SHERIFF APPEAL COURT

[2020] SAC (Civ) 22
FFR/A103-18

Sheriff Principal D L Murray
Appeal Sheriff WH Holligan
Appeal Sheriff S F Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

CHARLES JOHN DAVIDSON

and in the cause

BRADLEY JOHNSTON

Pursuer/Respondent

against

CHARLES DAVIDSON AND ANGELA MILNE

Defenders/Appellants

Appellants: Kennedy Advocate; Campbell Boath
Respondent: MacColl Advocate; J Myles and Co

5 November 2020

[1] This case concerns a dispute over the interpretation of the terms of an express servitude and the rights which stem therefrom. Following proof before answer the sheriff issued a judgment dated 29 August 2019 and after hearing further submissions on 13 December 2019 granted declarator in the following terms:

> "that the Pursuer, as heritable proprietor of the subjects at 16 Fox Street Carnoustie (registered in the Land Register for Scotland under title number ANG31127) has -

a. a right of vehicular access over, and

b. a right to park on those parts of the Defenders' property at 14 Fox Street Carnoustie (registered in the Land Register for Scotland under title number ANG8928) which are shown coloured blue and brown on the Pursuer's title plan as they lead west from Fox Street up to the point at which they meet the eastern boundary of the Defenders' garden and the path leading to the parties' front doors."

The sheriff further ordained that the defenders should remove the tree, fence and bollards on the said parts of their property so that the pursuer may exercise the said rights, and found the defenders liable to the pursuer in the expenses of the action except in so far as previously awarded.

[2] Fox Street is a narrow single carriageway which leads south from Carnoustie High Street. It is a dead end which terminates in an underpass beneath the main East Coast railway line. Double yellow lines are painted on both sides of the carriageway. Residential properties line both sides of the carriageway, some of which have parking spaces. Since at least 1997 it has not been possible to park a vehicle in the carriageway without blocking the road. Set back at right-angles from its western side are two semi-detached cottages. The pursuer is the proprietor of the western property number 16, and the defenders are the proprietors of the eastern property, number 14. Access to numbers 14 and 16 can only be taken from Fox Street over the disputed area (shown blue and brown on the pursuer's title plan) and then by a path which leads west from the disputed area past the entrance doors to numbers 14 and 16. The path then turns south where it leads to the garden and back door of number 16. The defenders own the path from the western portion of the disputed area up to the gable which separates number 14 from number 16, and the pursuer owns the remainder of the path.

[3] Prior to 1997, and the acquisition of numbers 14 and 16 by two local property developers David and George Soutar, different access arrangements applied. The matters in contention arise from the access arrangements established by the Soutars when they conveyed numbers 14 and 16. The 1997 disposition in favour of the Soutars reserved "a heritable and irredeemable servitude right of access for pedestrian and vehicular purposes" to the proprietors of number 18 Fox Street. The Soutars undertook the extension and renovation of the two cottages. Following completion of the redevelopment of 16 this was sold to two local residents Mr Duncan and Ms Brown. The disposition giving effect to the sale was dated 21 October 1998 and registered in the Register of Sasines for the County of Angus on 3 November 1998. That deed *inter alia* conveyed

> "a heritable and irredeemable servitude right of access in common with the Disponer and their successors as proprietors of the adjoining subjects known as and forming Fourteen Fox Street, aforesaid, over the area of ground extending to Ninety nine square metres and Fifty eight decimal or One-hundredth parts of a square metre or thereby being the area of ground shown coloured pink on the said plan annexed hereto."

The Soutars subsequently completed the extension of number 14 which they sold following advertisement. That sale was effected by registration in the Land Register of Scotland with title number ANG8928: the title sheet records that the burdens comprised the 1997 and 1998 servitudes. On 16 July 2004 the pursuer purchased number 16 from Mr Duncan and Ms Brown and that transaction resulted in the registration of number 16 in the Land Register (ANG31127). The property section included:

> "(TWO) a heritable and irredeemable servitude right of access in common with the proprietors of the adjoining subjects 14 Fox Street, aforesaid, over the area of ground tinted brown and blue on the said plan."

