SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA 14

GLW-A1090-18

JUDGMENT OF SHERIFF AISHA Y ANWAR

in the cause

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

Pursuers

against

(FIRST) RHODERICK PATTERSON AND (SECOND) ANNE PATTERSON

Defenders

Act: Mr R McClelland, Advocate, instructed by Cochran Dickie, solicitors, Paisley
Alt: Mr D Turner, advocate, instructed by Freelands, solicitors, Wishaw

GLASGOW, 28 February 2020

The sheriff having resumed consideration of the cause (a) GRANTS the pursuers' opposed motion to amend the pursuers' craves by the insertion of the word "authorising" between the words "instructing" and "causing" where they appear in line 3 of crave one and by the insertion of the words "or from instructing, authorising, causing or permitting others to do so" at the end of crave two; (b) SUSTAINS the pursuers' fifth plea in law only insofar as Excludes from probation the following averments from the Record (i) from the words "under explanation that due to the inaccuracies" to "are referred to for their terms" where they appear in Answers 2, page 5, lines 9 to 17; (ii) from the words "The defenders' title" where they appear in Answers 2, page 6, line 14 to the words "for the sake of brevity" where they appear in Answers 2, page 7, line 14; (iii) from the words "The pursuers title" where

they appear in Answers 2, page 7, line 19 to the end of Answers 2; (iv) from the words "The defenders and their predecessors" where they appear in Answers 3, line 29 and 30, page 11 to "in excess of 40 years" in Answers 3, line 8, page 12; (v) the words "and storage of equipment" where they appear in Answers 3, line 2, page 13; (vi) the words "and usage" where they appear in Answers 4, line 1, page 16; (vii) from the words "The gates have been" where they appear in Answers 3, line 31, page 13 to "and acquiesced thereby" where they appear in Answers 3, line 6, page 14; and (viii) the words "the gates are *inter alia* incidental to the servitude of parking" where they appear in Answers 3, line 12 and 13, page 14;

(c) SUSTAINS the defenders' first plea in law only insofar as Excludes from probation the following averments from the Record (i) from the words "Any possession enjoyed by Marshall Coaches" where they appear in Article 2, page 4, line 20 to the words "has been tolerated by the pursuers" where they appear in Article 2, page 4, line 26; (ii) from the words "The Form 1" where they appear in the penultimate line of Article 3, page 9 to "servitude rights over the pursuers ground" where they appear of Article 3, page 10, line 5; and (iii) from the words "They would be unable to sell" where they appear in Article 3, page 10, line 26 to the words "used by the defenders" where they appear in Article 3, page 10, line 22; (d) Repels the defender's fourth plea in law and GRANTS the pursuers' second crave in terms of which Interdicts the defenders, their agents, servants, tenants, employees or anyone acting on their behalf from locking or otherwise securing the gates at the southern boundary of the pursuers' heritable property at Gillies Lane, Baillieston being the area shown tinted pink on the title plan annexed to Land Register title number LAN184963, or from instructing, authorising, causing or permitting others to do so;

(e) deletes the number and words "of access" and "1 and" where they appear in the defender's third plea in law; (f) deletes the words "access, use and" where they appear in

the defenders' fifth pleas in law; (g) Allows parties a proof before answer of their respective averments, reserving the remaining pleas in law for both parties; Reserves the question of expenses meantime and Appoints parties to be heard thereon and on the issue of further procedure on 11 March 2020 at 9.30am.

NOTE

Introduction

[1] The pursuers are the heritable proprietors of subjects at Gillies Lane, Baillieston. The pursuers' title is registered in the Land Register of Scotland under Title Number LAN184963. A copy of the plan annexed to the pursuers' title sheet is attached as Appendix 1. The pursuers' title comprises two areas of ground, that shown tinted pink ("the pink strip") and that shown tinted blue; the area shown tinted blue and edged green has been removed from the title. This action relates to the pink strip.

[2] The defenders are the heritable proprietors of an area of ground immediately west of the pink strip. The defenders' title is registered in the Land Register of Scotland under Title Number LAN211580. A copy of the plan annexed to the defenders' title sheet is attached as Appendix 2. The defenders' title comprises that area of ground shown edged red. The defenders' premises are used as a commercial garage. The pink strip is the defenders' only means of access to the south most boundary of their property.

[3] The pursuers' seek interdict prohibiting the defenders and others acting on their behalf or with their instructions from *inter alia* encroaching on the pink strip by parking, storing and depositing vehicles and storage units thereon. Put shortly, the defenders' aver that (a) they have a better registered title to part of the pink strip (b) that they have acquired title to part of the pink strip by the operation of prescription (c) that they have acquired a servitude right of access, use, storage and parking over the pink strip by prescriptive possession.

[4] There exists a tall gate which extends across the width of the southern end of the pink strip which was not installed by the pursuers. It is locked and controlled by the defenders. The pursuers' seek interdict prohibiting the defenders and others acting on their behalf or

with their instructions, from locking or otherwise securing the gates at the southern boundary of the pink strip. The defenders' assert that they have acquired a servitude right to lock the gate as an ancillary right to the purported servitude of parking.

[5] There are no historic or physical features on the ground indicating the position of the boundary between the parties' respective properties.

[6] The matter called before me for debate. Each party has a preliminary plea to the relevancy of the other party's averments. The pursuers' sought decree *de plano*, failing which to have certain of the defenders' averments excluded from probation. The defenders' sought a proof before answer and to have certain of the pursuers' averments excluded from probation.

[7] Mr McClelland, advocate appeared for the pursuers. Mr Turner, advocate appeared for the defenders. I am grateful to them both for their helpful submissions.

The pleadings

[8] Since these proceedings were raised, the defenders have granted a lease over their title to a third party. While a Minute of Amendment had been lodged on behalf of the defenders dealing with the current occupation of the subjects, it had not been moved. It was a matter of agreement between the parties that the debate before me was to proceed on the basis of the parties' averments as they currently stood (item 20 of process).

[9] Mr McClelland moved to amend the terms of the pursuers' first and second craves. The amendments proposed sought to address the presence of tenants in occupation of the defenders' subjects. Mr Turner opposed the motion on the basis that the proposed amendment did not focus the issues in dispute. I will allow the amendment. The

amendment is competent and it is in the interest of justice that it should be allowed. It deals with a change of circumstances and causes no discernible prejudice to the defenders.

Submissions

Submissions for the pursuers

[10] Mr McClelland sought decree *de plano* in relation to both of the pursuers' craves, which failing, he sought to have various averments excluded from probation.

