONES and KIRSTEN NATALIE JONES

Defenders and Respondents

Pursuer and Reclaimer: MacColl QC, Reid; Shepherd & Wedderburn LLP
Defenders and Respondents: D Thomson QC, Massaro; DLA Piper Scotland LLP

22 September 2021

Introduction

[1] This is a dispute about rights over a narrow strip of land, which is owned by the defenders, between the parties' houses. The pursuer maintains that he has a servitude over the strip for the purposes of inspection, maintenance and repair. The Lord Ordinary found that he has no such right.

[2] The remedies sought by the pursuer, so far as now relevant, are: (1) a declarator that a servitude right of access, measuring 900mm, exists over the strip, for the purposes of inspecting, cleaning, maintaining, repairing and renewing the pursuer's western wall; (2) a declarator that the defenders are not entitled to build on the strip so as to "defeat" the right; (3) an order for the defenders to remove all buildings on the strip (ie a house extension, or at least part of it); and (4) an interdict to prevent any future obstruction. Although the first conclusion does not mention the mode by which any servitude might have been created, the pursuer's first plea-in-law refers to it as either a "necessary incident" of the pursuer's right of property or as something which has been peaceably enjoyed for the prescriptive period of 20 years (Prescription and Limitation (Scotland) Act 1973, s 3(2))).

The properties

[3] The pursuer owns Seven Gables, South Street, Elie, Fife. This is also known as number 2 and is shown on the following title sheet:

The defenders own the adjacent number 4 (Seafort); the extent of which is shown shaded in pink on the sheet. The area shown in blue is owned in common and consists of a passage

running south from the street between the parties' buildings. It extends only half way to the sea wall. There was formerly an unlocked gate at its southern end. Beyond that there was, and is, a strip of ground, wholly owned by the defenders, which the pursuer or his predecessors in title would go onto intermittently for the purposes of inspecting, maintaining and cleaning the wall which runs along his western boundary to the sea wall. The eastern configuration of the strip was initially created in 2004 as a result of the construction of a conservatory, and the removal of a dwarf wall, by the defenders' predecessors. That conservatory was demolished by the defenders in 2016 when they built a larger extension which reaches the sea wall. Its proximity to the pursuer's building markedly reduced the space between the walls of the parties' buildings. It is that of which the pursuer complains.

The Lord Ordinary's findings

Servitude by prescriptive use

[4] The Lord Ordinary found that the only use of the strip, which was of any regularity and frequency during the prescriptive period, was access for the purpose of window cleaning, lasting 5 or 6 minutes, between 5 to 10 times a year during the summer months. The pursuer's wall had been painted in 2004-2005 at the request and cost of the defenders' predecessors. It had been painted on other occasions before that, but not as much as every ten years. The gutters had been painted at some point too, but again at the invitation of the defenders' predecessors. The pursuer used the strip on up to three occasions a year to carry out, for a few minutes, a superficial inspection of the condition of the wall.

[5] The Lord Ordinary reasoned that it was necessary to have regard to the nature of the claimed servitude. If it was such as involved infrequent use, it could be difficult to regard

that use as giving rise to an inference that it was being exercised as a right. No case had been cited in which a servitude of the type claimed had been established. Given that the pursuer was trying to demonstrate a real right which did not appear on the register, there was "little room for imprecision in the evidence". The nature, quality and frequency of the use were relevant to the constructive knowledge of the defenders; whether it was to be inferred that the use was an assertion of a right by the pursuer as distinct from tolerance from the defenders. Having reviewed the authorities extensively, the Lord Ordinary held that the onus was on the pursuer to demonstrate use of such a quality and character that it amounted to an assertion of a right.

