SHERIFF APPEAL COURT

[2022] SAC (Civ) 2
GLW-A1090-18

Sheriff Principal M W Lewis
Appeal Sheriff W H Holligan
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in an appeal in the cause

(FIRST) ALEXANDER MEIKLE MCCABE;
(SECOND) PATRICIA ANNE MARIE MCCABE; (THIRD) MICHELLE ROSE MCCABE;
AND (FOURTH) SIMON MCCABE

Pursuers and Respondents

against

(FIRST) RHODERICK PATTERSON; AND(SECOND) ANNE PATTERSON

Defenders and Appellants

Defenders and Appellants: Mitchell QC, advocate; Freelands Solicitors
Pursuers and Respondents: McClelland, advocate; Cochran Dickie & Mackenzie Ltd

29 June 2021

[1] There were two distinct aspects to the appeal which we deal with in turn. We recognise that the question for the court is the relevance of the averments and whether the defenders have averred facts sufficient to persuade the court to allow proof.

Background

[2] The parties are owners of property which border one another in Gillies Lane, Baillieston. The respondents' title is registered in the Land Register of Scotland under Title

Number LAN184963. The title comprises two areas of ground: one coloured pink and the other blue. This appeal is concerned with the area coloured pink. The appellants' title is registered under Title Number LAN211580. The title comprises an area of ground edged red. Each party lodged their respective Land Certificates which had plans attached. They agreed that the title plans are accurate.

[3] The appellants operate a commercial garage on their land. They have an acknowledged right of access to their property over the respondents' property (the area coloured pink). A gate extends across the width of the southern end of the area coloured pink. It is locked and controlled by the appellants.

[4] The respondents have raised proceedings for interdict to prevent the appellants from parking, from storing material, and from locking the gate. The sheriff granted interdict to prevent storage, allowed a proof before answer in relation to a claimed servitude right of parking, and granted interdict to prevent the appellants from locking or otherwise securing the gates, refusing to admit to proof the appellants' averments about their having a right to lock the gate.

[5] The terms of the interdict granted in relation to storage read short are:

> "to interdict the [appellants] from encroaching by storing and depositing vehicles and storage units…upon the [respondents'] heritable property at Gillies Lane, Baillieston being the area shown tinted pink… and registered in the Land Register of Scotland under Title Number LAN184963……";

[6] The appellants challenge the sheriff's decision in relation to (1) the grant of interdict in relation to storage; and (2) the refusal to admit to proof the averments about locking the gate, arguing that the existence of the servitude right of parking can have, as an ancillary right, a right to lock the gate. In the context of this opinion the respondents are the servient

proprietors (owners of the land over which the servitude is exercised); the appellants are the dominant proprietors (entitled to exercise the servitude rights established).

The first issue; appeal against the grant of interdict

Submissions by appellants

[7] The submission was short and focused; the appellants submitted that in referring to the plan attached to the Land Certificate, the interdict was not precise enough for them to know the extent of the property from which they were to be excluded from storing or parking; the issue was not the accuracy of the plan, but its application to the properties.

[8] There was a general need for clarity and precision in interdicts *(Murdoch* v *Murdoch* 1973 SLT (Notes) 13 and *Perth General Station Committee* v *Ross* (1896) 23 R 885*)*. In this case the lack of clarity arose from the thickness of line on the plan. The appellants reasonably asked - where on the ground is the line?

[9] If the appellants placed storage items on their land right at the edge in thickness of the line, the respondents could assert that the interdict was breached even if the appellants acted in good faith. The appellants submitted that there would then require to be proof traversing the same factual issue - how do you transpose the line onto the ground? There was a *bona fide* disagreement about how actually to transpose a thick line onto the ground when no historic boundaries still existed; there was a problem of precision.

[10] The appellants submitted that the sheriff should have dealt with the issue; to suggest that the appellants should themselves seek a declarator, and aver and focus what the precise location was, was to invert the onus. The obligation of clarity lay with the respondents, who sought to prevent the appellants from doing something on their ground. The appeal should be granted in relation to the interdict.

Submissions by respondents

[11] The respondents posed the question in this way - when seeking interdict to protect land from encroachment, how precisely must the land be defined?

[12] The issue was the width of line demarcating the division between the parties; where does the land lie in relation to the pink strip on the respondents' Land Certificate? The respondents submitted that they were entitled to interdict over the area drawn from and defined by the Land Certificate. The appellants accepted that the respondents are in principle entitled to interdict but they complained that the imprecision of interdict left it unclear where storage rights lie. So the thickness of the line on the plan is the only area of dispute. The respondents accept that there was scope for argument about where precisely the boundary falls, but that degree of precision was beyond the Land Register. In the respondents' submission it was for the party to whom it matters to raise proceedings seeking a more precise location. These considerations did not justify the withholding of interdict framed at the same level of precision as the Land Certificate. It was, in the respondent's submission, a matter for the law of remedies rather than the law of property.