[11] He submitted that the defenders' averments anent ownership by prescription were irrelevant. In terms of section 1(1) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), the deed upon which a prescriptive claim is founded must be at least 10 years old. The defenders' Land Registered title was first registered on 10 February 2012. The defenders' claim thus, must be based on an earlier Sasine title. If prescription begins to run on a Sasine title, it will continue to run in the event that a title has migrated to the Land Register (para 17.9 of Reid & Gretton, *Land Registration,* 1st edition 2017). The defenders failed to aver the basis upon which it is said that the earlier Sasine titles are habile to support their prescriptive claim and failed to specify the area to which title is claimed. The disposition in favour of the defenders (item 6/3/4 of process) refers to an earlier disposition of 1875 (item 5/5/1 of process) which described the land by reference to a bounding description; that cannot form the basis for a prescriptive title (Erskine, II, vi, 2 and 3; *North British Railway Co* v *Hutton* (1896) 23 R 522*)*. If the defenders cannot explain how the Sasine title relates to the ground, there is no fair notice of what the defenders claim the Sasine titles are habile to support. A proof on this issue would be a futile exercise.

[12] Anticipating the defenders' submission regarding the terms of the interdicts sought, Mr McClelland noted the defenders' admission that parties' titles are contiguous; there are

no gaps and no overlaps. That admission was based on the scaling of the Ordnance Survey map. The error tolerance in such maps, he submitted, are irrelevant without a challenge to the pursuers' title. The pursuers sought orders on the level of precision of that map. While he accepted that this may leave unresolved a point of difference between the parties about where exactly one draws a boundary shown by the title, he submitted that it is not necessary to resolve that matter to determine the orders sought. If the defenders claimed the need for greater precision, they ought to have sought a declarator in relation to where they say the boundary between the properties lies.

[13] Turning to the defenders' averments regarding servitude rights, Mr McClelland submitted that the defenders' claim of a servitude right of access was irrelevant as the pursuers did not seek to interfere with such. In relation to the servitude right of use or storage, it was submitted that (a) the averments were not capable of constituting possession of such a right for the relevant prescriptive period of 20 years (Johnston, *Prescription and Limitation* (2nd edition) paragraph 19.09-12 and section 3(2) of the 1973 Act); (b) the averments regarding such a right were lacking in specification as they failed to set out the extent of either servitude right, over what area of the pink strip it was claimed, what items were capable of being stored/how these were to be stored or what use could be made of any part of the pink strip; and (c) the law does not recognise a stand-alone servitude of storage – while it is recognised as a possibility in certain circumstances as an adjunct to other servitude rights, no such circumstances existed in this case (Cuisine & Paisley, *Servitudes and Rights of Way* (1998) paragraph 3.16). Moreover the defenders' pleas in law did not mention any servitude right of storage.

[14] Turning to the defenders' averments regarding a servitude right of parking over the whole area of the pink strip and an ancillary right to lock the gates across the southern

boundary of the pink strip, it was submitted that there was no dispute that the gates were placed on the pursuers' land (even if the defenders claim title to some unspecified part of that land). He submitted that the pursuers were entitled to simply remove the gates erected on their title (Cusine & Paisley, paragraph 12.104), however, the pursuers do not seek to do so; they simply wish to prohibit the defenders from locking them. The defenders' claim to an ancillary right to lock the gates was akin to a claim of exclusive possession and control of the pink strip.

[15] The authorities dealing with the locking of gates across lands to which a servitude right of access is exercised all deal with situations in which the servient proprietor has erected a gate and locked it (Cusine & Paisley, paragraph 12.98; *Borthwick* v *Strang* (1799) Hume 513; *Oliver* v *Robertson* (1869) 8 M 137). Even where a servient proprietor offers the dominant proprietor a key, he acts contrary to the servitude right of access; a key-system is fallible and access cannot be guaranteed at all times. If that is the settled position in Scots law in relation to the actions of the servient proprietor, it must apply with greater force in relation to the actions of the dominant proprietor who is seeking to exercise control over lands which he does not own. A servitude cannot be repugnant to the rights of property in the servient tenement (Gloag and Henderson, *The Law of Scotland,* 14th edition at paragraph 34.40(g); Cusine & Paisley paragraph 12.13; *Rattray* v *Tayport Patent Slip Co* (1868) 5 SLR 219; *Stair Memorial Encyclopaedia* Vol 18, paragraph 445; *Leck* v *Chalmers* (1859) 21 D 408; *Robertson's Trustees* v *Bruce* (1905) 7 F 580). While it was generally accepted that a stand-alone servitude right of parking is recognised by the law (*Moncrieff* v *Jamieson* 2008 SC (HL) 1; *Johnson Thomas & Thomas* v *Smith* 2016 SC GLA 50), the ancillary right to lock a gate claimed by the defenders goes far beyond what the law will recognise.

[16] Finally, in relation to the defenders' averments of acquiescence on the part of the pursuers, to be relevant, such acquiescence required to relate to the locking of the gates for all time coming, not to their mere presence; there were no averments in relation to any acquiescence to the act of locking the gates. The requirements for a relevant plea of acquiescence had been set out in *William Grant & Sons* v *Glen Catrine Bonded Warehouse Ltd* 2001 SC 901.

Submissions for the defenders

[17] On behalf of the defenders, Mr Turner, advocate moved the court to allow a proof before answer and to refuse to admit to probation the pursuers' averments in relation to (a) the defenders' and their predecessors' lack of peaceable possession; (b) the contents of the Form 1 application for registration; and (c) the marketability of the pursuers' property.

[18] Mr Turner observed that the action was one for interdict; no declarator as to the extent of the pursuers' title was sought. The court must be satisfied that the pursuers have a *prima facie* right which they are entitled to protect and that there is a wrong being done or threatened to be done. Any order requires precision. The order must leave the defenders in no doubt in relation to what they may or may not do (Burn-Murdoch, *Interdict in the law of Scotland,* at paragraph 15).

[19] The pursuers sought to prove that they have a better title than the defenders. It is incumbent on the pursuers to aver and prove their title (*Colquhoun* v *Patton* (1859) 21 D 996). If the defenders hold title to any part of the property which is the subject of the action, they cannot have committed a wrong.

[20] Mr Turner submitted that there was an ambiguity in the Land Register which the court required to address and resolve. While the parties' titles are contiguous the defenders have

put into issue the question of where exactly the boundary lies. The pursuers' reliance on their Land Certificate failed to appreciate and make allowances for the limits of the Land Register. The Keeper has used a dotted line to signify that there is no geographical boundary on the ground (*Registration of Title Practice Book* (2nd edition) para 4.26). The Ordnance Survey map uses a scale of 1:1250 with an accuracy of 0.23m. The parties' boundaries are set out by a red line around the boundary. By its very nature that has a thickness. That thickness may be immaterial in many cases but here, where it lies on the ground is a question for proof.

[21] In terms of section 12(3)(d) of the 1979 Act, indemnity for losses arising as a result of an inaccuracy in the delineation of any boundaries is not accepted. This reflects the "or thereby" principle common in conveyancing. The question of the latitude to be given in respect of measurement described as "or thereby" is a question of circumstances (Gordon & Wortley, *Scottish Land Law,* para 3.08; Cuisine, *The Conveyancing Opinions of Professor J M Halliday,* p205; *Young* v *McKellar* 1909 SC 1340; *Hetherington* v *Galt* (1905) 7 F 706). If there is a dispute regarding the parties' titles, the defenders' position may be fortified by actual possession; it was a matter of admission that the pursuers have never enjoyed actual possession of the pink strip (*Hetherington* v *Galt).* The court can only form a view on these matters after proof.