[4] The parties agree that the pursuer's servitude right derives from the express grant contained in the said disposition of 16 Fox Street by David Soutar and George Soutar in

favour of Stewart Duncan and Linsey Brown. The area of ground coloured brown and blue is referred to as "the disputed area". The two colours are explained by the fact that the eastern area which is nearest Fox Street (coloured blue) is also subject to the separate servitude right of access for the benefit of number 18. It is convenient at this point to record a number of the findings in fact made by the sheriff which parties confirmed were not matters of contention. The occupiers of properties in Fox Street without parking spaces must park their vehicles elsewhere. There is sufficient space in the disputed area to park at least four vehicles. The Soutars intended, following the redevelopment of numbers 14 and 16, that the purchasers would have the right to park in the disputed area. They believed that off-street parking areas made the properties more desirable to prospective purchasers. Prior to the sales of numbers 14 and 16 David Soutar made the purchasers aware of that intention. After he purchased number 16, Mr Duncan parked his car in the disputed area, and after they purchased number 14 Mr Christie and Miss Hill also parked on it. Since they purchased number 14 the appellants have parked on it.

Submissions for the appellants

[5] Counsel for appellants invited the court to recall the interlocutors of the sheriff of 29 August 2019 and 13 December 2019; to repel the respondent's pleas-in-law and to grant decree of absolvitor. Counsel adopted his written submissions and sought to make additional points in oral submission in response to the written submissions of the respondents. They accepted that *Moncrieff* v *Jamieson* 2008 SC (HL) 1 was authority for the proposition that a right of parking may be established as an ancillary right to a right of vehicular access. The *Moncrieff* case should however be distinguished on the basis that, as had been recognised by the House of Lords, the circumstances of a rural location in Shetland

were manifestly different to an urban situation such as in the present action, and because in *Moncrieff* it had been accepted that a right of vehicular access had been established by the terms of the express grant of servitude.

[6] A fundamentally different approach was to be applied when interpreting the terms of an express grant of servitude from determining the extent of any ancillary rights and the sheriff had fallen into error in conflating the two concepts. It was submitted that an express grant should be determined by the construction of the terms of the deed. This did not necessarily exclude the factual position immediately following the grant but the focus should be on the terms of the grant and the position on the ground when the grant was made. As a result it was perfectly possible that the servitude right provided by an express grant could fall short of what was necessary for the comfortable enjoyment of the property. Ascertaining the extent of the primary servitude created by the express grant did not require, and was not dependent on, the answer to the question of what was necessary for the comfortable enjoyment of the property. The sheriff had erred in his approach as could be seen in para [85] of the sheriff's Note where he stated:

> "On that basis, while I must firstly determine whether the express grant in this case implies vehicular access, and, if so, whether it also implies a right to park, I must do so in both cases having regard to Lord Hope's test in *Moncrieff*."

The test in *Moncrieff* which contemplated what was necessary for the comfortable enjoyment of the property only related to the ascertainment of ancillary rights and was not relevant to the interpretation of the express grant. The sheriff had erroneously applied consideration of comfortable enjoyment as an aid to interpretation of the express grant. The sheriff's approach suggested he was treating vehicular access as ancillary to access in general.

[7] The sheriff's starting point should have been to ascertain the correct interpretation of the express grant. In para [85] he had identified the need to determine whether the express

grant included vehicular access. The sheriff had however failed to answer the question and failed to express a view on the nature and extent of access conferred by the express grant.

[8] The court was invited to distinguish *Russell* v *Cowpar* (1882) 9 R 660 on the basis that the title in that case had been interpreted as a restriction on the right to build in a particular manner for over a hundred years. It was submitted that the sheriff's own legal analysis began and ended with an analysis of *Moncrieff*. At para [78] the sheriff stated that Lord Hope concluded (para [29]) that the test in *Ewart* v *Cochrane* (1861) 23 D (HL) 3 could be modified to apply to the question of whether an express servitude right contained ancillary rights:

> "the question is whether an ancillary right is necessary for the comfortable use and enjoyment of the servitude. The use of the words 'necessary' and 'comfortable' strikes the right balance between the interests of the servient and dominant proprietors."

