SHERIFF APPEAL COURT

[2023] SAC (Civ) 24
FAL-A176-18

Sheriff Principal S F Murphy KC
Appeal Sheriff A M Cubie
Appeal Sheriff T McCartney

OPINION OF THE COURT

delivered by APPEAL SHERIFF A M CUBIE

in the appeal in the cause

(FIRST) GRAHAM FERGUSON AND (SECOND) ANGELA FERGUSON

Pursuers and Appellants

against

(FIRST) BARBARA GREGORS, (SECOND) MORAG FOWLER AND (THIRD) ALASTAIR FOWLER

Defenders and Respondents

Pursuers and Appellants: G Dunlop, advocate; Russel + Aitken (Falkirk & Alloa) Limited
First Defender and First Respondent: G Middleton, advocate; Trainor Alston Limited
Second Defender and Second Respondent: F McShane, advocate; Friels Solicitors Limited
Third Defender and Third Respondent: Party

6 July 2023

Background

[1] Wesleymount Farm, Church Road, California, Falkirk is owned by the first respondent, Mrs Gregors. Her title is registered in the Land Register of Scotland under Title Number STG56698. Access and egress to her property is taken along Church Road, California, Falkirk and then across a strip of land 0.5 metres in width owned by the appellants, the Fergusons, whose title thereto is registered in the Land Register of Scotland

under Title Number STG79893. Thereafter, a track serves Mrs Gregors' property. This is the only access route available to her.

[2] Mrs Gregors has lived at Wesleymount Farm since the early 1980s. Wesleymount Farm used to be owned by her father-in-law. Upon his death, Mrs Gregors and her late husband took ownership of the farm. Upon her husband's death, Mrs Gregors became the sole owner of the farm.

[3] From 1993, Mrs Gregors and her late husband sold various plots of Wesleymount Farm to other proprietors. All of the plots of land sold off also require to take access and egress via Church Road and across the Fergusons' property. One of the plots of land sold was to Mr and Mrs Fowler, the second and third respondents. They hold an unregistered disposition from Mrs Gregors and her late husband. This was issued to them in 2016. The disposition transferring the plot of land to the Fowlers has not been registered in the Land Register of Scotland.

[4] The Fowlers had obtained planning permission to change the use of their plot from vacant to form a private gypsy or traveller pitch with one static caravan and one touring caravan together with the laying of a hard surface and erection of a boundary fence.

[5] From the time of the Fowler's occupation of the plot in 2016 there was an increase in the burden of traffic using Church Road and the Fergusons' property. That increase in traffic was attributable to the Fowlers and vehicles attending their plot.

[6] The Fergusons purchased Title Number STG56698. They submitted their registration with the Land Register of Scotland on 17 May 2018. The application for registration was accepted on 23 May 2019. This action was warranted on 9 October 2018.

[7] The Fergusons sought to interdict Mrs Gregors from traversing and permitting, authoring or encouraging access across her property, except for normal residential or

agricultural uses. With respect to the Fowlers, the Fergusons sought interdict to stop any traversing of their property by the Fowlers. Separately, interdict was sought to prevent any of the respondents traversing the appellants' property for any purpose in connection with the business or commercial interests of the respondents. Finally, interdict was sought to stop the respondents from allowing specific types of vehicle to traverse across the appellants' property. A counterclaim was made by Mrs Gregors seeking declarator that she had a servitude right of pedestrian and vehicular access over the Fergusons' property.

[8] Following proof, the sheriff upheld the counterclaim and found that Mrs Gregors had a servitude right of pedestrian and vehicular access over the Fergusons' property. He refused to make any order of interdict against her. He found that the burden on the servitude had increased as a result of the Fowlers taking occupation of their plot. He therefore granted interdict against the Fowlers to prevent them i) from traversing the appellants' property for any purpose in connection with their business or commercial interests and ii) from allowing specific types of vehicle to traverse across the appellants' property.

[9] For the purposes of expenses, the sheriff chose to treat all the respondents as one party. In respect of the proof diets the sheriff found the respondents liable for 60% of the Fergusons' expenses and the Fergusons liable for the 40% of the respondents' expenses of the proof diet. He applied the same percentage findings in respect of the remaining expenses in the cause not already subject to an order of the court.