[6] Having considered the evidence, the Lord Ordinary found that none of it was sufficient to establish by prescription a servitude right of access for cleaning, maintenance or inspection. The only use of any frequency was a fleeting one for window cleaning. The painting had not been done as of right, but at the request of the defenders' predecessors. Permission to access the defenders' ground had been requested by the painter and the window cleaner. The pursuer had failed to discharge the onus on him to establish possession of the requisite quality and frequency. It was in the interests of good relations between neighbours to permit access for the stated purposes but permitting that amount of access did not create a servitude. Even if it had done so, the Lord Ordinary was not persuaded that it had a width of 900mm throughout the length of the pursuer's wall. This could not be deduced from the evidence of the pursuer's expert, David Vince, concerning what was needed for scaffolding. The common passage was narrower.

Servitude of Necessity

[7] The Lord Ordinary rejected the pursuer's case in so far as it was based on a

contention that the pursuer had a "servitude of necessity". In order to set up such a servitude, the pursuer had relied on *Brydon* v *Lewis*, unreported, Edinburgh Sheriff Court, 12 February 1958, in which the defenders conceded the existence of a servitude right of access over their garden for the purposes of maintaining a gable wall belonging to the pursuer, but in which the defenders had a common interest. The sheriff held that it was plain that there was a servitude right which could not be obstructed by, *inter alia*, a wooden hut which the defenders had built against the wall.

[8] Because of the concession, the Lord Ordinary held that the sheriff's decision was of limited value. She was not persuaded that the concession had been correctly made. First, if it were correct, it would sterilise land next to walls. Secondly, there was no authority in which a servitude of access for the purposes of repair, maintenance and inspection had been constituted simply by necessity. Thirdly, as a matter of policy there was a presumption in favour of the freedom of the use of land by the owner. The law should be slow to recognise the creation of servitudes by implied grant. Certainty in relation to real rights was important. Purchasers of land should be able to discover the existence of a real right easily. Fourthly, the logical consequence of the pursuer's argument was that, by building up to his boundary, a proprietor could create a servitude right of access which prevented a neighbour from building next to it.

[9] The Lord Ordinary observed that she did not require to determine what rights a proprietor might have regarding the inspection, maintenance or repair of a wall, or what the juridical character of that right might be. She was only being asked if the pursuer had a servitude right of access by necessity. He did not.

Variation of servitude

[10] The Lord Ordinary held that, where the dimensions of a right of access were not defined, variation by the servient tenement was possible if the new access was equally convenient. Inspecting, maintaining and repairing the pursuer's wall remained possible. The defenders' extension had made access manifestly less convenient at least in relation to that part of the wall which lay below the level of the extension's roof. A person could move along the strip between the buildings and carry out maintenance and repair, but it would be far more difficult. If a servitude right had been established, it would have been encroached upon by the extension.

Removal of extension

[11] The Lord Ordinary rejected the defenders' plea of mora, taciturnity and acquiescence. She recorded that the first time on which the pursuer had become aware that the defenders were to build the extension was when a planning application had been intimated to them in April 2017. The pursuer had objected, but not on the basis that he had a servitude. Planning permission was granted in June 2017, after which there was no attempt at communication between the parties until November, when the pursuer tried, unsuccessfully, to send a recorded delivery letter to the defenders. Contact was made in January 2018 when the servitude right was asserted. In the *interim* the defenders had accepted a tender to carry out the works, which started in February. The extension cost £170,000. Altering the extension, in such a way as to be at least 900mm from the pursuer's wall, would cost about £58,000.

[12] The Lord Ordinary addressed whether she would have exercised the court's equitable discretion not to enforce heritable rights in relation to encroachments in

exceptional circumstances. Having reviewed the authorities, she determined that the power could be exercised when restoration was either impossible or involved unreasonable loss and expense which was disproportionate to the advantage to be gained. The encroachment had to be made in good faith in the belief that it was unobjectionable, inconsiderable and did not materially impair enjoyment of the property encroached.

[13] The Lord Ordinary held that the defenders failed at the first hurdle of acting in good faith. This was because they had built the extension in the face of an objection prior to construction. The loss to the defenders had to be "wholly disproportionate" and the Lord Ordinary was not persuaded that it would be.