[22] Alternatively, the defenders asserted a claim to title by the operation of positive prescription. It was submitted that Professors Reid & Gretton were incorrect in their analysis of section 1(1) of the 1973 Act; in the case of a change of registers, prescription can run on either a recorded deed or a registered title. A habile title is not one which conveys the property in dispute but one which is capable of doing so (*Auld* v *Hay* (1880) 7 R 663 at 668). In cases of ambiguity, provided that the title is habile to include the disputed area,

possession is the measure of the defenders' rights (*Suttie* v *Baird* 1992 SLT 133 at page 136). Where measurements are described as "or thereby", and there are no remaining physical boundaries on the ground, the question of title can only be resolved by an examination of the extent of possession, after an enquiry into the facts. As presently averred, the pursuers do not say where the defenders are exercising their rights of storage and parking and whether such activities are in fact taking place on the pink strip. If the rights are being exercised over the area falling within the defender's "habile title", no question of any wrong arises.

[23] It was submitted that the pursuers' averments that the defenders have not enjoyed peaceable possession are irrelevant. The pursuers rely upon items of correspondence which by their very nature can only be described as peaceable. No action has been taken by the pursuers sufficient to assert that possession was not enjoyed by the defenders peaceably (Cusine & Paisley paragraph 10.17).

[24] Turning to the question of the defenders' servitude rights, it was submitted that the law now recognises a right of parking as an ancillary right to a right of access (*Moncrieff* v *Jamieson, supra* and *Johnson, Thomas and Thomas (A Firm)* v *Smith, supra*). The pursuers appear to accept that a general right of parking is now established. The defenders' averments are sufficient and provided the pursuers with fair notice of their use of the whole of the pink strip for parking.

[25] In relation to the ancillary right to lock gates, it was well established that a dominant proprietor may carry out activities which are ancillary to the primary activity permitted by the servitude right. Those must be such rights as are either absolutely necessary to render a servitude capable of being exercised, or are of "reasonable necessity" (Cuisine & Paisley paragraphs 12.01, 12.124 and 12.125). The defenders assert that they are entitled to secure

the site to enable them to exercise the parking rights. While it was conceded that the courts have generally taken a very narrow view in relation to the locking of gates over property which is subject to rights of access, it was argued that such a position was not absolute. The possibility of an entitlement to lock a gate, if established by the passage of the prescriptive period, was acknowledged in *Oliver* v *Robertson, supra*. If one accepted the position as expressed in *Moncrieff* v *Jamieson* that servitudes will of necessity amount to some form of interference with the owner's rights to access his own property, and that the locking of gates do not in all circumstances amount to a material interference, there can be no reason in principle why a dominant proprietor cannot install and lock gates across a property in relation to which he enjoys a servitude right. In the present case, the defenders have offered to provide a combination for the padlock fixed to the gate which the pursuers can use as they wish.

[26] In relation to the question of acquiescence, it is well established that a servitude can be created by acquiescence (Bell's *Principles*, 947). While there may be few reported examples of this, *G Munro* v *J Jervey* (1821) 1 S 161 was one such example. In the present case, the pursuers purchased a property fully aware of its use by the neighbouring proprietor and the existence of a gate across its boundary. The defenders offer to prove that those gates have been used for a period of at least 39 years. It is thus open to the court to conclude that the pursuers are barred from now objecting to the defenders' use and locking of the gates. It was conceded that the decision in *William Grant* gave rise to difficulties for the defenders in terms of what was required to establish acquiescence.

[27] Finally, it was submitted that the pursuers' averments anent the entries in the Form 1 lodged by the defenders at the time of registration (which did not make reference to any

servitude right of access) and their averments regarding the marketability of their title were irrelevant to the questions of title and of the creation of servitude rights.

Pursuers' submissions in reply

[28] In retort, Mr McClelland accepted the criticisms of the pursuers' averments regarding (a) the correspondence relied upon by the pursuers as challenging the defenders' peaceable possession (b) the defenders' Form 1 and (c) the marketability of the parties' titles. He accepted that these averments should be excluded from probation.

Discussion

[29] Broadly speaking, the submissions focussed on the following six issues:

(a) the relevance of the defenders' averments that they have a better registered title to any part of the pink strip ("Issue 1");

(b) the relevance of the defenders' averments that they have acquired ownership of any part of the pink strip by prescription ("Issue 2");

(c) the relevance of the defenders' averments that they have acquired a servitude right of (i) access; (ii) use and storage; (iii) parking; and (iv) an ancillary right to lock the gate, over the pink strip by prescription ("Issue 3");

(d) the relevance of the defenders' averments *anent* the pursuers' acquiescence in the presence of the gates ("Issue 4");

(e) the pursuers' assertion that the interdicts craved cannot be granted as the orders sought are imprecise ("Issue 5");

(f) the relevance of various miscellaneous averments made by the pursuers ("Issue 6").

Title by registration: Issue 1

[30] That the defenders assert a better title by registration over part of the pink strip is not immediately obvious upon reading the pleadings. This line of argument had not been anticipated by counsel for the pursuers and thus his submissions in retort were brief. I confess that I shared Mr. McClelland's difficulty in comprehending the defenders' position; the defenders' pleadings appear to be directed to a claim of title by the operation of positive prescription rather than a claim based on a registered title.

[31] Insofar as the defenders' pleadings are capable of being read as directed towards a claim of title by registration, I note that the defenders do not seek declarator of title to any part of the pink strip. They have not sought rectification of their title by the Keeper of the Register. There is no plea in law directed towards the relevancy of the pursuers' pleadings on the basis that the defenders have a better registered title to any part of the pink strip.

[32] The argument on behalf of the defenders, put shortly, is that their title is *capable* of extending to part of the pink strip over which the pursuers' claim title. They argue that owing to the limitations of the scaling of Ordnance Survey maps (which according to the *Registration of Title Book* at para 4.26, utilise a scale of 1:1250 and are capable of scaling to 0.23m), their title is capable of including an area which reflects the uppermost extent of the tolerance of the scaling, being +/- 1.1m; and that a further area of ambiguity is created by the width of the red line used to delineate boundaries, in respect of which the Keeper excludes his indemnity. That being the case, as the defenders are in actual possession to the full extent to which the defenders' title is habile, they have a better registered title to part of the pink strip. They argue that it is for the pursuers to establish that they have title to the entirety of the pink strip and if they cannot do so, they cannot succeed.