[10] The Fergusons appeal and each of Mrs Gregors and Mr and Mrs Fowler cross-appeal. The Fergusons argue that the sheriff erred in taking into account evidence from Mrs Gregors given by affidavit, that there was insufficient evidence to support the existence of the

servitude; and that even if a servitude did exist, the element relating to commercial and agricultural vehicular access had been extinguished by way of negative prescription.

[11] Mrs Gregors in her cross-appeal challenges the disposal on expenses. The Fowlers also challenge the expenses disposal. Mrs Fowler separately argues that the interdict should not have been granted against her, as there was no evidential basis for the sheriff's decision to include her in the parties to be subject to restriction.

Affidavits of Mrs Gregors

[12] Prior to proof the sheriff had ordered affidavits to be lodged by any witness to be called by the parties. Mrs Gregors lodged two affidavits; however, for a variety of reasons she did not wish to attend court to give oral evidence. On the first day of the proof diet, a motion was made for Mrs Gregors' evidence to be taken on commission. The sheriff refused that motion and refused to grant leave to appeal.

[13] Mrs Gregors did not attend at court. Neither of the affidavits were adopted by her. The sheriff noted the existence of the affidavits while the case was at avizandum and sought submissions on the use that might be made of them. The Fergusons conceded that the affidavits were admissible, but argued that no weight should be attached to them. The sheriff took the affidavits into account in sustaining the crave of the counterclaim and finding that there was a servitude right of access.

Submissions for Pursuers and Appellants

Ground 1

[14] The sheriff erred in law when exercising his discretion in accepting the Mrs Gregors' affidavits as being proven, in circumstances where Mrs Gregors declined to attend court.

[15] Her affidavits were critical in establishing her counterclaim for declarator of the existence of a servitude right of pedestrian and vehicular access over the appellants' property. The sheriff found that the relevant prescriptive period for the acquisition of the servitude began in the early 1980s. The only factual evidence for continuous use of taking access and egress over the appellants' property from the 1980s was contained in Mrs Gregors' affidavits.

[16] The sheriff had requested to be addressed specifically on the issue of admissibility of the affidavits. In their submissions to the sheriff, the Fergusons conceded that Mrs Gregors' affidavits were admissible; however, the Fergusons submitted that the sheriff ought to have attached no weight to the contents of the affidavits.

[17] It was submitted that there was no assessment by the sheriff as to the weight to be attached to Mrs Gregors' affidavits. The sheriff had appeared to accept the contents of the affidavits in their entirety without reservation. Mrs Gregors had, to all intents and purposes, succeeded in her counterclaim without lodging a document or producing a witness in person, other than lodging her affidavits. The sheriff ought to have provided reasons for what weight (if any) should be given to the affidavits: per *Thomson* v *Glasgow Corporation* 1962 S.C. (HL) 36 at 66. The sheriff ought to have provided reasons for accepting the affidavits as proven: *M* v *M* [2022] SAC (Civ) 19 at paragraphs 43-44. There was no assessment of the credibility and/or reliability of Mrs Gregors' evidence. With the exception of the affidavits, there was no other evidence led at proof to establish the prescriptive possession required for the counterclaim to succeed. The sheriff had therefore erred.

Ground 2

[18] The sheriff erred by reaching a conclusion on prescription for which there was no evidential basis. The sheriff had found that positive prescription for the purposes of the servitude began in the 1980s. He made no finding in fact as to whether the use had been continuous. He made no finding in fact as to when in fact the servitude was acquired. Such a finding in fact was necessary given the Fergusons were contending that, even if there was a servitude, part of it had been extinguished by non-use (i.e. use by agricultural and commercial vehicles). The only evidence for use of the servitude by agricultural or commercial vehicles prior to 1994 was Mrs Gregors' affidavits, which ought to have had no weight attached to them. Absent the evidence in the affidavits there was no basis to make the findings which the sheriff did.