[13] The respondents referred to *Murdoch*, submitting that the standard in an action of interdict was not one of absolute, incontrovertible precision. The order made should leave no meaningful doubt in the circumstances of case. But the courts tolerate a certain amount of ambiguity. Referring to *Murdoch*, there might be a dispute, for example, about when a warning or an admonition turned into a threat.

[14] In this case the respondents adopted the extent of their title from the Land Certificate. They rely on that; the interdict stops storage on the pink strip. It is perfectly obvious to the appellants what they must not do; store on the land. There is no meaningful

ambiguity in the terms of the interdict. The respondents submitted that cases where ambiguity matters were few; a demand for too much precision denied justice at a common sense level; interdict would be too difficult to obtain.

[15] In any event if the appellants challenge the precision, they should aver facts which identify a more precise location. But they have not done so in this case. The averments made about the extent of the boundary are irrelevant. If proved, it would still not be clear which aspect of the interdict was unacceptably wide. The interdict had been framed with reference to an accurate plan. The issue was whether the argument about the boundary line is too imprecise for interdict to have been granted at all; it was not.

[16] Even after it was granted, the appellants could seek a more precise declarator of the boundaries; it would not conflict with interdict but might refine its scope; it would still be framed in accordance with the Land Register.

[17] The respondents submitted that the true test was whether the crave for interdict was irrelevant; it was not. Even if the appellants establish everything which they offer to prove, the pursuers are still entitled to their interdict. There were insufficient averments to allow the court to position the boundary with more precision. There was no proper prescriptive progress of titles. They made references to the three dispositions giving rise to the appellants' title but all rely on an 1875 feu disposition, and the description contained therein.

[18] The appellants were not able to say where the various anchor points were to be located on the ground. There was no proper basis on which the court could declare the boundary with any more precision than the Land Certificate. It was submitted that it would be futile to have a proof on these averments.

Decision on grant of interdict

[19] The first issue involves a narrow point, figuratively and literally; we accept that an interdict must be precise. The appellants' argument was that in the circumstances of this case greater precision can be provided; the respondents' analogy with a non-molestation interdict in *Murdoch* is not exact; the order in that case sought to prescribe future behaviour rather than define a precise area. The appellants argued that more precision can be given to the description of the area from which the respondents seek to exclude storage and parking.

[20] In *Murdoch* in delivering the opinion of the court the Lord President (Lord Emslie) said:

> "Interdict, as is well known, is an equitable remedy designed to afford protection against an anticipated violation of the legal rights of the pursuer. In all cases, however, where interdict is granted by the court the terms of the interdict must be no wider than are necessary to curb the illegal actings complained of, and so precise and clear that the person interdicted is left in no doubt what he is forbidden to do."

[21] There are similar dicta to similar effect in *Perth General Station Committee.*

[22] From the authorities, the test as to precision is that the defender must be in no doubt what he is forbidden to do. Read short, the interdict seeks to prohibit the appellants from encroaching upon the respondents' land; the encroachment restrained is particularised as parking, storing and depositing vehicles and storage units. It is a matter of agreement that the heritable subjects of the parties to this action are in immediate proximity to each other. In our opinion, whether an interdict is sufficiently precise falls to be determined objectively. In the present case the wrongful act (encroachment) and the method (parking etc) are clear. The extent of the respective heritable ownerships is set out in the Land Register with relevant plans. It is difficult to see what greater precision the respondents could give. Put another way, the appellants complain they are not certain as to the extent of their ownership. The level of precision allows the appellants to know and understand the area

over which there is a restriction. It is nothing to the point in relation to extent if the interdict is breached in good faith, as the appellants' apparent concern was. Any such dispute would be resolved in the context of breach proceedings.

[23] But even if there were an argument to be made about the level of precision provided by the Land Certificate, we do not consider that the appellants' averments justify enquiry. Firstly we share the sheriff's confusion (at para [30]) about the relevance of averments which appear to rely upon a prescriptive progress of titles. But even if that were not an impediment, and the argument is that their title extends into the property claimed by respondents, the pleadings do no more, in essence, than repeat the description in the feu disposition; the averments narrate what the original boundaries were and the degree of flexibility in the measurements provided.

[24] In Answer 2 at page 5/6 of the record the appellants aver:

> "Believed to be true that there are no gaps or overlaps between the various registered titles under explanation that due to the inaccuracies of the maps utilised by the Land Register a boundary area may nonetheless be habile to being part of more than one title, ownership being determined by possession."

The appellants aver at Answer 2, page 7:

> "The [respondents'] title is believed to start at its east most point at the dividing fence with the adjacent Supermarket and extend west. The exact features on the ground differ to those depicted on the Land Certificates. There are no longer any historic features on the ground indicating the position of the boundary between the parties' respective properties in this area…"

[25] We agree with the respondents' submission that, even if all of the facts which the appellants offer to prove were established, the court would be in no better position to determine the precise measurements on the ground. As the respondents submitted, in criticising the respondents' lack of precision, the appellants offer no better precision of their own.