[33] In my judgment, the pursuers' title is of itself sufficient proof of the extent of their right of ownership. As noted by Professor Reid, *Stair Memorial Encyclopaedia*, Volume 18 at paragraph 147:

> ". . under registration of title, complete proof of right is peculiarly easy. Once land has been registered in the Land Register, the question of who is owner or, as the case may be, liferenter or tenant, is immediately and conclusively shown by an examination of the relevant title sheet. In consequence, it is both a necessary and also a sufficient condition of success in an action for protection of possession that the name on the title sheet is that of the pursuer. It is a necessary condition because the person named on the title sheet alone holds the right in question; and it is a sufficient condition because, even where indemnity has been excluded by the Keeper – and indeed, even where the defender maintains that the Register is inaccurate and that his own name should appear there in place of the pursuer's – the pursuer nevertheless remains the holder of the right in question unless and until the Register is rectified against him. The only course open to an aggrieved defender is to seek rectification of the Register, for as long as the name of the pursuer remains on the title sheet he has no stateable defence to the pursuer's claim."

[34] It is for the defenders to explain and aver the basis upon which they claim a better title. The defenders do not do so. They aver that "due to the inaccuracies of the map 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" (my emphasis). The defenders' averments do not amount to a positive assertion that their title is affected by any such discrepancy, merely that it is *possible* that it may be. That is a precarious basis upon which to usurp the pursuers' registered title.

[35] There was no dispute that as both titles were registered before the coming into force of the Land Registration (Scotland) Act 2012, the effect of registration of the parties' titles is governed by the terms of the Land Registration (Scotland) Act 1979. In terms of section 3(1)(a) of the 1979 Act, registration in the Land Register confers upon the registered proprietor a real right in the heritable subjects.

[36] Titles which are registered in the Land Register enjoy the protection of what is often referred to as the "curtain principle". As noted by Lord Tyre in *Willemse* v *French* 2011 SC 576 at paragraph [4]:

> "As a general rule, in accordance with the 'curtain' principle of registration of title, it is neither necessary nor permissible to look behind the Land Register at prior title deeds in order to determine the extent of a proprietor's interest in land."

[37] Lord Tyre's observations echoed those of Lord Philip in the earlier decision of *Marshall* v *Duffy*, 8 March 2002, unreported, at paragraph [22]:

> "The Register represents the definitive measure of the parties' rights. . . In the absence of any conclusion for reduction or rectification of the titles, there is no justification for going behind the terms of these titles. To do so would defeat the purpose of the 1979 Act, and no argument advanced on behalf of the defenders persuaded me otherwise."

[38] Nevertheless, it can, in limited circumstances, be necessary to examine prior titles where there is a dispute which cannot be resolved by reference to the Land Register titles. That is particularly so where, as in the present case, the amount of land at issue is small and there are no longer any historic features on the ground indicating the position of a boundary. Sasine titles have been referred to in a number of cases; in *North Atlantic Salmon Conservation Organisation* v *Au Bar Pub Ltd,* Edinburgh Sheriff Court, 18 July 2008, unreported, a question arose as to what the term "within" the land edged red meant; in *Clydesdale Homes Ltd* v *Quay* OH, 10 Sept 2009, unreported, an original Sasine feu plan was referred to in order to determine the length of a boundary; in *Welsh* v *Keeper of the Registers,* Land Tribunal, 22 April 2010, unreported, having regard to the inaccuracies of a scale on an Ordnance Survey map and the thickness of a boundary line, the Lands Tribunal heard evidence of the background circumstances and of the parties' respective positions regarding the location of a line of track by which the boundary was defined in an earlier disposition.

[39] In my judgment, if a party is to challenge the Land Register titles, and to claim a better title, it is necessary that he or she specify clearly what the nature of the dispute is, make clear reference to descriptions, physical boundaries (historic or present), measurements or plans of prior titles and set out precisely where it is said that a boundary falls to be drawn (not merely where it is capable of being drawn owing to the extremes of scaling inaccuracies or the width of delineated boundary lines) – the averments must in my judgment, "stake a claim". Vague averments regarding the tolerances of scaling or the width of the red line used to delineate the boundary will not suffice. Those tolerances and the apparent ambiguity of the width of the red line may be of no consequences at all, or they may operate to reduce or increase an area of ground by any measure up to the fullest extent of a margin of error.

[40] The pursuers' title to the pink strip is clearly delineated on its western boundary by a dotted line. The description of the pursuers' title reads "subjects being the two areas of ground at Gillies Lane, Baillieston, Glasgow tinted pink and blue on the title plan." The defenders' title, whilst shown edged in red, shares a common border with the pursuers' – the same dotted line. The description of the defenders' title reads "subjects on west side of Gillies Lane comprising 21 and 23 Gillies Lane, Baillieston, Glasgow G69 7HJ edged red on the Title Plan". The defenders accept that the parties' titles are contiguous; they accept that "there are no gaps or overlaps between the various registered titles". The defenders aver, and the pursuers admit, that on the title plan "the defenders' title to the area lying to the east of their building scales to approximately 1.0m at the north end of the building and 1.7m at the southern end." The boundary between their respective properties is shown in each case by a dotted line which, according to the note attached to each title plan has "been plotted from the deeds." The defenders do not aver, whether by specific reference to prior deeds,

plans or otherwise, that the placement of the dotted line is incorrect, nor where that dotted line ought to be drawn.

[41] Accordingly, in my judgment, the defenders' averments being insufficient to establish a relevant claim based on a better registered title, fall to be excluded from probation. That being the case, the question of whether the defenders are in possession of the ground, and if that possession accords them a better title by registration does not arise.

[42] Insofar as the defenders assert a better title by registration, as currently pled, such an assertion is irrelevant as a defence to the pursuers' craves.

Title by prescription: Issue 2

[43] The defenders aver as follows:

> "The defenders' title is described by reference to an Ordnance Survey Map at a scale of 1250:1. For the purposes of determining the extent of the defenders' title, the relative accuracy of that map is +/- 1.1m with a confidence of 99% and a root mean square error of +/-0.5m relative and absolute accuracy. On the title plan, the defender's title to the area lying to the east of their building scales to approximately 1.0m at the north end of the building and 1.7m at the southern end. The defenders' title for this area is accordingly habile to an area up to 2.1m at the north end and to 2.8m at the southern end. It affords ample space for the parking of vehicles at the southern end and storage at the northern end. The defenders and their predecessors in title, members of the Marshall family (the owners of Marshalls Coaches) have been in possession of the area to the east of the defender's building to the maximum extent to which the defenders' title is habile for a continuous period in excess of ten years openly, peaceably and without judicial interruption and since at least 1980. The Marshall family's titles over the area consisted of (1) Disposition by Barbara S Coulter in favour of John Marshall dated 27 June 1949 and registered in the General Register of Sasines for the County of Lanark on 7 July 1949; (2) Disposition by William Marshall (son and testamentary beneficiary of John Marshall) in favour of Robin Marshall, John Marshall, George Alexander Marshall and Stewart Wallace Marshall as trustees of the Firm Marshall's Coaches dated 14 January 1990 and registered in the General Register of Sasines for the County of Lanark on 21 June 1990; (3) Disposition by Robin Marshall, John Marshall, George Alexander Marshall and Stewart Wallace Marshall as trustees of the Firm Marshall's Coaches in favour of Robin Marshall, George Alexander Marshall and Stewart Wallace Marshall as individuals dated 22 November 2005 and registered in the General Register of Sasines for the County of Lanark on 13 March 2006, the terms of which are adopted

> and held as repeated herein for the sake of brevity. . . . *Esto,* any part of the area to which the defenders' title is habile was potentially also habile to forming part of the area coloured pink on the pursuers' title, which is not known and not admitted, the defender's title thereto is exempt from challenge in terms of section 1 of the Prescription and Limitation (Scotland) Act 1973. . . At no time prior to 2005 did any predecessor in title to the pursuers' ground interfere with the possession by the defender's predecessors in title. At no time has the defender or its predecessors in title ceased to be in possession of property to the greatest extent eastwards to which their titles were and is habile."