Ground 3

[19] The sheriff erred in considering that negative prescription (under section 8 of the Prescription and Limitation (Scotland) Act 1973) did not apply in this action. There was no evidence as to use of the track by agricultural and commercial vehicles. There was no finding in fact as to when use by agricultural and commercial vehicles had last used the track prior to 2016 in order to assess whether section 8 of the 1973 Act was applicable. In other words, the Fergusons' position was that, even if there had previously been a servitude over their property allowing for agricultural and commercial vehicles, it had been extinguished through non-use by the respondents for vehicles of that type.

Response to Cross-Appeals

[20] The only cross-appeal as to the merits was by Mrs Fowler; however, the ground of cross-appeal had materially changed to that which was contained in her grounds for cross-appeal. Mrs Fowler challenged the scope of the interdict granted against her. The Fergusons' referred the court to passages of evidence given at proof and submitted the sheriff was entitled to grant the scope of interdict that he did in relation to the second respondent.

[21] All three respondents challenged the sheriff's finding on the proof expenses and the expenses in the cause. The Fergusons' position was that expenses were entirely for the discretion of the sheriff. All respondents had been represented by the same agent at the proof. All the respondents had, in effect, pled a common defence. The pleadings they each made were to similar effect. Only Mr Fowler elected to give evidence. The Fowlers had an interest in the success of the Mrs Gregors' counterclaim. It would not have been appropriate to award three sets of expenses against the Fergusons. The sheriff had decided to treat the respondents as one entity for the purpose of judicial expenses. He was entitled to do so.

[22] The criticism that the sheriff in his interlocutor had failed to say whether the respondents were jointly and severally liable was misplaced. In the absence of such words, the liability of the respondents was *pro rata* and joint: per *Warrand* v *Watson* 1907 S.C. 432 at 434.

Submissions for Mrs Gregors

Response to Appellants' Appeal

[23] Mrs Gregors submitted that ground one of the appellants' argument was ill founded. The appellants had conceded prior to judgment that the affidavits were admissible. That

being so, the question was what weight (if any) the sheriff ought to have attached to the evidence.

[24] In the absence of an identifiable error an appellate court should only interfere with the findings of fact made by a first instance judge if it is satisfied that his decision cannot reasonably explained or justified: per Lord Reed in *Henderson* v *Foxworth Investments Limited* 2014 S.C. (U.K.S.C.) 203 at paragraph 67. The rationale of the legal requirement of appellate restraint on issues of fact was for two reasons. First, the first instance judge has the advantage of assessing the credibility and reliability of witnesses. Secondly, reopening questions of fact for redetermination on appeal would expose parties to greater cost and divert judicial resource: per Lord Hodge in *Royal Bank of Scotland Plc* v *Carlyle* 2015 S.C. (U.K.S.C.) 93 at paragraph 22. While Mrs Gregors did not attend to give oral evidence, the sheriff was still able to consider the weight to be assigned, if any, to her affidavits by assessing her evidence against the evidence led from the other witnesses and the evidence as the whole. The sheriff had evaluated Mrs Gregors' evidence in her affidavits and accepted it. On the basis of *Henderson* and *Royal Bank of Scotland Plc* there was no basis for this court to interfere with the sheriff's acceptance of her evidence.

[25] In any event, there was evidence given by the witnesses for the appellants, in particular by Lorna Robinson, that pedestrian and vehicular access had been exercised by the first respondent since the 1980s.

[26] Mrs Gregors submitted that the terms of the interdicts sought by the appellants against her were, in effect, to continue to allow access for residential purposes and by agricultural vehicles, but not commercial vehicles. That distinction was impermissible but in any event irrelevant. There is no basis to construe a limitation based on the purpose of traffic using a servitude: per Lord President Clyde in *Carstairs* v *Spence* 1924 S.C. 380 at 386

and 388; per Lord Blackburn in *Carstairs* v *Spence* 1924 S.C. 380 at 394. If there is a servitude which provides for vehicular access, there can be no restriction on that, other than on the level of the burden on the servient tenement. The level of use acquired during acquisition sets the scope of the extent of the servitude. A servient tenement can object to an increase in burden beyond what has been established by positive prescription.