It was submitted that the sheriff had not been referred to or addressed on the case of *Ewart* v *Cochrane* and, unlike the present case and the *Moncrieff* case, *Ewart* was concerned with whether a servitude could be implied into a conveyance when it was not expressly granted or even referred to. *Ewart* was therefore to be distinguished because it applied to situations where the deed was silent and the rights already in use for the comfort and enjoyment of the property conveyed.

[9] The sheriff was therefore in error in applying the concept of "necessary for the comfortable enjoyment" to the interpretation of the express grant. He had apparently disregarded the cases identified by the pursuer's counsel and the submissions of counsel on both sides. The question of whether the express grant included vehicular access must be answered solely by construing the terms of the express grant against the surrounding circumstances. This error manifested itself in particular in relation to the second finding in

fact and law: "2. Ancillary rights of vehicular access and parking are necessary for the comfortable use and enjoyment of said servitude". That finding should not stand. It was an error to categorise a vehicular right of access as an "ancillary" right and accordingly the sheriff's decision should be recalled. He had made repeated references to ancillary rights in the plural, but the only ancillary right was a right of parking. In para [115] his error is reinforced by his statement:

> "In these circumstances I conclude that the Pursuers have made out their case. Ancillary rights for vehicular access and parking over the disputed area and an order to facilitate them are justified on the facts as proved or admitted and in law."

[10] In the absence of a finding of vehicular access there can be no ancillary rights. The sheriff having erred on his approach to the question of whether the express grant can properly be construed to include vehicular access the question was at large for this court. It was said that the sheriff ought to have found that, on a true construction of the express grant in 1998, it provided for a pedestrian right of access to the pursuer's property. The appellants accepted the approach as set out by Lord Hope in *Moncrieff at* para [7]:

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

[11] Having regard to the surrounding circumstances on the ground, it was submitted that the right of access cannot be of vehicular access for the simple reason that the second half of the access route to the west comprises a narrow pedestrian pathway which is not accessible for a vehicle and accordingly it is not, and has never been possible, since 1998 for vehicular access to be taken to the pursuer's property. It was recognised in *Kennedy* v *MacDonald* 1998 GWD 40-1653 by Sheriff Principal Caplan that:

> "A servitude right of access is variously described in the authorities as a servitude of access or of way or of road. However, the essence of the right is to permit the dominant owner to enjoy access to his property. Thus in the case of vehicular access the practical objective is to allow the owner of the dominant tenement and authorised visitors to the tenement to reach it by vehicle, not to permit the vehicle itself to enter the lands of the dominant tenement."

The developers, the Soutars, granted the 1998 disposition of number 16 when they owned number 14. It was open to them to grant a servitude in whatever manner they chose. Had they intended to grant common ownership or vehicular access such provisions could have been set out in express terms. It is highly likely that the disposition of number 16 would have conveyed a vehicular right of access if it had also included title to a parking space, especially when a servitude right of parking was not legally recognised until the decision in *Moncrieff*. It was telling that in the declarator the sheriff had been forced to re-write the terms of the express grant and remove the west most part of the disputed area from the scope of the access right, thereby granting the pursuer a vehicular right of access which does not extend to his property. The statement in the 1998 disposition of number 16 that the right of access was "in common with number 14 Fox Street" simply demonstrated inept conveyancing. A right of access could not be granted in common. The words should be found to be wrongly used; it was not competent to provide that number 14 would enjoy a right of access in common with the purchasers of 16 Fox Street. One cannot have a right of access over one's own property. The words were used to explain to the purchaser the same access route that would ultimately be used by the owners of 14 Fox Street when it came to be developed and sold. The sheriff had found that the area was used by the purchasers, Duncan and Brown, from late 1998 when they purchased the property, until they sold the property to the pursuer on 16 July 2004, and it was then used by the pursuer until 2007 when he relocated for a period to Thailand. Since 2007 the access and parking arrangements

had been the subject of dispute. It was submitted that the short term use of the area in question between 1998 and 2007 should have no bearing on the construction of the 1998 deed. Reference was also made to section 3(1) of the Prescription and Limitation (Scotland) Act 1973. While it was recognised this was a case involving an express grant and not prescription, it was nonetheless suggested that regard should be had to the section which provides:

> "3. Positive servitudes and public rights of way.
> (1) If in the case of a positive servitude over land—
> (a) the servitude has been possessed for a continuous period of twenty years openly, peaceably and without any judicial interruption, and
> (b) the possession was founded on, and followed the execution of, a deed which is sufficient in respect of its terms (whether expressly or by implication) to constitute the servitude,
> then, as from the expiration of the said period, the validity of the servitude as so constituted shall be exempt from challenge except on the ground that the deed is invalid *ex facie* or was forged."

[12] Insofar as the sheriff placed any weight on finding in fact 4, in which he found that Brown and Duncan advertised the property as having shared parking and told the pursuer this, that was an error in law as it was not relevant to the construction of the express grant in the 1998 disposition. Likewise, the sheriff's analysis in paras [90] to [98] of other circumstances which he considered to be relevant was erroneous. The sheriff's analysis of other relevant factors in para [97] of his Note all demonstrated that the sheriff had misdirected himself by applying the test in *Ewart* (or Lord Hope's test in *Moncrieff*) rather than focusing on the construction of the terms of the express grant.

[13] The appellants therefore invited the court to conclude that, when properly construed, the express grant only extended to pedestrian access as a consequence of which there was no question of an ancillary right to park.

[14] If contrary to the submissions the court was satisfied that the terms of the express grant established a vehicular right of access, it had then to consider whether that right carried with it an ancillary right to park on the disputed area. This was the correct point for Lord Hope's test (necessary for the comfortable enjoyment) to be applied.

[15] The sheriff had found that a number of properties including number 16 Fox Street did not have parking spaces and routinely parked their vehicles elsewhere. In an urban setting such as the instant case parking would be available on the street and elsewhere. The sheriff had erred in failing to distinguish these circumstances from the particular and exceptional circumstances which applied in *Moncrieff*. As well as agreeing that there was a right of vehicular access, the parties in *Moncrieff* were agreed that, ancillary to the right of vehicular access, was the right to stop vehicles on the servient tenement, to turn, load and unload goods and to set down passengers. That was the context in which the House of Lords held that in the particular circumstances it was also necessary for the comfortable use and enjoyment of the vehicular right of access that there should be an additional right to park. The decision in *Moncrieff* should be construed restrictively as it was arrived at on the particular facts as applied there. "Da Store" in Shetland was situated in an exceptionally isolated location. The court in *Moncrieff* held that the test was most unlikely to be satisfied in an urban setting and emphasised the unique nature of the properties in question.
Lord Hope specifically stated at para [34] that the situation in the case was as far away from an urban situation which Lord Rodger [in the dissenting opinion] referred. In para [36] Lord Hope held that in view of the particular and unusual circumstances, a right ancillary to the express grant of a right of access in favour of the dominant (benefited) tenement, was a right to park vehicles on the burdened tenement.

[16] The only finding of discomfort arising from the lack of a parking space was found in finding in fact 40 where the sheriff found that the pursuer and his family were unable to park on the defender's land and as a consequence, could not drop off shopping, arrange to have goods delivered and experienced difficulty in returning their children to home safely. There was no analysis by the sheriff as to whether these elements of discomfort necessitated a right to park rather than simply a servitude right to enter, leave, unload and set down passengers. The sheriff had also failed to explain or make sufficient findings in fact to demonstrate why, on an urban street in which other occupants routinely park away from their homes, it was necessary for the pursuer to park on the defender's land. There was no proper basis to find that an ancillary right to park was established in the instant case.

