SHERIFF APPEAL COURT

[2023] SAC (Civ) 9

Sheriff Principal D C W Pyle
Sheriff Principal S Murphy KC
Appeal Sheriff W A Sheehan

OPINION OF THE COURT

delivered by APPEAL SHERIFF WENDY A SHEEHAN

in an appeal in the cause

STUART WILLIAM LOGAN

Pursuer and Respondent (and Cross Appellant)

against

ANDREW BRUCE IRONS

Defender and Appellant (and Respondent in Cross Appeal)

Pursuer: Reid, Advocate; Jackson Boyd LLP
Defender: Tosh, Advocate; Burness Paul LLP

27 January 2023

Introduction

[1] As there are cross appeals in this case, the parties are referred to as the pursuer and the defender. In this action, the pursuer seeks declarator that his property benefits from servitudes of aqueduct and access over the defender's property. He avers that those servitudes were created by express grant, which failing by implied grant. He also seeks interdict against interference with the exercise of those servitudes.

[2] The title history of parties' properties is a matter of agreement (set out in the joint minute lodged prior to the debate). The material dates and events are as follows:

(a) 3 September 1987: servitude right created in favour of the pursuer's property over the defender's property by the Legal and General (Pension Management) Assurance Society Limited as heritable proprietors (appendix number 9).

(b) 10 September 1993: the pursuer's property (The Auld Kirk, Dunbog) was disponed to the defender and his wife (appendix number 5).

(c) 6 May 1994: the property known as Beauty's Land was disponed to the defender and his wife (appendix number 6).

(d) 20 September 2003: the defender and his wife borrowed £400,000 and granted a standard security in favour of the Household Mortgage Corporation, over the Auld Kirk, Dunbog (appendix number 4).

(e) 16 October 2007: the Auld Kirk, Dunbog was disponed by the Household Mortgage Corporation (acting under a power contained in the standard security) to James Montague Roberts (appendix number 7).

(f) 30 November 2007: Beauty's Land was disponed to Hilda Brown by the defender and his wife (appendix number 8).

(g) 5 October 2017: the pursuer purchased the Auld Kirk, Dunbog (title sheet, appendix number 2).

(h) 25 September 2019: the defender purchased Beauty's Land, Dunbog (title sheet, appendix number 3).

[3] These appeals are against the sheriff's decision following a diet of debate. It is contended by both parties that the sheriff erred in appointing the cause to a proof before answer, and that he identified issues which were not relevant to the dispute between the parties or which the parties had elected not to plead or advance in their respective cases. Had the sheriff confined himself to the issues in the parties' pleadings and taken their

respective averments *pro veritate*, the parties' respective pleas in law ought to have been determined at the conclusion of the debate.

Central issues in the appeals

[4] The issues which properly arose for judicial determination by the sheriff at first instance, and which now arise on appeal are:

(i) whether the servitude right constituted by express grant on 3 September 1987 was extinguished by confusion when the pursuer's and the defender's properties came into joint ownership on 6 May 1994; or whether the servitude right was simply suspended or not absolutely extinguished and came to be revived upon separation of the two titles on 16 October 2007.

(ii) *esto* the servitude right did not revive on the separation of the titles, whether a servitude was created by implied grant when the Auld Kirk, Dunbog, was conveyed to James Montague Roberts by the Household Mortgage Corporation on 16 October 2007 and whether, in such circumstances, a heritable creditor exercising their right to sell the subjects in terms of section 25 of the Conveyancing and Feudal Reform (Scotland) Act 1970 ("section 25") had the right or title to grant any servitude (whether by implication or otherwise) over the subjects.

Submissions for the defender

[5] The defender sought dismissal of the action, which failing to have the pursuer's averments anent express or implied grant of servitude refused probation. It was submitted that the sheriff ought to have granted the defender's primary or secondary motions, rather than holding that it was unnecessary to determine the competing submissions of the parties,

as there were a number of disputed factual issues which required to be resolved first. The sheriff's interlocutor of 13 June 2022 should be recalled and thereafter the defender's first plea in law should be sustained (and the pursuer's first plea in law repelled), dismissing the action. Alternatively, the defender's first plea in law should be sustained to the extent of refusing to admit to probation the pursuer's averments anent the constitution of a servitude by express or implied grant. The cross appeal should be dismissed.