[27] Even if the court did not accept the distinction as irrelevant, the attempt by the appellants to argue there was evidence of non-use of the track by agricultural and commercial vehicles was also irrelevant. Counsel referred the court to section 8 of the Prescription and Limitation (Scotland) Act 1973. Counsel submitted that once a servitude right of pedestrian and vehicular access was established, it was not divisible.

Cross-Appeal

[28] Mrs Gregors had been successful in resisting the appellants' craves for interdict. She had also established her counterclaim against the appellants. Notwithstanding that, the sheriff decided to treat all parties as one for the purposes of expenses. While the parties had all been represented by the same agent at proof it was not reasonable for Mrs Gregors to bear any expenses having vindicated her position. Counsel moved the court to quash the sheriff's decision on the expenses of the proof, the expenses of the cause not already awarded and the counterclaim and find the Fergusons liable to Mrs Gregors for her expenses and outlays for the expenses of the proof, the expenses of the cause not already awarded and the counterclaim.

Submissions for Mrs Fowler

Response to Appellants' Appeal

[29] Mrs Fowler adopted Mrs Gregors' position on the Fergusons' first ground of appeal.

[30] In respect of the second ground, Mrs Fowler submitted there was sufficient evidence to establish the use of the track from 1951 based on the Mrs Gregors' affidavit evidence. The sheriff was entitled to infer a servitude existed over the appellants' property given it was the only access route to the respondents' properties which were landlocked: per Lord Justice Clerk Moncrieff in *McLaren* v *City of Glasgow Union Railway* (1878) 5 R. 1042 at 1047 and Lord President Rodger in *Bowers* v *Kennedy* 2000 S.C. 555 at 560E-563B. There was adequate evidence such that the sheriff was entitled to find positive prescription of a pedestrian and vehicular servitude had been established.

[31] As for the Fergusons' ground of appeal regarding negative prescription, they would have required to lead positive evidence of the absence of exercise of access for 20 years. They had failed to do so. In any event, the distinction between agricultural and commercial vehicles was irrelevant: *Carstairs* v *Spence* 1924 S.C. 380. The only basis upon which the Fergusons could restrict usage was if the burden became excessive. Mrs Fowler accepted that, on the evidence, the sheriff was entitled to find there was an increase in the burden; however, it was submitted there was no evidence or finding in fact this was due to Mrs Fowler. The interdict granted against Mrs Fowler should be recalled.

Cross-Appeal

[32] Mrs Fowler's first ground of cross-appeal had materially changed to that which was contained in her note of grounds for cross-appeal. She challenged the interdict on the basis that there was no evidence to substantiate that she was liable for the increase to the burden

on the servitude in her grounds of cross-appeal. In oral submissions, however, Mrs Fowler rather challenged the scope of the interdict rather than the imposition of the interdict itself. It was submitted that the evidence at proof did not provide the sheriff a basis to grant the scope which he did. Notwithstanding the lack of a ground of appeal on the interdict's scope, Mrs Fowler moved the court to restrict the scope of the interdict, without proposing in terms a suitable alternative wording.

[33] Mrs Fowler also cross-appealed in relation to the sheriff's finding on expenses. She accepted there was mixed success; however, the appropriate starting point ought to have been 50% for each party's expenses. She had not made a counterclaim. Any liability in expenses for the counterclaim should not be made against her.

Submissions for Mr Fowler

Response to Appellants' Appeal

[34] Mr Fowler adopted the first and second respondents' position as respects refusal of the appellants' appeal.

Cross-Appeal

[35] Mr Fowler moved that the sheriff had erred in his finding of expenses for the proof and the expenses in the cause. He adopted Mrs Fowler's position on expenses.

Discussion

Preliminary remarks

[36] There was an unusual feature in that the Fowlers were not infeft proprietors of their property. They had an unregistered disposition in their favour. Title does not pass until

registration, and a servitude is a right over land, not a personal right, so the court wondered aloud whether anything turned on the unusual conveyancing situation. Parties were clear that nothing did – the Fergusons' position was that they did not want or intend to interfere with the right of access, which all of the respondents had, to their homes, being accessible only through the strip of land owned by the Fergusons.

[37] No concession was made about the existence of a servitude or even implied right of access - the Fergusons chose to view it as a permissive right or a concession. The intention of the action was to address the increase in volume and the type of vehicular access being taken to the properties over the Fergusons' land.