[44] Section 1 of the 1973 Act (as amended by the 2012 Act) provides as follows:

> "(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed–
>
> (a) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in–
> (i) that land; or
> (ii) land of a description habile to include that land; or
>
> (b) the registration of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in—
> (i) that land; or
> (ii) land of a description habile to include that land,
>
> then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge."

[45] The terms of section 1 are clear and well understood; in order to establish title by the operation of positive prescription in terms of section 1(1) of the 1973 Act one requires to establish (a) possession; (b) for a continuous period of ten years; (c) openly, peaceably and without any judicial interruption; and (d) which is founded on and follows the recording or registration of a deed. After the expiry of the prescriptive period, such a title will be exempt from challenge.

[46] The possession must be founded on, in other words, attributable or referable to, a deed. The possession must be commensurate with the rights granted by the deed. It is incumbent upon a party who seeks to rely upon section 1(1) of the 1973 Act to claim title to a

real right in land, to identify the deed upon which possession is founded and to explain why the terms of that deed are sufficient to constitute in his favour "a real right in that land or land of a description habile to include that land". Possession must follow for the prescriptive period after the recording or registration of that deed.

[47] In the case of a deed recorded in the Register of Sasines, what is commonly referred to as a "foundation writ" requires to be identified; that is the writ upon which possession follows. In the case of possession following upon a registered title, the Land Certificate requires to be examined.

[48] In the present case, insofar as the defenders rely upon their Land Certificate to establish a title by the operation of prescription, any such claim is bound to fail. The defenders' title was registered on 12 February 2012. As the defenders cannot claim possession for a continuous period of ten years from that date, the question of what title their Land Certificate might be "habile" to support, is irrelevant.

[49] On behalf of the defenders it was argued that in the case of a change of registers, the Land Certificate must be examined to confirm the extent of the land over which prescription is said to operate and to confirm that the person claiming possession holds title.

[50] It is clearly correct that examination of the Land Certificate will confirm the identity of a heritable proprietor. However, where a title has been registered for less than the prescriptive period, the extent of the land over which possession is claimed will be determined by reference to the foundation writ. Registration does not interrupt the prescriptive period nor can it affect the extent of the land over which a title based on prescription is claimed. That is clear from the terms of sections 1(1)(a) and (b) which are expressed in the alternative. In this respect, I agree with the views expressed by Professors Reid & Gretton (at paragraph 17.9):

> "If prescription begins to run on a disposition registered in the Register of Sasines, it seems that it will continue to run in the event that the title migrates to the Land Register before the ten year period of possession is completed . . . on the migration of a title to the Land Register, therefore, the prescriptive clock will not return to zero. The basis of the prescription remains the original Sasine deed."

[51] What then do the defenders aver in relation to the earlier Sasine titles? The defenders refer to three dispositions dated 1949, 1990 and 2006. These are lodged by the defenders and incorporated into their pleadings. The defenders do not identify upon which of these dispositions their claim under section 1(1) of the 1973 Act is founded nor explain on what basis any of these dispositions are sufficient to constitute in their favour "a real right in that land or land of a description habile to include that land". It is incumbent upon them to do so. As noted by Gordon & Wortley, *supra* paragraph 12-48:

> "It is not only necessary to show that that there is some title to which possession can be referred, but, in addition, the party alleging that he has acquired by prescription must show that the possession on which he founds does relate to the title which he produces . . . ."

[52] The disposition by Robin Marshall and others as trustees of the Firm Marshall's Coaches in favour of Robin Marshall and others as individuals dated 22 November 2005 and registered in the General Register of Sasines for the County of Lanark on 13 March 2006 ("the 2006 disposition"), describes the land disponed as follows:

> "ALL and WHOLE that plot of ground situated at Crosshill, Baillieston in the Parish of Old Monkland and County of Lanark containing One thousand Five hundred and Eleven square yards or thereby Imperial Standard Measure being the subjects described in and delineated on the plan annexed and described as relative to a Feu Disposition by Mrs Agnes Neilson or Nelson or Scott in favour of William Birrell Senior and Henry Birrell dated Ninth December Eighteen hundred and Seventy four and recorded in the Division of the General Register of Sasines applicable for the County of Lanark (Book 145-Folios 27-31) on the Second day of June Eighteen hundred and Seventy five".

[53] The disposition by William Marshall (son and testamentary beneficiary of John Marshall) in favour of Robin Marshall and others as trustees of the Firm Marshall's

Coaches dated 14 January 1990 and registered in the General Register of Sasines for the County of Lanark on 21 June 1990 ("the 1990 disposition"), contains the same description as the 2006 disposition.

[54] Finally, the disposition by Barbara S Coulter in favour of John Marshall dated 27 June 1949 and registered in the General Register of Sasines for the County of Lanark on 7 July 1949 ("the 1949 disposition") describes the land disponed thus:

> "ALL and WHOLE that plot of ground situated at Crosshill, Baillieston in the Parish of Old Monkland and County of Lanark containing One thousand Five hundred and Eleven square yards or thereby Imperial Standard Measure; Bounded on the North by the property now or formerly of Robert Thomson along which it extends fifty three feet nine inches or thereby measuring along the centre line of a thorn hedge; on the West by the property now or formerly of Robert Ward along which it extends in a straight line Two Hundred and thirty nine feet nine inches or thereby; On the South by the property now or formerly of Mrs John Scott along which it extends Fifty nine feet or thereby measuring along the centre of a thorn hedge and range thereof and along the East by the centre line of a proposed fourteen feet wide street along which it extends Two hundred and fifty feet nine inches or thereby; Which plot of ground above disponed is delineated on a plan endorsed on and subscribed as relative to the Feu Disposition to the said piece of ground aftermentioned . . ."

[55] The Feu Disposition referred to in the 1949, 1990 and 2006 dispositions is the same; namely, the Feu Disposition by Mrs Agnes Neilson or Nelson or Scott in favour of William Birrell Senior and Henry Birrell dated 9 December 1874 and recorded in the Division of the General Register of Sasines applicable for the County of Lanark on 2 June 1875 ("the 1875 disposition"). Thus to understand the extent of the defenders' title, one requires to examine the terms of the 1875 disposition.