Submissions

Pursuer

[14] The pursuer maintained that the Lord Ordinary erred in finding that the pursuer's property did not benefit from a servitude right which was created either by way of positive prescription or necessity. Evidence had been led on the use of the strip. No contrary evidence had been led. The Lord Ordinary ought to have found that the possession proved was adequate to indicate, objectively, that a right had been asserted during the prescriptive period. She had been wrong to place any reliance on the absence of any authority for the existence of a right of the nature claimed. The onus had then been on the defenders to demonstrate that the possession was the result of permission or tolerance. The level of possession that was required was dependent on the nature of the right claimed (*Aberdeen City Council* v *Wanchoo* 2008 SC 278 at para 18; *Macdonnell* v *Alexander* (1828) 6S 600 at 608). A relatively small number of instances of use could be sufficient (*Macpherson* v *Scottish*

Rights of Way and Recreation Society (1888) 15 R (HL) 68 at 70). The servitude here required only occasional access.

[15] The Lord Ordinary erred in finding that someone, who was seeking to establish an off-register real right, had little room for imprecision in the evidence. A degree of imprecision was neither surprising nor impermissible (*McGregor* v *Crieff Cooperative Society* 1915 SC (HL) 93 at 98). The test was whether the burdened proprietor ought objectively to have been aware that a right was being asserted (*Aberdeen City Council* v *Wanchoo* at para [18]). The Lord Ordinary ought to have asked whether she was satisfied that a proprietor would have been so aware.

[16] In holding that the pursuer had failed to establish that the maintenance strip was 900mm in width, the Lord Ordinary conflated two aspects of David Vince's evidence. He had said that 900mm was required for the erection of scaffolding, but he had also testified that 900mm was the width of the passage prior to the extension. The Lord Ordinary ought to have found that the strip, during the prescriptive period, was 900mm in width.

[17] The Lord Ordinary erred in not holding that the right claimed arose by operation of law *rebus ipsis et factis* (by the facts and circumstances themselves). The right arose when maintenance by other means was not reasonably possible. The nature of such a right had never been the subject of authoritative determination. Such authorities as there were supported the existence of such a right (Hume, *Lectures* vol iii (15 Stair Society), at 206-7; *Brydon* v *Lewis; Finlay & Co* v *Bain* (1949) 66 Sh Ct Rep 59 at 65; Gretton and Reid, *Conveyancing 2017* at 162-4; Cusine & Paisley: *Servitudes and Rights of Way* at para 11.13). The four factors identified by the Lord Ordinary as being against the existence of such a right were all open to challenge. Without such a right, properties, such as the pursuer's, could not be properly maintained.

[18] Each of the grounds of cross appeal (*infra*) should be rejected. The Lord Ordinary correctly concluded that any valid variation of the access would have to be equally convenient. She was entitled to hold that the inspection, maintenance and repair would all face greater difficulties than previously as a result of the defenders' extension. The general rule was that removal of encroaching structures should be granted. The Lord Ordinary was correct to conclude that the conditions for the exercise of the court's discretion had not been met. The Lord Ordinary was not satisfied that the encroachment had been made in good faith. The defenders had been aware that a right was being asserted. The Lord Ordinary's conclusion on proportionality was correct. The Lord Ordinary was at an advantage having heard the "entire factual nexus of the case" (*Anderson* v *Imrie* 2018 SC 328 at paras [35] and [101]). Her decision should be treated with deference and interfered with only if plainly wrong.

Defenders

[19] The Lord Ordinary was correct to proceed on the basis that the onus was on the pursuer to demonstrate that his use of the strip was of sufficient quality and frequency to justify the contention that it amounted to an assertion of a right. There was no challenge to the findings in fact made by the Lord Ordinary. The court had to proceed upon these findings and not on any gloss applied to them. It was doubtful whether there could be a right of access for the stated purposes which was created by prescription. The nature of the servitude was not particularly frequent or easily capable of observation. There was little room for imprecision in the evidence. The use which had been proved was isolated, fleeting and non-descriptive. Where the use was so limited, the inference was that it was based on toleration and not right (*McGregor* v *Crieff Co-operative Society* at 103-4, 107; Cusine & Paisley

at para 10.12 citing *Carstairs* v *Spence* 1924 SC 380). The pursuer had not established that use had been made of a strip of 900mm. Evidence of the existence of a 900mm wide strip was of no value where there was no evidence of the actual use of that width.