Did the sheriff err in attaching the weight which he did to the affidavits for Mrs Gregors?

[38] The sheriff had come across the affidavits while the case was at avizandum and sought the parties' views on what should be done with them; the Fergusons, with apparently more enthusiasm than Mrs Gregors, accepted that the court could consider the affidavits and the sheriff proceeded to do just that.

[39] Much was made of the sheriff purportedly binding himself to follow the affidavits but despite the Fergusons' attempt to elevate the sheriff's words into some improper reliance on the affidavits, all that the sheriff said was that he "must have regard to" the affidavits (see paragraph 141 of the note). He did so having from paragraphs 45 and 46 of the note considered the approach to be taken, and satisfied himself that they were admissible. He then had regard to the affidavits. He accepted them having considered them in the context of other evidence. There is no error in that approach, particularly standing the concession made and not withdrawn. It is therefore unnecessary for us to consider that position if there had been no such concession.

[40] Once the sheriff was entitled to consider the affidavit, thereafter the weight becomes a matter for him in context of evidence. We acknowledge that when the affidavit evidence is admitted, weight to be given to it should be considered with care; it is an exercise of judgment. But there is no rule of law that precludes the court from giving weight to such evidence, even if unsupported and unchallenged by cross examination. He did not, as was suggested, accept the affidavits without reservation. In considering the evidence as a whole, we conclude that there was ample material which would have allowed the sheriff to accept Mrs Gregors' affidavits, the most compelling being Mr Ferguson's admission in evidence that there no other way to enter her premises. That admission, allied to the affidavit of Lorna Robertson, allowed the sheriff to find on a balance of probabilities that there was a servitude established through positive prescription under section 3 of the 1973 Act.

[41] There was no competing narrative and we are not persuaded that the absence of cross-examination fatally undermined the weight which the sheriff was able to afford the affidavits. The Fergusons' ability to challenge Mrs Gregors' account was limited by their own time spent at the property. There was not, on the material before us, any foundation for challenging the accounts in the affidavit.

[42] As the Fergusons acknowledge there is a high bar for an appellant in seeking to overturn findings in fact. The test can be put thus - the first instance judge has to be plainly wrong, by fundamentally misunderstanding the evidence or omitting relevant material, or taking into account irrelevant material, or have arrived at a view which the evidence, on no view, could support. Authority if needed can be found inter alia in *Thomson* v *Glasgow Corporation, M* v *M, Henderson* v *Foxworth, Royal Bank of Scotland* v *Carlyle.*

[43] It does not matter whether the appeal court considers that it would have reached a different conclusion; it can only intervene if the decision is one that no reasonable judge

could have reached. As was put neatly by Lord Goddard in *Stepney Borough Council* v *Joffe* [1949] 1 KB 599 at 603.

> "…the function of the court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

[44] The sheriff's acceptance of the affidavit evidence is reasonable and intelligible; indeed it is difficult to know what other approach could have been taken. The sheriff was entitled to find that there was a servitude operating by way of positive prescription in terms of section 3 of the 1973 Act – i.e. that it had been possessed for twenty years openly, peaceably, and without judicial interruption and to sustain the plea in law in the counterclaim. The first ground of appeal fails.

Was the servitude right of vehicular access exercised without interruption in respect of commercial use?

[45] Section 8 of the 1973 Act provides:

> "8. **Extinction of other rights relating to property by prescriptive periods of twenty years.**
> (1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of twenty years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished.
> (2) This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6 or 7 of this Act as being a right correlative to an obligation to which either of those sections applies."

[46] The Fergusons argue that even if a servitude did exist, the commercial vehicular aspect of that servitude had prescribed. We observe that this was not apparently the subject of detailed submissions to the sheriff. The division of the servitude seems to have emerged as a feature in the course of the appeal procedure.

[47] We accept that there was reference to limited authority for the proposition that a servitude that provides for vehicular and pedestrian access might be divisible into these two components. In *MacFarlane* v *Morrison* (1865) 4 M 257 a jury held that a right to access a road by horse and cart had been lost, although the right to use the road as a footpath was preserved. That case dealt with a right of way, and we note that paragraph 24.05 of *Servitudes and Rights of Way* (Cusine and Paisley 1998) draws a distinction between rights of way and servitudes.