[56] The 1875 disposition is not referred to by the defenders in their pleadings (save for the purposes of admitting its terms) nor lodged by them. The 1875 disposition is referred to and incorporated into the pleadings for the pursuers. There is however no plan attached to the 1875 disposition and the parties have advised that they have been unable to obtain a copy of the plan referred to.

[57] The description of the lands disponed in terms of the 1875 disposition (and referred to in each of the 1949, 1990 and 2006 dispositions) is a bounding description. It is a long and well-established principle that a bounding description cannot form the basis for a prescriptive title. As explained in *Erskine's Institutes,* II, vi, 3;

> "In a bounding charter, no possession can establish to the vassal a right of lands out with the bounds specified in his charter; for he is circumscribed by the tenor of his own grant, which excludes whatever is not within these bounds from being pertinent of the lands disponed."

[58] In *North British Railway Co* v *Hutton* (1896) 23 R 522, the defender adopted an argument similar to that pursued by the defenders in the present action; he claimed a prescriptive title based upon a disposition which described the land conveyed by reference to a plan and measurements. Delivering the decision of the Inner House, in his often quoted opinion, Lord McLaren observed:

> ". . . a proprietor cannot acquire by prescription a subject which is excluded by the terms of his title, because this would not be possession under charter and sasine, but would be possession contrary to the written title. The case of what is termed a bounding charter is an example, but not the only example, of a title which defines the estate as to exclude the possibility of acquiring land by prescription in excess of the subjects actually conveyed."

[59] The position is neatly summarised at paragraph 17.45 of Johnston, *Prescription and Limitation* in the following terms:

> "Where the boundaries of a title are delimited, for example by measurements, description, specification, a plan or some combination of these, there is no scope for relying on prescriptive possession to acquire title to an interest in land lying beyond the boundaries. . . . The reason is simple: the terms of the deed are not then sufficient to constitute a title beyond the boundaries contained in the deed."

[60] In the present case, the defenders argued that while the boundaries are specified in the 1875 disposition, they can no longer be identified. Moreover, as the measurements specified in the 1875 disposition are qualified with the words "or thereby", there is an inherent ambiguity about the extent of the defenders' title.

[61] Whilst it is correct that if the boundaries cannot be identified, possession for the prescriptive period by the defenders and their predecessors will be the measure of their right (*Suttie* v *Baird, supra)*, the issue remains that the 1875 disposition must be capable of being construed so as to include the area over which title by the operation of prescription is claimed. As Lord Salvesen put it in *Troup* v *Aberdeen Heritable Securities* 1916 SC 918 at p142 "the test is whether the ground, as possessed, fits the description in the title on which possession has followed."

[62] The defenders' averments are not capable of satisfying that test. The defenders fail to aver what area has been possessed by them for the prescriptive period. They fail to identify the particular disposition upon which title to such an area is claimed. They fail to aver on what basis it is claimed that the description contained in the 1875 disposition (or indeed any of the later dispositions) is "*sufficient in respect of its terms to constitute . . . a real right in land or land of a description habile to include that land*."

[63] The defenders aver that they "and their predecessors in title, members of the Marshall family (the owners of Marshalls Coaches) have been in possession of the area to the east of the defender's building to the maximum extent to which the defenders' title is habile for a continuous period in excess of ten years". They aver further that at no time "has the defender or its predecessors in title ceased to be in possession of property to the greatest extent eastwards to which their titles were and is habile". These averments simply beg the question, exactly what is the maximum extent the defenders' title is habile to support and why? How does that "maximum extent" relate to the pink strip? If there is an ambiguity caused by the qualification of measurements by the use of the words "or thereby" in the 1875 disposition, what is the uppermost extent of that ambiguity? The defenders aver with clarity what area of the pink strip their Land Register title is habile to include based on the

error tolerances of the Ordnance Survey map. However they make no such averments in respect of any of their predecessors' Sasine titles, upon which any claim to a prescriptive title must be based. Unlike the pursuers in *Suttie* v *Baird* (being a case in which the extent of the pursuers' title was resolved by evidence of possession), the defenders in the present case do not refer to any sketch or plan nor any measurements setting out the extent of the area they claim to have possessed for the prescriptive period.

[64] Accordingly, in my judgment, the defenders' averments *anent* a claim to title of part or whole of the pink strip by the operation of prescription are irrelevant. Such averments fall to be excluded from probation.

Servitude of access, use and storage, parking and ancillary right to lock gates: Issue 3

[65] The defenders aver that each of these servitude rights have been constituted by prescriptive possession.

Servitude of access

[66] The defenders' aver that they exercise a servitude right of access over the whole of the pink strip; that access over the pink strip has been enjoyed by "the defenders and their predecessors in title, their employees, members of the public and trade and other deliveries" on a daily basis for a continuous period of at least twenty years, openly peaceably and without judicial interruption.

[67] The pursuers admit that the defenders enjoy a right of access over the pink strip but aver that any servitude right exists only "over the minimum area of the pursuers' ground necessary for the defenders to access their property".

[68] Notwithstanding the limited nature of the pursuers' admission, the pursuers do not seek orders prohibiting the defenders from taking access over any part of the pink strip. The defenders do not seek a declarator in relation to the extent of the access enjoyed by them. The court does not thus require to determine over exactly what part of the pink strip any servitude right of access exists. Accordingly, the defenders' averments relating to the constitution and exercise of a servitude right of access over the pink strip are irrelevant as a defence to the pursuers' craves.

[69] While limited averments of the existence of a servitude right of access may assist the defenders at any proof to "set the scene" in respect of the other servitude rights claimed, evidence relating to the constitution and extent of usage of the servitude right of access is irrelevant and unnecessary.

[70] Accordingly, I shall exclude from probation those averments which relate to the constitution and extent of usage of the servitude right of access exercised by the defenders.

Servitude of parking

[71] Having carefully considered the submissions, there appeared ultimately to be little dispute between parties that the law of Scotland now recognises a "free-standing" servitude right of parking, being independent of and not ancillary to a servitude right of access.

[72] I was referred by both parties to the decision in *Moncrieff* v *Jamieson*. The House of Lords dealt there with the question of whether a servitude right to park was capable of being constituted as ancillary to an express grant of a servitude of access and not ancillary to a servitude right of access constituted by prescription, however I did not understand either party to draw any distinction of its *ratio* on that basis. Each of the five law lords were to varying degrees mindful of the unique topography of the dominant tenement, "Da Store";

Lord Hope referred to the "particular and unusual circumstances" of the case (paragraph [36]), Lord Scott described the geography as "all-important" (paragraph [48]), however, notably, Lord Rodger was "utterly unmoved" by the plight of the owners of Da Store who, without a right to park, would have required to access their property by foot by means of a steep stairway. Notwithstanding the particular topographical considerations in *Moncrieff* v *Jamieson* and the "ancillary" nature of the right they were asked to consider, their Lordships considered the question of whether an independent servitude right to park can exist in Scots law more broadly, acknowledging that it would be illogical to conclude that a right to park might exist as ancillary to a right of access, but not as a "free-standing" or independent servitude right. While Lord Hope and Lord Mance formally reserved their opinions on this issue, both acknowledged that a right to park could constitute a servitude in its own right (paragraphs [23] and [24] per Lord Hope; paragraph [102] per Lord Mance). The remaining law lords had no difficulty accepting that such a servitude could exist; Lord Scott (with whom Lord Neuberger agreed) noted that there "should be no doubt" that a servitudal right to park is recognised by law (paragraph [47]); Lord Rodger could see no reason why a servitude of parking should not be recognised (paragraph [75]).