[26] The plan attached to the Land Certificate provides sufficient specification of the area from which the defenders are excluded for storage purposes without offending the principles desiderated in *Perth* and *Murdoch*. The appeal fails in relation to the first issue.

The second issue; can the appellants assert a right to lock the gate?

Submissions for appellants

[27] The appellants submitted that they were entitled to establish that the locking of the gate was an ancillary right necessary for the comfortable enjoyment of the servitude of parking which the sheriff had considered apt for proof. Only after proof could there be a determination of the extent, if any, to which there was the ancillary right to lock the gate as sought by the appellants.

[28] The appellants began by referring to *Johnston* v *Davidson* 2021 SCLR 17 at para [27], which demonstrated that there is a two stage process; the court must determine the nature of the servitude right and, having done so, then determine what ancillary or auxiliary rights were necessary for the comfortable enjoyment of the servitude.

[29] The appellants had access rights and an arguable right to park so that stage 1 is performed by determining the extent of possession. The sheriff in this case appeared to have decided that there is no right to lock the gate and that was the end of it; but in the appellants' submission, if a right was claimed as accessory the court could not make the decision that it did not exist; there needed to be enquiry; it had been premature to decide that issue.

[30] Anything susceptible to a grant could be an ancillary right and could be obtained by prescriptive possession. But the court needed to determine the extent of the servitude before moving on to looking at the ancillary right; it was accordingly premature of the sheriff to

dismiss the issue without evidence about extent. Only once the extent of the rights exercised were established did the court then move to consider the test for the existence of the ancillary right. Such a consideration could not take place in an evidential vacuum.

[31] The appellants submitted that such an ancillary right must be necessary for the comfortable enjoyment of the servitude. So much was made clear in *Moncrieff* v *Jamieson* (2008) SC (HL) 1 Lord Hope said at para [29]:

> "It is preferable, however, not to risk diluting the test by expressing it in these terms. The question is whether the 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 the dominant proprietors."

[32] In the authorities, and in the judgment, there was the occasional conflation of the words "servitude" and "property" but the test was what was necessary for the comfortable use and enjoyment of the servitude. It was submitted that the test anticipates a balance between necessity and comfort, but it must be necessary; it was not enough to be comfortable, or convenient.

[33] The appellants made detailed reference to the principle in the law of servitudes to the obligation on the dominant servitude to exercise the right *civiliter* (Lord Scott in *Moncrieff* at para [45]). The principle of repugnancy was also engaged (see *Johnson, Thomas and Thomas (A Firm)* v *Smith* [2016] SC GLA 50; *Moncrieff* paras [24], [57], [59], [76], [140] and [144]). In *Moncrieff* Lord Scott suggested that the repugnancy principle "must await summary of the relevant facts" (para [45]).

[34] The appellants submitted that it was clear that quite extreme invasions can be necessary for comfortable enjoyment of the property. In all cases, a balance requires to be struck and accordingly a proof was required to determine the matter.

[35] The appellants' point was that, irrespective of the repugnancy or ouster principle, there was always some interference, even material interference, with the servient proprietor's right. Lord Scott developed the point.

> "[55] In *Wright* v *Macadam* the Court of Appeal had to consider whether the right to use a coal shed could exist as an easement and held that it could (see Jenkins LJ, p 752). It has been suggested that the case may have turned on whether the claimant had sole use of the coal shed, but it is difficult to see any difference in principle between a case in which the dominant owner has sole use of a patch of ground for storage purposes, e g a coal shed, and a case in which the dominant owner is the only user of a strip of road for access purposes or of a viaduct for the passage of water. Sole user, as a concept, is quite different from, and fundamentally inferior to, exclusive possession. Sole use of a coal shed for the storage of coal does not prevent the servient owner from using the shed for any purposes of his own that do not interfere with the dominant owner's reasonable use for the storage of coal. The dominant owner entitled to a servitude of way or for the passage of water along a viaduct does not have possession of the land over which the road or the viaduct passes. If the coal shed door had been locked with only the dominant owner possessing a key and entry by the servient owner barred, so that the dominant owner would have been in possession and control of the shed, I would have regarded it as arguable that the right granted was inconsistent with the servient owner's ownership and inconsistent with the nature of a servitude or an easement. But sole use for a limited purpose is not, in my opinion, inconsistent with the servient owner's retention of possession and control or inconsistent with the nature of an easement. This conclusion is supported by Lord Evershed MR's remarks in *Re Ellenborough Park* (p 176) where the issue was whether the right to use a communal garden could take effect as an easement. He said that:
>
> > '[T]he right conferred no more amounts to a joint occupation of the park with its owners, no more excludes the proprietorship or possession of the latter, than a right of way granted through a passage, or than the use by the public of the gardens of Lincoln's Inn Fields … amount to joint occupation of that garden with the London County Council, or involve an inconsistency with the possession or proprietorship of the council as lessees.'"

[36] It was submitted that there was no difference in principle between sole use for storage purposes (or by extension parking) and a case in which the dominant proprietor is the only user of an access strip or waterway; being the sole user as a concept is different from and fundamentally inferior to exclusive possession.