[48] More recently in *Walker's Executrix* v *Carr* 1973 SLT (Sh Ct) 77 the sheriff held that a servitude right of access for vehicles was lost *non utendo* (through lack of use) when for a period of 41 years only a bicycle and motor bike had used the right of access.

[49] We accept that there may be circumstances where a right of vehicular access can be divided, or isolated, from pedestrian access in the context of section 8 of the 1973 Act. But we do not accept that a right of vehicular access which is established by positive prescription in terms of section 3 of the 1973 Act (and is in this case acknowledged to exist) can be subdivided into separate vehicular categories such as residential, commercial and agricultural as the Fergusons tentatively sought to do before the court. In response to questions from the court it was acknowledged that no sharp division between the three apparent categories could be made – agricultural and commercial use could easily overlap for example.

[50] Although examples were given (of a servitude right of vehicular access for a small domestic vehicle not being apt for vehicular access for a tank, to give one), these examples tend to fortify our view that the remedy for a servient tenement, complaining of such abuse of the servitude, would be an interdict in relation to the extent of use of the servitude, which is precisely what the Fergusons have done. That remedy was touched upon by the sheriff in

Walker's Executrix, where he observed that daily access to and from a garage by a motor car was quite different from infrequent use by a horse and cart, imposing an additional burden on the servient tenement.

[51] In any event we consider that the decision in *Carstairs* v *Spence* 1924 SC 380 establishes the indivisibility of the vehicular access. In that case, the court held that once there was a servitude right of access by horse and cart established, such access was not restricted by its original purpose. The Lord President (Clyde) identified the two questions for the court in *Carstairs* as:

> "Has the appellant prescriptively acquired any servitude right over the respondents' lands? If so, is the prescriptive right limited (as the Sheriff-substitute has found) to use of the way by traffic for agricultural and market garden purposes only?"

As can be seen there are similarities with the instant case.

[52] The Lord President continued at page 385:

> "It is certain that in the law of Scotland the prescriptive use of a private way not merely establishes the *existence* of the right, but, in some most important ways, defines the *extent* of the right. Thus, ways are classified, in accordance with the measure of their burdensomeness, as footways, horse roads, and carriage-ways; and prescriptive use determines under which of the fixed categories the way shall be ranked. It may be noted in passing (as indicating a rather more formal quality in the law of Scotland with regard to this department as compared with the law of England) that, while in Scotland the more burdensome right includes the less, in England this does not follow."

[53] After looking at examples of servitudes which may be obviously limited by circumstances (providing access to a defunct mill, for example), the Lord President concluded at page 386:

> "But I know of no Scottish case (and none was cited to us) in which—apart from some specialty arising out of the peculiar character of the *terminus ad quem* —a prescriptive servitude of way has ever been held to be established subject to limitations with reference to the purposes of the traffic which might be carried by it. In the ordinary case, the way is either a means of access and passage between two parts of the dominant tenement separated by intervening lands, or it is a means of access and egress between the dominant tenement and a public highway. In either

> case I have always understood that the access, if constituted at all, was constituted as a general one to and from the ground of the dominant tenement, and that therefore the traffic entitled to use it was unlimited as regards the purposes it served so long as these purposes were connected with the enjoyment of the dominant tenement—unless indeed the purpose was one lying beyond the reach of the owner of the dominant tenement as such."

[54] We take from these observations that in the instant case, the means of control and limitation open to the Fergusons as the servient tenement is in relation to the burden of the servitude. It does not afford a right to limit the purpose of the traffic; they are able to restrict the extent. On the material before us, and before the sheriff, the purported different natures of the vehicular access are not able to be isolated, one from the other. That precludes the Fergusons from arguing that one or more elements of the servitude have been extinguished in a servitude which otherwise continues.