[73] More recently, Sheriff Reid carefully analysed the authorities, academic and institutional writings, together with the opinions expressed in *Moncrieff*. Sheriff Reid's analysis is compelling. He summarises the position thus:

> "…. while I acknowledge that *Moncrieff* does not represent a strictly binding judicial recognition of the existence of a free-standing servitude right, in my judgment the debate on this narrow issue is ended for all practical purposes by the overwhelming current of eminent obiter dicta in that case. It is futile to stand Canute-like against it. From *Moncrieff*, it is but a short skip in logic to conclude, by analogy with the ancillary right recognised in that case, that an independent free-standing servitude right is, at least, similar in nature thereto." (*Johnson* v *Thomas and Thomas (A Firm)* v *Smith (*unreported, 28 July 2016), paragraph [33])

[74] In my judgment, without an enquiry into the facts, it is premature to determine the relevancy of the defenders' averments regarding a purported servitude of parking or to repel the defenders' third plea in law and those parts of their fourth and fifth pleas in law which make reference to such a servitude right. The defenders aver and offer to prove that vehicles have been parked on the pink strip on a daily basis, as of right, for a continuous period, openly, peaceably and without judicial interruption since at least 1980. They aver that coaches parked on the pink strip for approximately 80 years prior to the defenders acquiring title to their property. They aver that the right to park is in exercise of a praedial interest over their land and furthers their enjoyment of their land. It is necessary thus, for evidence to be led to ascertain the extent of the prescriptive use of the purported right to park, whether the purported servitude has indeed been exercised as of right, openly, peaceably and without judicial interruption and whether the purported servitude was, and is, for the praedial use of the dominant tenement.

Servitude of "use and storage"

[75] Before dealing with each of the remaining purported servitudes, it is helpful to set out in general terms the established legal principles regarding the creation of a prescriptive servitude (some of which are listed and considered in detail by Professors Cuisine and Paisley at paragraph 2.01 and in Gloag & Henderson at paragraph 34.40):

(a) there must be two tenements, a servient tenement and a dominant tenement, in separate ownership, or owned by the same party but in different capacities (Stair, I, vii; Erskine II, ix, 5; *Baird* v *Fortune* (1861) 4 Macq 127 HL; Cuisine & Paisley paragraphs 2.05 – 2.07);

(b) the servitude must constitute a praedial right benefitting the dominant tenement and burdening the servient tenement ie it must benefit the dominant tenement as a heritable subject (Cuisine & Paisley para 2.49; *Patrick* v *Napier* (1867) 5 M 693; *Dyce* v *Hay* (1849) 11 D 1266);

(c) generally, the servient proprietor is not bound or obliged to do anything, but only to suffer the exercise of the servitude right by the dominant proprietor (*in patiendo)* (Stair II, viii, 6; *Ingram* v *Chalmers* (1937) 53 Sh Ct 292; Bankton, *An Institute of the Laws of Scotland* II, vii, 7);

(d) the servitude right claimed must not be repugnant with ownership of the servient tenement (*Dyce* v *Hay, supra; Rattray* v *Tayport Patent Slip, supra*; *Moncrieff* v *Jamieson, supra);*

(e) possession will be the measure of the right – *tantum praescriptum quantum possessum* (Erskine, II, ix, 4; *Lord Advocate* v *Wemyss* (1899) 2 F (HL) 1);

(f) possession must be open, peaceable and without judicial interruption for a continuous period of twenty years; it must be exercised as of right and not attributable to tolerance by the servient proprietor (section 3(2) of the 1973 Act);

(g) the purported servitude right must be one which is well-recognised or "known to the law", or one which is similar in nature thereto; or otherwise one which by "immemorial use" or custom, or developments in society ought to be so recognised (Bell, *Principles,* p979; *Patrick* v *Napier*, *supra*; *Alexander* v *Butchart* (1875) 3 R 156; *Romano* v *Standard Commercial Property Securities Ltd* 2008 SLT 859; *Dyce* v *Hay, supra*; *Johnson* v *Thomas and Thomas (A Firm)* v *Smith, supra).*

[76] Dealing first with the purported servitude of use, the defenders' fifth plea in law is in the following terms:

> "The defenders having servitude rights of access, use and parking over and upon the pursuers ground the cause of action is unfounded and decree of absolvitor should be granted."

[77] Having carefully reviewed the defenders' pleadings, it is impossible to identify any averments which might be capable of supporting a claim to a purported general servitude right of use. The limited references to "use" of the pink strip in Answers 2 are directed towards the defenders' claim to a better title. In Answers 3, the word "use" is clearly referable to the use of an access, the use of the pink strip for parking, the use of the gates and the use of the pink strip for storage, each of which activities are asserted as constituting either distinct or ancillary servitude rights. The only stand-alone averment of use is as follows:

> "Explained and averred that the area occupied and used by the defenders and that area claimed to be owned by the pursuers was previously a bus garage" (lines 6-8 on page 11 of the Record).

[78] That averment is entirely unsatisfactory, lacking in specification and cannot possibly form the basis upon which a general servitude of use can be asserted.

[79] Little else requires to be said, however, as I was addressed on whether a general servitude right of use could exist, I should record that I have little difficulty in concluding that it cannot and should not. Put simply, such a servitude is too unspecific (Cuisine & Paisley at paragraph 3.77). How is one to judge whether such a servitude is repugnant to ownership? How is the servient proprietor to understand what possessory rights are enjoyed by the dominant proprietor, with which the servient proprietor must not interfere? By what measure would one determine whether the servitude was being exercised *civiliter*? There is no recognised general servitude of use, nor is such an expansive right akin to any

known servitude. Each of the known and recognised servitudes involves some use of the servient tenement; each is limited to a particular specified and identifiable activity. I am not persuaded that a general servitude of use requires to be recognised in response to any development in society; the position in Scots law on this issue remains as stated by the Inner House, in particular by Lord Cowan in *Leck* v *Chalmers, supra* at p417.

[80] Turning to the purported servitude of storage, again the defender's averments are limited. Following extensive averments in support of the claimed servitude right of parking, the defenders aver as follows:

> "Although their Land Certificate is dated April 2018, LAN184963, the pursuers acquired said property in or about 2005 during all parts of which time the property was used for access and for the parking of vehicles and storage of equipment upon it adjunct to the use of the property owned by the defenders and their predecessors in title."