[6] The pursuer's first plea in law founds upon the express grant of servitude on 3 September 1987. That servitude was extinguished by confusion when the benefitted and burdened properties came into joint ownership on 6 May 1994. The pursuer's contention that the servitude right revived when the two properties were split off from one another on 16 October 2007 is incorrect. Confusion does not operate to suspend a servitude right temporarily. The servitude is extinguished and must be constituted *de novo*.

[7] There is a limited (so called) exception to that general rule which may operate where the benefitted and burdened properties come to be held by the same person in two different capacities. The recognition of that exception stems from a statement made by Bell (Principles, 4th Edition 1839, paragraph 997). That exception was recognised by the Inner House in the case of *Donaldson's Trustees* v *Forbes* (1839) 1 D 449 per Lord Glenlee at page 453:

> "The Lord Ordinary has gone upon the ground of servitude having been extinguished by the two properties coming into the possession of one fee-simple proprietor. But he was aware that the rule was not universal, and he adverts to the observation of Mr Bell (Principles, paragraph 997), which is founded on good principle. The case where it is most likely that a servitude may continue, when the servient and dominant tenements come together, is where the proprietor of the two tenements holds them by two distinct titles. An entailed proprietor may buy a property and hold it quite separate from his other property, in a manner dividing himself into two persons; not meaning to sink the dominant in the servient tenement, but keeping them quite separate. In the present case, unless something more were stated, I see no reason why the common rule should not apply, that a servitude must

> be understood to be extinguished confusione, when the dominant and servient tenements come both into one person".

[8] On a proper analysis this does not operate as an exception at all, but is applicable only to the narrow circumstances where the two titles are held by the same person but in two different capacities (fee and entail). In such circumstances confusion does not operate as there is a separation of interests. This equates to the situation where a debt is not extinguished by the death of a debtor in circumstances where a creditor and executor merge into one person (*Gloag and Henderson*: The Law of Scotland, 15th Edition paragraph 3.41).

[9] The pursuer founds on the case of *Walton Brothers* v *Magistrates of Glasgow* (1876) 3 R 1130. The ratio of this case founds upon the constitution of a servitude by implied grant. The Lord President's obiter comments at page 1133 appear to extend the circumstances where a servitude may revive beyond that contemplated by Bell to the situation where a dominant and servient tenement come into one ownership. At page 190 of *WM Gordon* and *S Wortley* : Scottish Land Law (3rd Edition Vol 2, 2020) there is the following commentary:

> "This extends the doctrine beyond the case at least primarily contemplated by Bell, of the splitting of the proprietor into two persons as it were, and brings it within the doctrine of implied grant, as is clear from the authorities cited; whether rightly so is doubtful. One must doubt, with respect, whether Lord President Inglis has not merged two distinct principles, one resulting from a difference in matters of title between Roman and Scots Law, and the other an equitable principle governing the construction of a grant. Bell's statement of the law was regarded as covering only the more limited case of separate titles, at least as regards negative servitudes; in *Union Bank of Scotland Limited* v *The Daily Record (Glasgow) Limited* (1902) 10 SLT 71 where the Lord Ordinary (Low) observed at 74:
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> > 'The ground upon which the exception has been allowed seems to me to be that, when there are distinct and divergent titles, there is not that complete union of ownership which the rule assumes, but, as Mr Bell puts it, the position of matters is "as if the proprietor had divided himself into two persons.'"

[10] The pursuer does not aver that the persons who in this case owned the benefitted and burdened properties held them in different capacities. The servitude created by express

grant was extinguished by confusion. It did not revive when the two properties came into separate ownership. Accordingly, for these reasons, the pursuer's averments in support of his primary case that he has a right of servitude constituted by express grant are irrelevant.