[55] But if we have misunderstood the effect of *Carstairs*, and if it was possible and competent to tease out a separate and discrete servitude right of access for vehicular commercial traffic, there was no evidence from the material before the sheriff or before us which would have allowed, far less bound, the sheriff to reach the conclusion that such a discrete servitude right of access had been extinguished. We consider that, even if such a remedy was open to them, the Fergusons have failed to establish by evidence that the commercial vehicular aspect had been extinguished. Absence of evidence of use is not evidence of absence of use.

[56] On the basis of the evidence which the sheriff accepted and which he was entitled to accept, the servitude right exercised by the Gregors includes vehicular traffic of a domestic, commercial or agricultural type, consistent with the nature and extent of the premises. That appeal point also fails.

[57] We deal with Mrs Fowler's cross-appeal before moving to the expenses.

Mrs Fowler's cross-appeal

[58] Mrs Fowler complains that there is no evidential basis to grant the interdict against her. We were not invited to reconsider any of the findings in facts. The sheriff made findings in fact which included:

> "(17) Since 2016 there has been an increase in the vehicular traffic traversing the disputed area and track. That increase has been specifically attributable to the arrival of the second and third defender and vehicles attending at their plot.
> (18) Prior to 2016 the track and disputed area were traversed by pedestrians and vehicles. Since 2016 there has been a significant increase in that vehicular traffic. That increase has been consequent to the arrival of the second and third defender and is attributable to their actions."

[59] The evidence recorded by the sheriff reflects an increase in traffic, which coincided with the arrival of the Fowlers, and that each of the Fowlers had been active participants in the various developments. The affidavit for Lorna Robertson for example provides evidence justifying the sheriff's findings (see paragraphs 9 and 10 of the affidavit; the Fowlers both filled in potholes and were present at a meeting which considered the development of the site). The sheriff was entitled on the basis of the evidence to draw no distinction between the Fowlers in consideration of the interdicts sought. There is no error in the sheriff's approach. Mrs Fowler's cross-appeal fails.

Expenses

[60] We recognise that the limits in relation to interference with first instance decisions apply with as much force to decisions on expenses which are discouraged. Macphail *Sheriff Court Practice* 4th edition at paragraph 18.166 says:

> "In practice, however, appeals solely on questions of expenses are severely discouraged, and are not entertained unless either there has been an obvious miscarriage of justice, or the expenses have become a great deal more valuable than the merits, or a question of principle is involved."

[61] Mrs Gregors and the Fowlers appeal about the award of expenses; they argue that the awards made do not properly reflect the parties' respective success and/or failure.

[62] The sheriff made a thoughtful, if elaborate, decision on expenses but on considering matters, we conclude that the sheriff fell into error in relation to his decision to treat the defenders/respondents as a single entity for the purposes of the expenses determination, and there is thereby a miscarriage of justice. The sheriff sought to effectively aggregate or spread the success/failure amongst the defenders. He was no doubt influenced by the fact that Mrs Gregors and the Fowlers had the same representation but such a determination was unfair to Mrs Gregors in particular, as it had the effect of depriving her of the fruits of her success in the litigation, and there is no warrant for that. The reason for the representation was not explored, but there was a clear potential for a conflict of interest, or differing outcomes, so that blanket approach to expenses was not justified.

[63] It is accordingly open to us to approach the matter as new. We conclude that Mrs Gregors was entirely successful; she succeeded in her counterclaim and resisted the orders sought by the Fergusons. She is accordingly entitled to her expenses. Any questions of overlap or duplication of expenses are properly matter for taxation, not for modification of the award reflecting success.

[64] That decision in Mrs Gregors' favour has implications for the Fowlers. They were not successful. The sheriff found that the increase in traffic was attributable to them and was in turn a justification for the orders made. The Fowlers should be liable to the pursuers for the expenses to the extent of 80%, that modification reflecting that some of the Fergusons' expenses relate to their challenge to the counterclaim

Disposal

[65] The appeal is refused.

[66] The cross-appeal by Mrs Gregors succeeds in relation to expenses.

[67] The cross-appeal by Mrs Fowler is refused subject to the variation in the disposal of the expenses.

[68] The cross-appeal by Mr Fowler is refused subject to the variation in the disposal of the expenses.

[69] All questions of the expenses of the appeal are reserved; these will be dealt with by way of written submissions in accordance with the interlocutor.