[37] In Lord Scott's example, the coal shed door had been locked with only the dominant owner having a key and entry by servient owner barred, giving possession and control to

dominant owner; that may have been inconsistent with servitude or easement. The appellants submitted that the unspoken corollary is that, if the servient proprietor had a key and entry was not barred, then such an interference would not be objectionable. It would not be repugnant to the ownership of the servient proprietor.

[38] The appellants then examined the sheriff's determination that, because the ancillary right sought cannot exist as stand-alone right of servitude, it could not be an ancillary right. In the appellants' submission the potential existence of an ancillary right is not dictated by whether it can be a stand-alone right as well. That was not supported by the authorities: *Moncrieff* at para [26], [76] and [77]; *Turpie* v *Dryburgh* (1899 unreported), *Eccleston* v *O'Keefe* [2007] NSWSC 159; *Chalmers Property Investment Company* v *Robson* 2008 SLT 1069.

[39] The appellants submitted that certain matters can be drawn from Lord Rodger's remarks; not only that an ancillary right does not need to be a stand-alone servitude but that there are all manner of accessory rights which can involve fairly major intrusions on a servient tenement that do not amount to displacement, so are not repugnant; intrusion of itself does not amount to dispossession; there is still the civil possession.

[40] The appellants turned to authorities which they submitted were capable of supporting the ancillary right of locking a gate. Cuisine and Paisley: *Servitudes and Rights of Way* at paragraph 12.98, disapproving *Magistrates of Glasgow* v *Bell* (1776); Justinian, Accursius and Bartholomew Caepolla, Baron Hume's Lectures, referring to *Lang* v *McMurrich* (1808 unreported); *Borthwick* v *Strang* (1799) Hume 513; *Aitchison* v *India Tyre and Rubber Company* [1950] CLY 4878; *Oliver* v *Roberson* (1869) 8 M 137; *Tomara Holdings Pty Ltd* v *Pongass* [2002] NSWSC 195; *Littledale* v *Liverpool College* [1900] 1CH 19 and *Amirtharaja* v *White* [2021] EWHC 330 (Ch). These authorities supported the proposition that

there was an ancillary right to lock a gate and that an enquiry as to the facts was necessary to investigate such an ancillary right.

[41] The appellants invited the court to recall the sheriff's interlocutor to the extent of recalling the interdicts granted and reinstating all the excluded averments save those relating to the servitude right of storage (paragraph (b)(v) in the sheriff's interlocutor).

Submissions for respondents

[42] Two matters were the subject of agreement. In the first place, the respondents agreed with the appellants' formulation of the test for an ancillary right, expressing the same concerns about the variety of expressions which could lead to confusion; it was important to draw the distinction between benefitting the property and benefitting the servitude; the key to this is *Moncrieff* and the speeches of Lords Hope and Neuberger.

[43] Secondly, the respondents agreed with the appellant's position that an ancillary right need not be capable of being a stand-alone servitude and their analysis of the authorities supporting that proposition.

[44] In analysing the remaining submissions for the appellants, the respondents posed the question in this way - can a servitude over land include a right to control access to that land by locking a gate across it, enforceable even against the owner of that land?

[45] The appellants had offered to provide a key. But they reserved to themselves the right to decide when the gate is locked. The respondents did not want the gate to be locked at all. So the claimed ancillary right was enforced against the owner of the land. A right of that nature in the hands of a non-owner would be repugnant to the owners' right of ownership. At a high level, the core feature of ownership is the right to control possession; that manifests itself as the owners' right to control access to the land.

[46] The respondents acknowledged that an owner can transmit rights for example by way of a lease. Any tenant under a lease enjoys physical possession including the right to exclude the owner; but such a transmission of rights is limited in two respects - in time (it reverts to owner after the lease has expired) and it is conditional upon terms with which the tenant must comply or the owners can terminate; the control which the owners have is not fully compromised.

[47] By contrast, it was submitted that any right removed from bundle of ownership rights and transferred into servitude may be lost forever; so if it included the right to control access, such a right is in principle lost to the owner and may never be recovered. It was submitted that what was left was not ownership, because of the need to defer to someone else on questions of access. The sheriff had characterised the position succinctly and correctly at para [98] of her judgment when she said: "Few acts indicate 'this is mine' more clearly than the act of controlling entry and egress to a property;"

[48] That principle explains the lack of authority for the right asserted by the appellants. The right claimed should be analysed. The gate excluded any access to the respondents' ground; the gate was secured by a combination padlock; the combination was controlled by the appellants; the concern seemed to be for the appellants' "yard" (although much of it is respondents' land); it was secured for the appellants' purposes and not the respondents'. The appellants, if they prevailed, would retain the power to decide who gained access to the respondents' ground.

[49] None of authorities directly address the specific issue before the court of the dominant proprietor erecting a gate, suggesting that the absence of direct authority testifies to the fact that for centuries no servitude holder has tried to argue that they should be in control of access over ground where the servitude is exercised.