[11] The pursuer avers that he has a right of servitude over the defender's property which was constituted by an implied grant on or around 16 October 2007. That was the date on which the subjects were disponed by the Household Mortgage Corporation to James Montague Roberts. The granter of the disposition exercised a statutory power in terms of section 25 to sell the subjects. As such, the grantor had no title or right to grant a servitude (whether by implication or otherwise) over the subjects now forming the pursuer's property. The grantor can give no better right than he himself has (*nemo dat quod non habet*). The pursuer has no averments that the Household Mortgage Corporation had any right or title to grant a servitude. The test in *ASA International Limited* v *Kashmiri Properties (Ireland) Limited* 2017 SC 107 (for determining whether a servitude implied grant may be implied from circumstances) does not fall to be considered by the court as the presumed intention of the grantor is irrelevant in circumstances where they have no power to grant a servitude right but, instead, simply dispone a property in terms of a statutory power. For these reasons, the pursuer's averments in support of his alternative case that he has a right of servitude constituted by implied grant are irrelevant.

[12] The pursuer's averments are irrelevant and accordingly the sheriff was correct in refusing to grant decree *de plano*. He should have gone further and dismissed the action. In the event the appeal succeeds, the cross appeal falls to be refused.

[13] The issue of acquiescence is raised in the cross appeal. This only arises in circumstances where the court finds that the pursuer's averments are capable of instructing a case that he enjoyed a servitude constituted by express grant and where the septic tank

was not located within the area over which the pursuer enjoyed any such servitude. That would require the court to consider whether the defender was barred by acquiescence from objecting to the location of the septic tank. This only arises in circumstances where the appeal is refused and the cross appeal is granted. In those circumstances, the sheriff was right to hold that this issue could only be determined after enquiry into the facts as to the location of the septic tank and whether the servitude was reasonably necessary for the pursuer's comfortable enjoyment of the property.

Submissions for the pursuer

[14] The pursuer sought recall of the sheriff's interlocutor of 13 June 2022 and decree *de plano* in terms of the first, second and third craves of the initial writ. It was submitted that the sheriff erred in holding that the various factual issues (identified at paragraphs 80-108 of his note) required resolution prior to determination of the legal issues between the parties. Specifically, the sheriff erred as follows:

a. Contrary to the sheriff's conclusion at paragraph 88 of his note, the pleadings do not disclose a dispute between the parties about the installation of the septic tank. It is admitted that the defender installed it.

b. Concluding that it was necessary to determine whether the septic tank was installed before 3 September 1987. That issue was not raised by either party in their pleadings. In so far as it might be a defence to the action, it is not one upon which the defender has chosen to rely. The sheriff erred in going beyond the terms of the dispute as pled to consider whether other matters might be brought into account.

c. Considering that it was necessary to determine whether the pursuer had used the septic tank since acquiring the property on 5 October 2017. That is not a factual matter put at issue by either party.

d. Concluding that the issue of whether the defender's position in relation to the septic tank had been consistent was relevant. The sheriff ought, at debate, to have considered whether the averments taken *pro veritate* disclosed a relevant case.

e. Concluding that the factual circumstances surrounding the disposal of Beauty's land to Hilda Brown on 30 November 2007 required to be determined. Ms Brown registered the disposition in her favour and received a good title. The status of that transaction was not relied upon by either party in their pleadings or at debate. It was not necessary for the sheriff to consider it.

f. Finding that the court required to determine the location of the septic tank before determining the parties' preliminary pleas. This was relevant only to the issue of acquiescence, which was not raised at debate.

[15] The express right of servitude granted on 3 September 1987 was not extinguished by confusion when the parties' properties came into joint ownership on 6 May 1994. It revived when the properties were re-divided on 16 October 2007. Whilst the general rule is that where two properties come into the same ownership confusion operates to extinguish the servitude, Bell (Principles, paragraph 997) provides that "wherever a separation or disunion may be anticipated" that the servitude will "revive" upon the separation of the two titles. Separate titles are simply one example of the wider rule. It is the anticipated separation or disunion of the properties, which will cause the servitude to revive on separation. Examples are found in the authorities: where properties are held in different capacities (*Donaldson's Trustees* v *Forbes* (1839) 1D 449) and when there is a *de facto* right of access between the two