Submissions for respondent

[17] The respondent invited the court to adhere to the sheriff's interlocutor of 13 December 2019 and to dismiss the appeal. The sheriff had correctly identified and applied the correct legal test as set out by the majority in the House of Lords in *Moncrieff*. In the alternative, even if the sheriff had erred in his application of the legal principles, which was denied, the matter was at large for this court and the same outcome should be reached by this court and the appeal refused.

[18] It was accepted by the respondent's counsel that both she and the appellants' counsel had presented the case to the sheriff at proof as involving a two stage process: firstly, to establish the correct interpretation of the terms of the express grant and then, having done so, to consider what ancillary rights were necessary for the comfortable enjoyment of the property. In seeking to support the reasoning of the sheriff, counsel maintained that the sheriff was entitled to have regard to what was necessary for the comfortable enjoyment of

the servitude in order to establish the proper interpretation of the express grant. She submitted that the sheriff had found more guidance in *Moncrieff* than counsel had identified at the time of the proof. She supported the sheriff's approach and sought to argue that *Moncrieff* was authority for the adoption of what she characterised as a more holistic approach. At para [26] of his speech in *Moncrieff* Lord Hope stated:

> "The essence of a servitude is that it exists for the reasonable and comfortable enjoyment of the dominant tenement. Whether it originates in writing by means of an express grant or is to be inferred from other provisions not expressly creating a servitude, practical considerations may indicate that it will carry with it other rights which, although they would not qualify on their own as servitudes, are necessary if the dominant proprietor is to make reasonable and comfortable use of the property in favour of which it was granted."

The appellants sought to draw too fine a distinction between analysing the rights necessary to enjoy a servitude and any ancillary rights associated with that servitude. The reference in that passage from Lord Hope's speech to the essence of the servitude recognised that in order to ascertain the intention underlying the express grant it was legitimate to have regard to what was necessary for the comfortable use of the benefited property. The court should reject the appellants' submission that the sheriff had incorrectly included consideration of what was necessary for the comfortable use of the property into the interpretation of the express grant. He was entitled to do so.

[19] The sheriff required to determine the meaning of the servitude granted in the break off disposition of number 16 in favour of Mr Duncan and Ms Brown dated 21 October 1998 and registered in the General Register of Sasines for the County of Angus on 3 November 1998 the terms of which are quoted above. *Moncrieff* was directly in point and the sheriff had correctly followed the approach to construction as set out by Lord Hope in the leading judgment at para [7] quoted above.

[20] The key question was whether the grant allowed for vehicular access. It was accepted that the terms of grant were ambiguous. The use of "in common" was inept for the grant of a servitude. As a result the court had to seek to identify the intention of the parties and interpret what the express grant meant.

[21] The sheriff was not to be criticised for describing the situation following the Soutars' acquisition of both 14 and 16 Fox Street as a fresh start. *Russell* v *Cowpar* (1882) 9 R 660 encapsulated a principle of interpretation, not of prescription or acquiescence. It could not be distinguished on the basis of the lengths of time involved. Lord Mure said at page 665:

> "Now it is settled law that light may be thrown on the meaning of a title, not in itself clear, by the usage which has followed upon it; and as the practice in this case has been of the kind I have described since 1779, I think we are entitled to hold that it was not the intention of parties at the time the sale took place to put an absolute restriction upon all buildings."

It was necessary and legitimate to look at the surrounding circumstances *(Alvis* v *Harrison* 1991 SLT 64 at 67G), what the parties meant at the time and what uses the benefited property might have been put to, now or in the future. *Alvis* was also further authority for the proposition that the actings of the parties after the grant is an aid to construction. Use for some 10 years following the grant was undoubtedly relevant for the interpretation of the express grant.