[50] The respondents referred to Gloag and Henderson *Introduction to the Law of Scotland* paragraphs 34-40; Cuisine and Paisley, *Servitudes and Rights of Way* paragraphs 12-13; *Rattray* v *Tayport Patent Slip Company* (1868) 5 SLR 219; *Leck* v *Chalmers* (1859) 21 D 408; *Robertson's Trustee* v *Bruce* (1905) 7 F 580; *Moncrieff* (*supra*); *Johnston* (*supra*).

[51] The respondents submitted that the gate locking cases referred to by the appellants were a distraction from the repugnancy principle which was at the heart of the case.

[52] None of the Scottish cases assisted because they did not deal with the critical point about whether a servitude right can include control of the ground. They mostly dealt with an owner (servient proprietor) restricting the exercise of the servitude operation by the dominant proprietor. Any help they did provide was in relation to reflecting the law's attitude to locked gates. There is a marked reluctance to allow locking of gates if it interferes with rights.

[53] Similarly cases from other Commonwealth jurisdictions did not provide any assistance; nor, the respondents submitted, did *Littledale* and *Amirtharaja*. Both of the cases were concerned with acquisition of ownership through the English variant of prescriptive possession, so did not relate to easements/servitudes and did not, in the respondents' submission, vouch the proposition that a servitude right can include locking of gate.

[54] In this case the appellants claimed a right to lock ancillary to a right to park. The ancillary right cannot be "necessary"; a right to park requires manoeuvrability and space to leave vehicles; that is all it requires. A right to lock a gate is not and cannot be ancillary to that; rather the appellants want the ancillary right because it benefits their land as a whole; they want to lock the gate to secure their whole yard. They wanted in short, to annexe ground as part of their own yard.

[55] The absence of averments about possession or use was entirely irrelevant to the question; the respondents do not accept that they lack access but it would not matter in any event. Lack of access might be temporary; a servitude right exists in perpetuity and over all of the servient property.

Reply

[56] The appellants in a brief reply recognised that the core dispute was whether the locking of a gate and provision of a key is repugnant to ownership. The locking of a gate and the provision of a key is not repugnant. Possession and control being shared does not mean that it is excluded. If the true owner can also control access to property, he is not dispossessed and there is no repugnancy which require the deprivation of possession and control.

Decision re gate locking

[57] The appellants seek an ancillary (or accessory) right of locking a gate in connection with the claimed servitude right of parking.

[58] There are a number of matters which arise for determination from the parties' submissions in the context of the appeal.

What is the test for establishing an ancillary right?

[59] We recognise that a variety of formulations arise in *Moncrieff* which have been considered since. There has been sometimes inconsistent use, and conflation of, the terms "dominant proprietor", "dominant tenement", "property" and "servitude" (see *Johnston* v *Davidson* para [28] where the court uses "benefitted property" and even Lord Hope in

Moncrieff para [30] where he uses the word "property" when "servitude" would have been more consistent with the conclusions in para [29]). We proceed primarily from the dicta of Lord Hope at para [29] of *Moncrieff* where he says:

> "The second point, which follows from the first, is that the issue as to what rights may be claimed as ancillary or accessory to the servitude right did not arise in *Ewart* v *Cochrane*. It requires only a slight modification to the words of Lord Campbell LC to identify the test that is to be applied in the case of ancillary rights, where there is an express grant and the question is what ancillary rights are necessary for the convenient and comfortable use and enjoyment of the servitude. In *Jones* v *Pritchard* (p 638) Parker J said that the grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise and enjoyment. Cusine and Paisley (para 12.124) accept this observation as a statement of the position in Scots law too. As they put it in the same paragraph, 'Not only does a servitude permit activity falling squarely within its scope but also activities which are ancillary to the primary activity.' In *Kennedy* v *Macdonald* Sheriff Principal Caplan said that activities which are reasonably incidental to the enjoyment of the access may be incorporated in the right. It is preferable, however, not to risk diluting the test by expressing it in these terms. The question is whether the 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 the dominant proprietors."

[60] We can assimilate the various formulations into the following proposition; that an ancillary right exists if it is necessary for the comfortable use and enjoyment of the servitude.

[61] It must be necessary, and it must be necessary for the benefit of the servitude, not the dominant proprietor, nor the property. A servitude may exist for the benefit of the dominant tenement (as Lord Hope says at para [26] of *Moncrieff*) but an ancillary right can only exist for the benefit of the servitude. Lord Neuberger supports this approach at paras [114]-[116]; he was initially concerned that the sheriff in *Moncrieff* applied the wrong test, but was satisfied that the sheriff had properly considered the matter of an ancillary right in the context of the right of access (the servitude) rather than for the benefit of the dominant tenement.