properties (*Walton Brothers* v *Magistrates of Glasgow* (1876) 3 R 1130). These are examples of the wider rule but do not limit its application to only these circumstances. Bell's approach was endorsed by the Inner House in *Donaldson's Trustees* as "good principle''. Whilst it was held that it was "most likely" that the approach would apply when the proprietor of the two tenements "holds them by two distinct titles'' (per Lord Glenlee at page 453), it is notable in this passage that, in the same manner as Bell, the Inner House did not restrict the class of cases where a servitude may continue only to a specified type of case. An exhaustive list of the type of cases in which the rule may apply is not given. In *Walton Brothers*, the Lord President's remarks were obiter (the case having been decided on implied grant) but, nevertheless, they ought to be given considerable weight having been consistent with the earlier approach adopted by Bell and in *Donaldson's Trustees*. The case of *Union Bank of Scotland Limited* v *The Daily Record (Glasgow) Limited* (1902) 10 SLT 71 should not be followed as the court was not referred to the relevant authorities, including *Walton Brothers.* The width of this approach has never been the subject of binding appellate authority.

[16] In the present case, the pursuer's and the defender's properties have remained on separate titles. They were purchased at different times. At the time of purchase, the servitude right (which is the subject of this appeal) had been granted by express grant. In such a set of circumstances, when separation or disunion was clearly in contemplation, the case falls into the category defined by Bell and by the Lord President in *Walton Brothers*. The servitude contained in the 1987 deed revived upon the re-division of the properties in 2007. The defence pled in article 4 of condescendence is irrelevant and the cross appeal and decree *de plano* should be granted.

[17] The issue of acquiescence is not relevant to the determination of these appeals. Taking the defender's averments *pro veritate*, the septic tank system has been installed in the

wrong location. An express grant of servitude may be varied by acquiescence when the dominant proprietor acquiesces in the use of an alternative route: *Robertson* v *Hossack* 1995 SLT 291, per Sheriff Principal Ireland at page 294. The defender installed the septic tank himself. He as the burdened proprietor cannot now rely on his own conduct installing the septic tank when he benefitted from the servitude. It would be both inconsistent and prejudicial to allow such reliance.

[18] The pursuer's *esto* position is that if the servitude did not revive on division of the properties, then one was created by implication when the pursuer's property was conveyed to James Montague Roberts by the Household Mortgage Corporation on 16 October 2007. A servitude is created by implication when two properties are possessed by the same owner and one part is used in a way that is necessary for comfortable enjoyment of the other. On division, a servitude will be created by implication provided that the twin requirements of use and necessity are met: *ASA International Limited v Kashmiri Properties (Ireland) Limited* 2017 SC 107, per Lord Drummond Young at paragraphs 19-20. The test is likely to be met when the properties have originally been separate before being joined in single ownership and then re-divided: *McLaren* v *City of Glasgow Union Railway Co.* (1878) 5 R 1042, per Lord Justice-Clerk Moncrieff at 1048.

[19] In the present case, the two requirements set out in *ASA International* are met. The servitude was in use prior to the division of the properties. It was expressly created in 1987. The septic tank was then subsequently installed by the benefitting proprietor. There are no averments challenging the contention that the septic tank was in use prior to 2007. The servitude right is one which is plainly necessary for the convenient and comfortable enjoyment of the pursuer's property. A functioning septic tank system is fundamental to the healthy, safe and comfortable enjoyment of a property. The matter arises from the nature of

the property and the servitude claimed. No contrary case is averred which would require a proof before answer.

[20] The sale by the Household Mortgage Corporation was effected by the exercise of a power of sale in terms of section 25. A power of sale may be exercised where the standard security in question provides that such a power exists (standard condition 10(2)). The heritable creditor, in proceeding on that basis, did not dispone a property which it owned in its own right, but, rather, exercised a contractually arising power of sale in disposing the property on behalf of the debtor. The defender and his wife had contracted with the heritable creditor on the basis that the heritable creditor would be able to dispone the security subjects with parts and pertinents (as the heritable creditor ultimately did). One of those parts and pertinents was the implied servitude right relating to the retained property. The court is accordingly invited on this *esto* basis, to allow the cross appeal and to grant decree *de plano*.

Decision

Appointment of the cause to a proof before answer

[21] The sheriff decided, following debate, that it was unnecessary to determine counsel's submissions on both express grant/confusion and implied grant, as a number of factual issues required to be resolved at proof before a determination was made.