[22] It was material that the Soutars as disponers had granted a right over a much bigger area than necessary to only permit pedestrian access from Fox Street. The area was sufficiently large to allow four cars to be parked. It was also material that there had been initial cooperation about parking on this area. The appellants' submission went too far in suggesting consideration be given to what may have been in the mind of a hypothetical conveyancer. No such evidence was before the sheriff. The objection to David Soutar's evidence which had been heard under reservation had not been maintained. The sheriff was

entitled to take account of his evidence about the arrangements for parking. Indeed that was critical evidence which should properly inform the court. It was also entirely legitimate and correct for the sheriff to consider the local parking environment, the configuration of the property, the knowledge of the parties when the deed was granted and the behaviour and actions of the proprietors following the grant.

[23] It was recognised that in *Moncrieff* a concession had been made that the grant provided a vehicular right of access. But contrary to the submission of the appellants a parallel could be drawn with the topography. The factual matrix in *Moncrieff* was that the benefited property lay at the foot of a steep escarpment and had a stairway that allowed pedestrians to proceed down the cliff. This route did not allow it to be reached by a vehicle. In the instant case the path leading from the disputed area to number 16 only permitted pedestrian access. In both cases the benefited tenement could only be reached by vehicle by parking where the burdened tenement allowed and then taking a few steps by foot. It could never be asserted that the pursuer could bring a vehicle onto his property using the right of access. In both *Moncrieff*, where vehicular access was conceded, and *Kennedy* v *MacDonald* in which it was not, the court recognised that a right of vehicular access could exist even where a vehicle could not ultimately be driven on to the benefited property. It was nothing to the point that the path only allowed for pedestrian access. In the context of the instant case number 16 has been reached by car if the vehicle pulled up in the disputed area and an occupant then walks up the side of the building to reach the front door.

[24] At para [85] the sheriff had correctly identified the decision to be made. He had firstly to determine whether the express grant in this case included vehicular access and, if so, whether it also implied a right to park. The facts found by the sheriff, not challenged on appeal, entitled the sheriff to conclude that the express grant was of vehicular access. The

right to vehicular right of access having been established, the second question to be answered was whether there was an ancillary right to park.

[25] The court was invited to follow the reasoning of the sheriff and to find that the servitude granted was a right of vehicular access with an ancillary right to park on the disputed area coloured brown and blue on the title plans. If the court did not support the holistic approach adopted by the sheriff it was open to this court to look at the matter afresh. On the basis of the facts as found, even if the sheriff had fallen into error, which was denied, and it was not relevant to consider what was necessary for the comfortable use and enjoyment of the property to ascertain the meaning of the express grant, his findings in fact were sufficient for this court to reach the same conclusion, namely that the express grant was for vehicular access with the ancillary right to park on the disputed area.

Decision

[26] We find that the sheriff has fallen into error in two fundamental respects. The correct approach in this case was, as proposed by the parties to the sheriff at the proof before answer, a two stage process. Firstly, to determine the nature of the right conferred by the express grant; and having done so, to determine what ancillary rights were necessary for the comfortable enjoyment of the servitude. The starting point for the sheriff should have been to determine the meaning of the express grant contained originally in the 1998 disposition of number 16 Fox Street and then repeated in the Land Certificate ANG31127. Both parties accept that the terms of the grant are not clear and unambiguous. In these circumstances the task for the sheriff was to determine what the terms of the grant meant. In particular did it convey a right of vehicular access to the proprietor of number 16? The facts, largely agreed in the joint minute, were not materially in dispute. We accept the

sheriff was entitled to have regard to the evidence of Mr Soutar whose evidence was heard under reservation but the objection was not maintained.