[62] An ancillary right should have been in contemplation, ie fall within the range of things that a dominant proprietor might reasonably be expected to do in the exercise of his right to the comfortable use and enjoyment of the servitude. In *Moncrieff* Lord Hope at para [30] said:

> "The third point is that, while the express grant must be construed in the light of the circumstances that existed in 1973, it is not necessary for it to be shown that all the rights that are later claimed as necessary for the comfortable use and enjoyment of the servitude were actually in use at that date. It is sufficient that they may be considered to have been in contemplation at the time of the grant, having regard to what the dominant proprietor might reasonably be expected to do in the exercise of his right to convenient and comfortable use of the property. In *Pwllbach Colliery Co Ltd* v *Woodman* (p 643) Lord Atkinson said that what must be implied is what is necessary for the use or enjoyment, in the way contemplated by the parties, of the thing or right granted. Activities that may reasonably be expected to take place in the future may be taken into account as well as those that were taking place at the time of the grant. So the fact that very little, if any, use was being made of the servient tenement at that time for the parking of vehicles cannot be taken as an indication that the need to park vehicles there when Da Store became habitable cannot have been in contemplation."

[63] Although these observations were made in the context of an express grant we see no reason why the same approach would not apply to a servitude acquired by prescription for the reasons we express in para [65].

[64] Both parties were agreed on that formulation which we accept can properly be distilled from the authorities, in particular the speeches in *Moncrieff*.

An ancillary right can arise from a grant or through prescription

[65] We are satisfied that, based on Lord Scott's observations at para [59] of *Moncrieff*, no distinction should be drawn whether the ancillary right is sought in relation to an express servitude or prescriptive servitude.

Must an ancillary right be capable of being a stand-alone servitude?

[66] The parties were also agreed on the approach to be taken on relation to this question, which is at odds with the sheriff's approach; she concluded at para [93] of her judgment that the fact that a right to lock a gate could not exist as a stand-alone servitude was a factor against the existence of such a right as an ancillary right.

[67] We consider that the sheriff misdirected herself and that the parties are correct that an ancillary or accessory right is not dependent on its potential existence as a servitude. In *Moncrieff* we consider that Lord Hope and Lord Rodger make the position clear at paras [26] and [77] respectively.

[68] That may be seen to support the proposition that the implied grant must be of a servitude, but examination of *Chalmers* makes the position clear. *Chalmers*, although decided in 1967, was not reported until 2008, presumably on the strength of *Moncrieff*; it decided that a servitude right to lay pipes could carry with it an implied right to carry a settling tank, if essential. (See Lord Reid at para [10] and Lord Guest at para [15]).

[69] The conclusion is supported by Professor Paisley's helpful analysis of *Dryburgh* where there was a right to draw water which included the rights to have a well, and retain a pump and other related apparatus.

[70] *Chalmers* confirms that the entitlement to draw water gave rise to an ancillary right to collect by means of a dam, and then use of pipes and ultimately the provision of a settling tank; the position is similar to *Eccleston*, where the right to water had been developed by the addition of a pump, a pump house and an electricity supply, none of which rights could be stand-alone rights but were considered necessary for the comfortable use and enjoyment of the servitude.

[71] Our view is also reflected by Cusine and Paisley at 12.124, who say "Not only does a servitude permit activity falling squarely within its scope but also activities which are ancillary to that primary activity." This passage was quoted with approval by Lord Hope in *Moncrieff* at para [29] and Lord Neuberger at para [110].

[72] We take the view that the ancillary rights need not be static but can develop, or evolve. In *Chalmers* the servitude comprehended an effective water supply system. So, the mechanism by which rights are exercised may be permitted to alter with changing technology.

An ancillary right must not be repugnant to ownership

[73] Repugnancy, or the 'ouster' principle, was considered at length in *Moncrieff*. It was recognised in *Moncrieff* that the fact that the servient proprietor is excluded from part of the property is not necessarily inimical to the existence of a servitude (Lord Hope at para [24]), but the exclusion from part of the property must not negate the very concept of ownership.

[74] An owner is in general terms entitled to use, possess and dispose of property. Anything which prohibits or materially interferes with those rights is thereby inconsistent with the rights and is hence repugnant.

[75] The existence of a servitude of itself is not repugnant to ownership, or all prescriptive servitudes would be challengeable. It is clear that a servitude may impose considerable restrictions on servient proprietor, and involve quite extreme uses of the land. As is clear from *Moncrieff* and *Johnson*, a servient proprietor whose ground is subject to a servitude of parking will not be permitted to build on the ground in such a way as to prevent parking, or parking of the type envisaged by the servitude. We accept also that sole user as a concept is

different from and inferior to exclusive possession. But sole use can be a factor in such exclusivity depending on other factors.

[76] The test for repugnancy is whether the servient proprietor retains possession and, subject to the reasonable exercise of the right in question, control of the servient land. (See Lord Scott at para [59], Lord Neuberger at para [143] and Lord Rodger at para [76] of *Moncrieff*).