[22] When considering the relevancy of the parties' averments at debate, the court requires to take those averments *pro veritate*. The pleadings do not disclose a dispute between the parties on the issues identified at paragraphs 81 and 82 of the sheriff's note. It is admitted that the defender installed the septic tank. The date of installation is not put at issue by either party. Equally, neither party's pleadings put at issue whether the pursuer

has used or has benefitted from the septic tank system since he acquired the property in 2017. The sheriff also considered that the location of the septic tank required to be factually determined (specifically, whether its location complied with the 1987 deed of servitude). This is not put at issue on record and is only relevant if acquiescence arises (in circumstances where the court found that there continues to be an express right of servitude and that the location of the septic tank does not comply with the terms of that express grant). It is perhaps unsurprising that this issue is not focussed upon in the pleadings in circumstances where the defender installed the septic tank himself. In any event, it would be a secondary matter only arising in circumstances where the court has first found that there continues to be an express grant of servitude over the subjects.

[23] At paragraphs 101-107 of his note, the sheriff raises the circumstances surrounding the disposal of Beauty's land to Hilda Brown on 30 November 2007. The status and nature of that transaction are not put at issue by either party in their pleadings. The disposition granted in favour of Hilda Brown was registered, thus giving her a good title to the subjects. The sheriff's decision that the circumstances surrounding this transaction required to be factually determined at proof before determining the issues of express or implied grant of servitude do not bear closer scrutiny.

[24] The sheriff erred in appointing the cause to a proof before answer. None of these matters was relevant to the determination of the parties' preliminary pleas following the diet of debate. When properly focussed, the issues which arose for judicial determination by the sheriff at first instance and now on appeal are as set out in paragraph [4] of this opinion.

Express grant of servitude

[25] An express right of servitude was granted over the defender's property in terms of the deed of 3 September 1987 (appendix no 9). The benefitted and burdened properties came into joint ownership on 6 May 1994. The general rules are articulated in *Erskine: An Institute of The Law of Scotland* (1871) II, paragraph 37:

> "Servitudes may be extinguished, first, *confusione*, when the same person becomes owner both of the dominant and servient tenement; for the use which the proprietor afterwards makes of the servient is not *jure servitutis*, but an act of property. And a servitude thus extinguished revives not, though the right of the two tenements should be again divided, unless the servitude be constituted *de novo*".

[26] The pursuer contends that there is an exception to or limitation on this general rule "when the dominant and servient tenements come both into one person" and where "a separation or disunion may be anticipated", founding on paragraph 997, *Bell's Principles* (1839 4th Edition). It is argued that in such circumstances "the effect seems to be to produce rather a combination of the two rights… a suspension rather than an extinction of the servitude….Nor would it seem to be necessary, on a subsequent separation of the tenements, to constitute the servitude *de novo*," as Erskine says. This limitation or exception was considered by the Inner House in *Donaldson's Trustees* but was applied to very restricted circumstances where the servient and dominant tenement came to be held by the same proprietor but in different capacities (fee and entail). At page 453, the proprietor was "in a manner dividing himself into two persons; not meaning to sink the dominant in the servient tenement, but keeping them quite separate". In such circumstances where there is only a separation of interests as set out at paragraph 3.41 of *Gloag and Henderson,* The Law of Scotland (15th Edition) confusion does not operate. The limited ratio of this decision does not assist the pursuer in the circumstances of this case where the heritable proprietors of

both the burdened and benefitted properties are individuals, the titles are separate and the properties were acquired at different times.

[27] The Inner House decided the case of *Walton Brothers* on the basis of an implied grant of servitude. The obiter comments of the Lord President at page 1133 may be of broader application:

> "The true view appears to me to be that, while the whole subject remained in the possession of *Walton*, there could be no existing or enforceable servitude; *res sua nemini servit*. But though two pieces of ground belong to one proprietor, there may be a right of access through one to the other *de facto,* and if it is sold it will be held to be sold with the existing access, and the disponee will be entitled to that access. The servitude, I apprehend, will revive without constitution *de novo*. Therefore, I do not think this case can be solved by holding that the servitude was extinguished *confusione*".