[27] The submissions of the respondent seeking to justify the sheriff's reasoning are without merit and but emphasise the flaws in his approach. The sheriff did fall into error: he failed to address clearly what was meant by the express grant. Finding in fact and law 1 simply repeats the terms of the deed but fails to answer the critical question of whether the express grant established a vehicular right of access. It is also defective in so far as it proposes that the right of access is in common with the proprietor of 14. That omission gives rise to the second error which we identify as having been made by the sheriff: that he conflated the test to determine ancillary rights - necessary for the comfortable use and enjoyment of the servitude with the interpretation of the terms of the express grant of servitude. We also agree with the appellants that finding in fact and law 2 is also flawed in so far as it states that an ancillary right of vehicular right of access is necessary for the comfortable use of the servitude. That begs the question of what the right of servitude is. The primary question of whether it creates a pedestrian right of access or a vehicular access had to be answered. We do not accept that it is possible to have a vehicular right of access as an ancillary right. Neither do we accept that there can be an ancillary right of parking without a vehicular right of access. Finding in fact and law 2 and the various references to ancillary rights in the plural are demonstrative of the sheriff's error in having failed to identify correctly what is meant by the express grant and suggest that he considered a vehicular right of access to be an ancillary right as opposed to a right of servitude. We also observe that para [85] of the sheriff's note which both parties prayed in aid of their position is ambiguous.

[28] We do not accept that the decision of the House of Lords in *Moncrieff* altered the well understood canons of interpretation in relation to an express grant. We do not accept the proposition of the respondent that consideration of what was necessary for the comfortable enjoyment of the property was properly part of a "holistic" exercise to interpret the nature and extent of the express grant of the servitude. There is no authority for such an approach. Rather, the authorities make clear that firstly the court must determine what is meant by the express grant and, having done so, establish what ancillary rights are necessary for the comfortable enjoyment of the benefited property. In *Moncrieff* their Lordships were addressing the ancillary rights necessary for the comfortable enjoyment of the property which had the benefit of a right of a vehicular right of access. That a right of vehicular access existed was not a matter of contention. They did reiterate, at para [7], in the passage quoted above, that, in the case of an express grant, consideration of the extent of the servitude must begin with the terms of the grant itself but the meaning and effect of those words must be determined by examining the facts which were observable on the ground at the time of the grant and the anticipated use of dominant tenement in future.

[29] As a result of these conclusions, as both parties recognised, the matter is at large for our reconsideration on the facts as found. The first step is to ascertain the correct interpretation of the express grant. That must be done having regard to the terms of the grant and if, as is accepted here, those terms are ambiguous, regard may also be had to the surrounding circumstances. The anticipated future use at the time of the conveyance, in this case as a residential property, is also relevant.

[30] We are satisfied that properly interpreted the express grant does give rise to a right of vehicular access. The reference to a right in common is clearly inept and consideration must be given to what is intended. The following factors support this constituting a right of

vehicular access. The use of "in common" supports a finding that that the intention was to give some equivalent right to use the disputed area which the sheriff found had sufficient space to park at least four cars. Importantly, the evidence of Mr Soutar was that it was intended that the proprietors of number 16 had a right to park on the disputed area. The sheriff accepted his evidence that off street parking would make the redeveloped properties more desirable (Finding in fact 32). That supports the creation a right of vehicular access over the disputed area. Mr Soutar was giving independent evidence as to the opportunity for a greater sale price with parking, evidence which the sheriff was entitled to accept. We also accept the proposition of the respondent that what was in the mind of a hypothetical conveyancer about which there was no evidence is to be ignored.

[31] We reject the proposition of the appellants that there cannot be a vehicular right of access where it is not possible to drive a vehicle onto the dominant tenement. That fails to recognise that was the position on the ground in *Moncrieff*, *Kennedy* and *Alvis*. We accept that even where the last part of the access has to be pedestrian there can none the less be a right of vehicular access to reach that point and beyond. Indeed the argument may be turned to suggest that the right being granted in part over a larger area than would be necessary to allow pedestrian access is an adminicle of evidence which supports it being for vehicular access.

[32] It is also relevant that the sheriff found that the right to drive onto the disputed area and to park had been exercised for almost 10 years before objection was taken. That is less than half the prescriptive period which would apply for an implied servitude, but the task here is to interpret what was intended by an express grant. In those circumstances the activities in the period immediately following the grant are the most relevant and they

support an interpretation which permits vehicular access. We shall therefore delete finding in fact and law 1 and substitute:

> "1. The pursuer and his successors are entitled to exercise a heritable and irredeemable right of vehicular access over the area of ground shown tinted brown and blue on the title plan of Title Number ANG 31127 of the Land Register of Scotland."