***Civiliter* principle**

[77] Any servitude, and, it follows, any ancillary right arising therefrom, must be exercised *civiliter*, as described in *Alvis* v *Harri*son 1991 SLT 64 at p 67 by Lord Jauncey: "(2) The right must be exercised *civiliter*, that is to say, reasonably and in a manner least burdensome to the servient tenement." As it is put in Rankine, *Land-ownership in Scotland* (4th ed), p 417: "It must be exercised in the mode least disadvantageous to the servient tenement, consistently with full enjoyment."

The locking of a gate - analysis of the case law

[78] The analysis of the cases was helpful; certain maters can be extracted.

[79] The high point for the appellants was *Magistrates of Glasgow* v *Bell*; that case permitted the erection and locking of a gate so long as the other party (in that case the dominant proprietor) had a key. Cusine and Paisley consider it to be no longer good law, a conclusion justified by the development of the case law since. Although the terminology is inconsistent, we conclude that it is generally impermissible for the servient proprietor to lock a gate even if willing to provide a key, or equivalent (paragraph 12.98). As Cusine and Paisley observe (paragraph 12.98), the justification for the rule is linked to the fact that the

dominant proprietor can allow access to members of the general public who wish to visit the dominant tenement and conduct business there; there would be insuperable practical difficulties in supplying all parties with a means of entry.

[80] Despite having traversed continents and centuries in search of support from the authorities, essentially the appellants were not able to point to any authority which endorsed the dominant proprietor erecting a gate or similar obstruction.

[81] The line of Scottish authorities to which reference was made involved the servient proprietor erecting a barrier against the dominant proprietor. Although parties considered that the cases provided some help, it seems to us to not be without significance that the authorities have never considered such to be an ancillary right; Cusine and Paisley do not appear to countenance the dominant proprietor excluding the servient proprietor by way of a locked gate.

[82] The "unspoken corollary" in Lord Scott's speech (if they provide a key, that is acceptable) is a fragile basis for asserting the right of the dominant tenement to erect and lock a gate. Even those cases which did not involve servitudes demonstrated the reluctance of the courts to support a right to lock (*Macpherson* v *Callander and Oban Railway Co* (1887) 25 SLR 474). There is no authority for the defenders' proposition that locking the gate is not inconsistent with the pursuers' retaining possession and control.

[83] We accordingly turn to the two English cases to which the appellants referred, which were rather trailed as vouching the proposition that the dominant proprietor could erect a gate. These were not apparently cited to the sheriff, and the significance given to them merits full consideration.

[84] In *Littledale* there is a superficial level of support, but was a case about acquiring the right of ownership; the locking of the gate was an act of inclosure (sic) but fell short of an

assertion of ownership because of the existence of a right of way for the plaintiffs and the recognised need to keep public from the protected lands; the assertion of ownership appeared late in the case; the plaintiffs initially sought only to assert their right of way. The appeal court held that the judge was entitled to regard the act as not unequivocal.

[85] The appellants relied on observations of Sir F H Jeune but his opinion is both guarded (at page 24 he says: "I am not prepared to differ from [the judgment of the Master of the rolls]", and "it is with considerable difficulty that I agree with the judgment of the …Court below. But, on the whole, I am not prepared to take the responsibility of differing from him…") and qualified (at page 25:

> "If there had been no right of way I should have thought that, when a man puts gates at each end of a strip of land and locks them, he has done as strong an act as he could do to assert his right to the ownership of the land.").

[86] We do not consider that the decision in *Littledale* supports the proposition that a dominant proprietor can erect a locked gate as an ancillary right to a servitude of parking.

[87] Turning to *Amirtharaja*, again there is an apparent degree of support offered to the appellants. But this must be seen in the context of the English law being invoked. What is required is actual possession, and possession with intention to possess, a single and exclusive possession to hold and exclude the world at large (paragraph 45). See also the following referred to in *Amirtharaja*: *Powell* v *McFarlane* [1977] 3 WLUK 188 at paragraph 18; *Buckinghamshire County Council* v *Moran* [1990] Ch 623, at page 640.

[88] The observation in these cases that enclosure (including by fence and gate) is unequivocal serves to undermine rather than support the appellant's position in this case. In short, the two English cases, when properly understood, do not bear the weight that the appellants give them as support for the proposition. They do not in our view fortify the

argument. There are accordingly no cases which support the existence of such a right as ancillary to a servitude.

[89] We acknowledge that the cases demonstrate a significant degree of protection to servitude rights; the servient owner cannot block the servitude; we consider that the same considerations apply with at least the same force to the protection of ownership rights. If the law is that the servient proprietor, with the benefit of ownership, cannot lock a gate which interferes with a servitude right, then it must be the case that the dominant proprietor is similarly restricted in relation to the erection and locking of a gate which excludes the servient proprietor.

Application of the law to this case

[90] We consider that the approach of the respondents is correct, in that the court should consider repugnancy before examining whether the test for the ancillary right is met.

[91] We consider that Lord Scott's parenthetical observation in *Moncrieff* at the end of para [47] ("An examination of the applicability of the 'ouster' principle to the right to park claimed in this case must wait a summary of the relevant facts") was not part of his judicial determination, but a prelude to his own consideration of the facts as found by the sheriff in *Moncrieff*. It does not support the appellants' argument that a proof is required.