On an initial reading this would appear to extend the doctrine beyond that initially contemplated by Bell and followed by the court in *Union Bank of Scotland*. But on a more careful scrutiny, these comments conflate the issue of implied grant with the revival of a servitude extinguished by confusion. This analysis is shared in *WM Gordon and S Wortley*, Scottish Land Law (3rd Edition) vol. 2 2020, at paragraph 25.104 and by *DJ Cusine and RM Paisley,* Servitudes and Rights of Way, at paragraphs 17.22-25. If the Lord President's obiter comments in *Walton* were taken to their logical conclusion, confusion would never operate in circumstances where the benefitted and burdened properties came into the same ownership. The servitude right would only be suspended pending subsequent separation. This is an issue of considerable practical importance. It would mean that conveyancers acting in the purchase of any property burdened or benefitted by a servitude would require to examine the titles of both the dominant and servient tenements to ascertain if they had ever been in the same ownership. That is not the current practice.

[28] The correct statement of the law in relation to this issue is encapsulated in paragraph 17.25 of *Cusine and Paisley* as follows:

> "The conclusion therefore seems to be that once the ownership of the dominant and the servient tenements come into the hands of one person, in the same capacity, the servitude is extinguished *confusione*, but extinction does not take place when the ownership passes into the hands of the same person, but in different capacities".

In the circumstances of this case the ordinary operation of confusion applies. The express right of servitude was extinguished by confusion when the two properties came into the same ownership on 6 May 1994. Accordingly, the pursuer's ground of appeal that the sheriff ought to have concluded that the servitude contained in the 1987 deed of servitude was not extinguished by confusion in 1994 (when the pursuer's and the defender's properties came into the same ownership) but revived without constitution *de novo* upon the re-division of the properties in 2007 must fail.

Implied grant of servitude

[29] On 20 September 2003, the defender and his wife borrowed £400,000 from the Household Mortgage Corporation and granted a standard security over the Auld Kirk, Dunbog, for the borrowed sum. The loan was called up by the heritable creditor who, exercising the right to sale in terms of section 25, disponed the subjects to James Montague Roberts on 16 October 2007. This separated the ownership of the pursuer's and the defender's properties. The defender founds on the absence of positive averments by the pursuer that the heritable creditor had any title to grant a servitude right to the pursuer (whether expressly or impliedly). When the seller is disponing a property by the exercise of a statutory power of sale deriving from a standard security (rather than selling the property

which they own in their own right) do they have a lesser right to convey? In consequence, does this preclude them from conveying a servitude right – *nemo dat quod non habet*?

[30] The contractual right conferred on the heritable creditor in terms of the standard security is the right to convey to a purchaser the property with parts and pertinents. The heritable creditor's obligation (in terms of section 25) was to expose the property for sale and to enter into a private bargain whilst taking all reasonable steps to ensure that the subjects are sold at the best price which could reasonably be obtained. It follows, in our opinion, that the sale of the subjects for the best price, conveyed with the parts and pertinents, may in the right circumstances, involve the heritable creditor disponing an implied right of servitude over the defender's retained subjects.

[31] A servitude is created by implication when two properties are owned by the same owner and where one part is used in a way that is necessary for the convenient and comfortable enjoyment of the other. On division, a servitude will be created by implication if the twin requirements of use and necessity are met: *ASA International* v *Kashmiri Properties (Ireland),* per Lord Drummond Young at paragraphs 19-20. In the present case, the servitude was expressly granted and was in use when the properties were split on 16 October 2007. The defender installed the septic tank system himself. There are no averments to put at issue the fact that it was in use prior to and at the point of division of the properties. The servitude itself is one which is plainly necessary for the convenient and comfortable enjoyment of the pursuer's property. The defender pleads no contrary case which would require a proof before answer. The twin requirements set out in *ASA International* are met in the circumstances of this case. The pursuer's second plea in law is well founded.

Disposal

[32] Accordingly, we recall the sheriff's interlocutor of 13 June 2022, which allowed the parties a proof before answer. For the foregoing reasons, the cross appeal is granted insofar as it relates to the pursuer's second plea in law. Decree *de plano* is granted in terms of the pursuer's first, second and third craves. It follows that we repel the defender's pleas in law and refuse his appeal.

[33] The expenses of both appeals are awarded in favour of the pursuer. These appeals are certified as suitable for the employment of junior counsel.