[20] No servitude right had arisen by operation of law *rebus ipsis et factis*. The pursuer had advanced no such case before the Lord Ordinary. It was prejudicial to the defenders for the pursuer to seek to advance a different case now. There was no basis in law for the creation of a servitude by this method. It had been rejected in *Ewart* v *Cochrane* (1861) 4 Macq 117 and, on that basis, by Bell: *Principles* (10th ed at para 992) and Rankine (*Landownership* (4th ed) at 430). More recently, this rejection was affirmed in *Moncrieff* v *Jamieson* 2008 SC (HL) 1 at paras [29] and [82]. This was reflected in the modern textbooks (Cusine & Paisley at para 11.17 and Gordon *Land Law* (3rd ed) at para 25.49). The passage cited from Hume: *Lectures* was not about servitudes and concerned slight and temporary inconvenience. *Brydon* v *Lewis* involved a concession and a wall in which there was a common interest following the severance of a single property.

[21] The defenders were entitled to vary the route of the servitude, provided that the alternative was equally convenient and the variation was not material and extensive (*Grigor* v *Maclean* (1896) 24 R 86; Cusine & Paisley at para 12.63). The Lord Ordinary erred in concluding that maintenance and repair would be materially less convenient. The court had withheld the remedy of removal in similar circumstances (*Jack* v *Begg* (1875) 3 R 35 and *Wilson* v *Pottinger* 1908 SC 580). The Lord Ordinary ought to have had regard to the limited nature of the right, and that the varied route could be used for any necessary repairs and maintenance. The Lord Ordinary erred in finding that the defenders had not acted in good faith. Prior to January 2018 the pursuer had not claimed a servitude right. He had erroneously thought that the strip was owned in common. The servitude was first asserted

orally on 31 January by the pursuer's law agent. It was not then said that the construction of the extension was prohibited by the servitude. The pursuer had been told that construction was to start on 5 February. The pursuer's agent re-asserted the claim of servitude on 6 February but the first written intimation had been on 10 April, some two months after work had started.

[22] Had the Lord Ordinary upheld the servitude claim, the appropriate course would have been to exercise a discretion to refuse to order alteration of the extension, which had been built after an objection had been raised, on the basis that it would be inequitable to do so (*Grahame* v *Kirkcaldy Magistrates* (1882) 9 R (HL) 91; *Anderson* v *Bratisanni* 1978 SLT (Notes) 42). A person was not in bad faith simply because he had notice of an asserted right. The Lord Ordinary erred in finding that alteration of the extension was not disproportionate.

Decision

[23] It is important to appreciate exactly what a servitude is in the modern law. Although there may be many inexact descriptions or definitions of it in textbooks and cases over the years, the classic definition (see Cusine & Paisley: *Servitudes and Rights of Way* at para 1.33; Duncan: *Servitudes* in *Stair Memorial Encyclopaedia* Vol 18 para 440) is that in Bell: *Principles* (10th ed at para 979) *viz.*:

> "Servitude is a burden on land or houses, imposed by agreement – express or implied – in favour of the owners of other tenements; whereby the owner of the burdened or 'servient' tenement, and his heirs and successors in the subject, submit to certain uses to be exercised by the owner of the other or 'dominant' tenement; or must suffer restraint in his own use and occupation of the property".

The important feature of the definition is the manner of a servitude's creation (cf Cusine & Paisley at para 1.37). It is not a burden which is imposed on neighbouring proprietors by operation of law, such as exists in relation to drainage or support in rural areas or in the

context of common interest in the law of the tenement. The latter, although sometimes called "natural servitudes", are not truly servitudes at all (Cusine & Paisley at para 1.07 citing Bell at para 980). If a right arises as a result of the application of the law, whatever else it may be, it is not a servitude since it exists outwith the realm of agreement, express or implied.