[92] In this case, the sheriff concluded that the right to lock a gate was repugnant with ownership of the servient tenement. We agree. We conclude that the existence of an ancillary right which excludes the servient proprietor from the whole of the property irrespective of the offer of a key, is repugnant to ownership.

[93] The test is crystallised in Lord Scott's speech in *Moncrieff* at para [59] and Lord Neuberger at paras [139] and [143].

[94] The respondents' characterisation of the appellants' action as "annexing" the land have some force; the respondents' possession and control is materially compromised by the locking to the extent that is repugnant with ownership. The servient proprietor is deprived of both possession and control. The respondents are effectively excluded from the land and are left without any reasonable use.

[95] We consider that the sheriff was right to characterise the existence of an ancillary right to lock a gate as an unwarranted interference with the servient proprietor's right of ownership (para [99] of the judgment).

[96] The case has similarities to *Copeland* v *Greenhalf* [1952] Ch 488 (reference to which was made by Lord Scott at para [56] of *Moncrieff*). A claim for an easement (servitude) was rejected on the basis that the defendant was claiming the whole beneficial use of the land, if necessary to the exclusion of the owner.

[97] We are fortified in our view about the repugnancy of the claimed right by the fact that the Scottish cases do not consider a set of circumstances where the dominant proprietor erects and locks the gate; indeed as we observed, it was not even countenanced in Cusine and Paisley's helpful analysis of gate locking.

[98] In reaching this conclusion we do not overlook the need for the right, whether servitude or ancillary to be exercised *civiliter*; but no reasonable exercise of a right to lock a gate can outweigh the repugnancy of that right. Exclusion by the locking of a gate is conceptually different to the interference, even significant interference, which a servitude causes by virtue of its operation. It is destructive of ownership (*Rattray*).

[99] That means that the appeal must fail, but we address other matters raised in submission.

Is the right sought necessary for the comfortable use and enjoyment of the servitude?

[100] If we are wrong about the repugnancy principle, we consider the ancillary right of locking a gate is not necessary for the comfortable use and enjoyment of the servitude right of parking.

[101] It is not difficult to envisage some rights which may be necessary (as anticipated in *Moncrieff* by Lord Scott at para [47]):

> "Thus the grant of a right of way over a driveway cannot place on the servient owner the obligation to keep the driveway in repair (see *Jones* v *Pritchard* , p 637). The dominant owner would be entitled, although not obliged, as a right ancillary to his right of way to do such repairs to the driveway as were necessary or desirable."

[102] That proposition finds support from Lord Jauncey in *Alvis* v *Harrison* 1991 SLT 64 at p 67 where he said:

> "(3) For the better enjoyment of his right the dominant owner may improve the ground over which that right extends provided that he does not substantially alter the nature of the road nor otherwise prejudice the servient tenement."

In *Stevenson and Others* v *Biggart* (1867) 3 SLR 184 at p 187, Lord President McNeill said:

> "The laying metal on it with a view to make it a better road is the very thing which I think he was entitled to do, to put it in repair, so long as he did nothing prejudicial to the benefice."

[103] The law has sanctioned re-surfacing (see *Wimpey Homes Holdings Ltd* v *Collins* 1999 SLT (Sh Ct) 16) as necessary. The respondents gave a further example, being the removal of overhanging branches, which might be seen to be necessary.

[104] We conclude that the ancillary right sought may be desirable or convenient or economical or commercially preferable to the appellants, but it is not a necessary component of the right to park; it is conceivable that a right to lock a gate might attach to a right of storage, but parking is conceptually different from storage (*Crawley Borough Council* v *Hickmet Ltd* (1998) 75 P & CR 500).

Have the appellants pled a relevant case for acquisition of the ancillary right?

[105] If we are wrong in principle about the necessity of such a right, in any event the averments do not provide a factual basis to allow the court to find the right sought to be necessary. In Answer three, the averments mention the need to secure the respondents' "yard" and the fact that removal of the gates will "prevent commercial activity" on the respondents' premises. These do not address the issues of repugnancy or necessity in terms of the right sought for enjoyment of the servitude.

[106] The appellants did amend during the appeal proceedings, adding two sentences to their pleadings as follows:

> "During the whole of that period the [appellants] and their predecessors in title locked the gates and provided a key or combination to persons who required to pass through the gates when they were locked."

and "locking of the gates is reasonably necessary to the comfortable exercise and enjoyment of [the servitude right of parking]".

[107] The first addition emphasises that the appellants appear to reserve to themselves the right of allowing entry, adding weight the respondents' repugnancy argument; the second addition is more akin to a legal proposition or plea in law. The factual averments are insufficient in our view to merit further enquiry. There are insufficient averments identifying the relationship between the servitude and the ancillary right sought.

[108] The appeal is refused. We find the appellants liable to the respondents in the expenses of the case and sanction the case as suitable for the employment of junior counsel. We are not persuaded that the involvement of senior counsel was reasonable.