[33] The second stage is to apply the test, as set out in *Moncrieff*, what ancillary right is necessary for the comfortable use and enjoyment of the servitude? We have considered the sheriff's judgment in the context of answering that question. His analysis is brief and that may perhaps be explained by his omission to firstly address the interpretation of the express grant before dealing with the ancillary right and his conflation of the two issues. He has, however, carefully recorded all of circumstances surrounding the grant and the factual position as to the location. The test is whether ancillary rights are necessary for the **comfortable** (our emphasis) enjoyment of the servitude. The servitude is one of vehicular access. Can that particular right, in that particular location, comfortably be enjoyed without the right to park? When one considers all of the circumstances of the subjects set out at various places in the sheriff's judgement we are of the view that the answer is no.

[34] The sheriff in finding in fact 32 found that "off street parking facilities would make the redeveloped properties more desirable to prospective purchasers." He records that until prevented from doing so, by the respondents, occupiers of number 16 used the disputed area for parking. In para [97] the sheriff explains that after development number 16 was a modernised semi-detached cottage with more than one bedroom and a garden, attractive to buyers with young families. He identified that Lord Hope had referenced not dissimilar considerations in *Moncrieff* (para [31]). We note that the hardship and difficulties of dropping off children identified by Lord Hope in para [34] would also apply in the instant

case. In para [103] the sheriff records that a right to park was attractive to prospective proprietors of number 16 and 14. In the next paragraph he discounts as irrelevant a comparison with other properties, such as that of Mr Robertson who gave evidence for the appellants, where they had never had a parking space and nowhere to create one. In para [108] the sheriff makes reference to his finding that on the evidence no one bar the appellants considered either ancillary right unnecessary, which again reflects his error in failing to approach correctly the interpretation of the express grant. Nonetheless that passage looked at in the context of the *Moncrieff* test and whether an ancillary right to park is necessary for the comfortable enjoyment of the servitude is highly relevant. Having identified the test posed by the majority in *Moncrieff* it is surprising that the sheriff in para [109] referenced his conclusion that there was an ancillary right to park against what he interpreted to be the higher test proposed by Lord Rodger, who dissented. Lord Rodger accepted at para [97] that "an implied right to park on the servient land was necessary to make the express grant of vehicular access effectual." But it may demonstrate that the sheriff was clearly comfortable on the evidence to find as he states in para [109] that "an ancillary right to park is necessary to carry out the purpose for which the 1998 was granted".

[35] Given our finding that the express grant provided a vehicular right of access we find there is sufficient evidence, and no contrary evidence, to allow us to concur with the view of the sheriff that there is an ancillary right to park a vehicle on the disputed area. The property is residential and particularly attractive to families - the pursuer has a young family; the configuration of the location is important - it is virtually impossible to park in the street with the consequence that, without the right to park, the right becomes limited to drop off only and therefore to render the servitude of very limited value; it was always intended that it be used for parking and was so used until the defenders took steps to

obstruct it - that suggests the right to park was seen as an integral part of the enjoyment of the subjects; the defenders use the disputed area for parking and have gone to some lengths to stop the pursuer from doing the same thing - they clearly consider it beneficial to them. We therefore accept having regard to the test endorsed by the majority in *Moncrieff* that an ancillary right to park is necessary for the comfortable enjoyment of the property given the benefits it brings and the issues around alternative available parking. As a result we shall also delete finding in fact and law 2 and substitute:

> "2. Ancillary rights of parking are necessary for the comfortable use and enjoyment of the said servitude."

Although these two findings in fact and law have required adjustment, they do not require any consequent adjustment to the terms of the interlocutor of 13 December 2019.

[36] Both parties sought sanction for Counsel and invited us to proceed on the basis that expenses should follow success. Given our findings we shall therefore award expenses in favour of the respondent and sanction the cause as being suitable for the employment of Counsel.