[24] In order to accommodate creation by prescription, it may be better to adjust Bell's definition slightly by adding "or equivalent" after "implied -". Although there may be academic criticism of a comparison between agreement and the application of prescription (Cusine & Paisley at para 1.28 comparing Erskine: *Institute* II ix 3 and a passage in *Carstairs* v *Spence* 1927 SC 380 at 394), the practical similarities between agreement and positive prescription, based on a failure to intervene in the face of an assertion of right, should not be ignored. Thus, put shortly (Duncan at para 442):

> "…[S]ervitudes, in their strict and proper sense, confer rights not implied by law and accordingly have to be constituted with the consent or agreement of the servient owner or by some means which the law recognises as an acceptable equivalent to such consent or agreement" (cf para 459).

That being so, the pursuer's first plea-in-law, in so far as it suggests that a servitude has been created as a "necessary incident" of the pursuer's right of property, is self-contradictory. A servitude of the nature claimed cannot be created by necessity. In this context the situation differs from implied grants of servitudes of access to land in cases where subjects held on one title have been divided (eg *Ewart* v *Cochrane* (1861) 4 Macq 117; or more recently *Moncrieff* v *Jamieson* 2008 SC (HL) 1).

[25] The Lord Ordinary's four reasons why a servitude cannot be created in this way are sound. It would, in many situations, sterilise land next to walls. There is no authority for such a concept. It would contradict the principle of freedom in the use of land. It has the

potential to allow one owner to create a servitude by building a wall along his boundary without any agreement from his neighbour.

[26] That is not to say that, in a situation of true necessity, a land owner cannot access his neighbour's ground. The view of Hume (*Lectures* 15 Stair Society at 206) that "an owner's interest must yield sometimes to immediate interest even of an individual where this is out of all proportion to the owner's interest in preventing interference" is sound in principle, but this is not a servitude. In so far as the Sheriff (Garrett) in *Brydon* v *Lewis*, unreported, Edinburgh Sheriff Court, 12 February 1958, suggested that a servitude existed simply by reason of the proximity of the parties' properties, he was in error. In any event no question of necessity arises here.

[27] Similar arguments apply in relation to the suggestion that a servitude can be created *rebus ipsis et factis* (by the facts and circumstances themselves); if by that it is being submitted that a servitude can exist even if it is not created in the manner described by Bell (at para 979, quoted above) or by prescriptive use. Bell was entirely clear when, citing *Cochrane* v *Ewart* (1860) 22 D 358 (affirmed as *Ewart* v *Cochrane*), he wrote (at para 992) that:

> "A servitude cannot be constituted *rebus ipsis et factis*".

Rankine: *Landownership* (4th ed at 403) is to the same effect. This was affirmed, again with crystal clarity, in *Moncrieff* v *Jamieson* (Lord Marnoch at para [29] and Lord Hamilton at para [82], referring to Cusine & Paisley at para 11.17 and Gordon (2nd ed) at para 24.41 (3rd ed) para 25.49). Bell explains the difference between the creation of a servitude and an implied grant deriving from necessity upon the severance of subjects held on one title. That situation does not exist in this case. Even if the pursuer could have legitimately raised this new contention on the basis of his pleadings, which is highly doubtful, the case presented would have foundered in these stormy waters.

[28] The proof focussed on the remaining basis for the existence of a servitude; that of prescription. The nature of the acts of possession or use which is required in order to found a case of prescriptive right, is that they must be:

> "overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right" (*McInroy* v *Duke of Athole* (1891) 18 R (HL) 46, Lord Watson at 48; followed in *Aberdeen City Council* v *Wanchoo* 2008 SC 278 at para [18]).

Occasional use is likely to be attributed to tolerance rather than right, since good neighbours are unlikely to object to such use. The law does not require an owner to object to such use in order to prevent a neighbour acquiring a real right (Gordon at para 24.49, approved in *Aberdeen City Council* v *Wanchoo* at para [18]). In applying this *dicta* in a practical manner, little, if any assistance can be obtained from cases unconnected with servitudes such as those cited by the pursuer in relation to the early 19th century law of patronage.

[29] Once a proof is completed, questions of onus will seldom arise (see *Woodhouse* v *Lochs and Glens (Transport)* 2020 SLT 1203, LP (Carloway), delivering the opinion of the court, at para [46] citing *Gibson* v *British Insulated Callenders Construction* 1973 SC (HL) 15, Lord Reid at 22). The Lord Ordinary's reference to onus is slightly misplaced. The pursuer did not fail because of the application of onus. The evidence at proof simply did not demonstrate the requisite degree of use.

[30] The evidence which the Lord Ordinary accepted was of very limited use indeed. It came nowhere near approaching the level of use of a small section of ground which would have been needed to support a contention that the pursuer was asserting a right, far less what the nature of that right might be. The pursuer complains that the Lord Ordinary has not taken into account the limited nature of the right claimed and that, by its very nature, use of such a right would be infrequent. There is little substance in this. The Lord Ordinary

did have regard to this factor. She commented, correctly, that limited use by itself creates difficulties for a person claiming a right of a nature never advanced prior to the dispute which ultimately led to the litigation. There is no sound basis upon which the Lord Ordinary can be faulted on this central aspect of the prescription element of the case. The use did not assert a right. It was correctly attributable to mere tolerance or permission, as would be expected of a neighbour in these circumstances. Since all the grounds upon which a right of servitude have failed, the reclaiming motion must be refused.

[31] On the cross-appeal, if the nature and extent of a servitude of access is defined in the grant, its specified dimensions cannot be altered unilaterally by the servient tenement even if the altered way is as, or even more, convenient to the dominant tenement (*Moyes* v *McDiarmid* (1900) 2 F 918, Lord Kinnear at 928). If it is not so defined, there will be scope for an alternative if it is equally or reasonably convenient in a substantial sense (*Grigor* v *Maclean* (1896) 24 R 86, LJC (Macdonald) at 89; *Moyes* v *McDiarmid,* LP (Balfour) at 923-4; Bell at para 987-8).

[32] The Lord Ordinary held, as a matter of fact, that the construction of the extension made access along the strip manifestly less convenient. There are no valid grounds for interfering with this finding. Had a servitude right of access been established, the building of the extension into the access space must be taken to have interfered with the right. On this basis, this part of the cross-appeal falls to be rejected.

[33] In *Anderson* v *Brattisanni* 1978 SLT (notes) 42 the First Division, under reference to the authorities, many of which were put before the Lord Ordinary, set out the circumstances in which the court can exercise its equitable power not to have an encroaching structure removed. The matter was put thus (at 43):

> "… the power may be exercised when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense quite disproportionate to the advantage which it would give to the successful party. The power will, however, be exercised sparingly and it may be deduced that because it is exercised the court will have to be satisfied that the encroachment was made in good faith in the belief that it was unobjectionable, that it is inconsiderable and does not materially impair the proprietor in the enjoyment of his property, and that its removal would cause to the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor."

[34] The Lord Ordinary held that the defenders had not acted in good faith because the pursuer had asserted the existence of a servitude right of access prior to the construction work commencing. Had this matter required to be determined, the court would have examined this conclusion with some care. By the time the pursuer asserted his servitude right, the defenders had obtained planning permission and instructed contractors who were on the brink of commencing construction. The defenders may well have taken the view that, standing the state of the titles, there was little merit in the pursuer's stance, especially as the pursuer did not take any active steps to stop the construction. Describing the defenders' decision to proceed as being one not taken in good faith may be seen as harsh. Given that the encroachment does not prevent inspection, maintenance and repair and that re-establishing of the 900mm width would cost some £58,000, the court may have revisited the Lord Ordinary's conclusion on this aspect of the case.

[35] For these reasons, the reclaiming motion is refused. In these circumstances, there is no requirement for a formal order in respect of the cross-appeal.