[81] In my judgment, the defenders' averments anent a purported servitude of storage are irrelevant for a number of reasons. Firstly, these averments are not relevant to any plea in law; none of the defenders' pleas in law challenge the pursuers' craves on the basis of the existence of a servitude of storage (MacPhail, *Sheriff Court Practice,* 3rd edition, paragraph 9.48). Secondly, the defenders' averments fail to assert (i) the exercise of any purported servitude of storage for the requisite prescriptive period of twenty years; (ii) that such a right has been exercised openly, peaceably and without judicial interruption; and (iii) on what basis such a right might be regarded as a praedial right. Thirdly, the averments are wholly lacking in specification; the defenders do not aver on what part of the pink strip any such purported servitude has hitherto been exercised nor the nature of the equipment which it is claimed they have a right to store.

[82] While it is not necessary thus to decide whether a general right of storage of unspecified equipment can be said to constitute a servitude right, for the same reasons I

have set out in paragraph 79 above, I am not persuaded that it can. I was referred to the discussion by Professors Cuisine and Paisley at paragraph 3.16. While I accept that there may be circumstances in which relevant and specific averments of a limited right of storage of a specified material or object may justify an enquiry into the facts, such an enquiry is not merited in the present case.

[83] Accordingly, I shall exclude from probation the defenders' averments *anent* a purported servitude right of use and storage and delete the references to "use" in the defenders' fifth plea in law.

The ancillary right to lock gates

[84] The defenders aver:

> "Admitted that there is a gate at the south most portion of the defenders land under explanation that it has been there for over 40 years. . . . . The gates are secured by means of a padlock operated by means of a combination lock. . . the first defender offered the combination for the padlock on the gates to the pursuers. The combination for the padlock remains available to the pursuers should they request it. The combination for the lock was made available to anyone who required access through the gates. For example, a long-time resident of Gillies Lane, John McWhirter, had the combination to allow him to access the gates as necessary. . . the gates have been in their present position and in continuous use since at least 1980. . . the gates secure the defenders yard and premises when they are not actively in use to protect vehicles, stock and property therein. The local area suffers from vandalism and theft. Removal of the gates will interfere with the ability of the defenders and those acquiring title therefrom to exercise the servitude of parking. It will prevent commercial activity on the defenders property. The gates are *inter alia* incidental to the servitude of parking." (Answers 3)

[85] It is a matter of admission that the gate has been fixed across the whole of the south most boundary of the servient tenement. The court is not asked to determine whether the defenders or their predecessors had any right to install and maintain the gate on the servient tenement; the pursuers do not seek to remove it. Accordingly, I express no opinion in that regard.

[86] The pursuers seek to interdict the defenders and those instructed by or acting on their behalf, from locking or otherwise securing the gate. In my judgment, the defenders do not aver a relevant defence to the pursuers' second crave.

[87] Firstly, the defenders' averments are not directed to the wrong in respect of which interdict is sought. The averments are directed towards the presence of the gates not the act of locking or securing them; indeed, the ancillary right claimed appears to be limited to the presence of the gates. There is no plea in law directed towards any right or entitlement on the part of the defenders to lock the gate.

[88] Secondly, even if the court were to proceed on the basis that what was in fact asserted by the defenders was a right to *lock* the gate as ancillary to the purported servitude right to park (upon which hypothesis submissions were made by both parties' counsel), I am not persuaded that such an ancillary right exists.

[89] I was referred by Mr Turner to the discussion of ancillary rights in Cusine & Paisley. The authors distinguish between those ancillary rights which are "absolutely necessary", without which the exercise of a servitude right would be "ineffectual" (at paragraph 12.124) and those which simply render the exercise of the servitude less cumbersome or more comfortable (at paragraph 12.125). The present case does not involve the former category of ancillary rights. It cannot reasonably be argued that to enjoy a right to park, one must of necessity also be permitted to park behind a locked and secured gate. In what circumstances then, will rights falling into the latter category be permitted?

[90] The applicable test, approved as being a correct statement of the position in Scots law in *Moncrieff* (see in particular Lord Hope, paragraph [29]; Lord Rodger, paragraph [102]; and Lord Neuberger at paragraphs [110] to [112]), is that set out by Parker J in *Jones* v *Pritchard* [1908] 1 Ch 630 (at p638); "the grant of an easement is *prima facie* also the grant of

such ancillary rights as are reasonably necessary to its exercise or enjoyment". Both *Jones* and *Moncrieff* involved express grants of servitudes and not servitudes constituted by positive prescription, however I can see no reason why the test should not be applied to servitudes created by prescription.

[91] While each of the law lords expressed the test in slightly different terms, the report of the decision summarises the majority view that the test was one of whether the ancillary right is necessary for the comfortable use and enjoyment of the servitude. Lord Hope noted "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 dominant proprietors" (paragraph [29]); Lord Scott referred to a test of "reasonably necessary to the enjoyment" of the servitude (paragraph [52]); Lord Mance noted such rights must be "necessary for the convenient and comfortable enjoyment" of the dominant tenement (paragraph [102]); Lord Neuberger preferred a test of "reasonably necessary" as "without necessity, there would be the danger of imposing an uncovenanted burden on the servient owner, based on little more than sympathy for the dominant owner; without reasonableness, there would be a danger of imposing an unrealistically high hurdle for the dominant owner" however, his Lordship acknowledged that the references to "*comfortable* enjoyment" and "*convenient and comfortable*" introduced concepts of reasonableness (paragraph [112]); Lord Rodger, who gave a dissenting judgment on this point, preferred a test which required that the ancillary right claimed was "essential to make the servitude effective" (paragraphs [77] to [82]).

[92] The question of what ancillary rights are necessary for the comfortable use and enjoyment of the servitude, will be guided by practical considerations (Lord Hope, *Moncrieff* at paragraph [26]). The practical considerations averred by the defenders arise, it is said,

from the need to protect vehicles from vandalism and theft. While the defenders refer to the need to protect stock and property, such a need is not referable to the right to park vehicles. However, the question is not whether an ancillary right is desirable or presents the least costly means of enjoying a servitude right. The defenders' need to protect vehicles could of course be addressed by other security measures such as the installation of CCTV cameras, use of security guards, warning signs, wheel clamps or steering wheel locks, none of which would involve the assertion of further rights against the servient proprietor. The defenders fail to set out why the locking of a gate and thus the controlling of entry and egress to the servient tenement is *necessary* for the reasonable and comfortable use of the dominant tenement. I have little difficulty concluding that it is not; it does not strike the right balance between the interests of the servient and dominant proprietors.

[93] Moreover, applying the same logic with which their Lordships wrestled in *Moncrieff,* a right to lock a gate as an ancillary right to park would be difficult to accept if a right to lock a gate as a servitude in its own right is unacceptable. I have little difficulty in concluding that no such servitude right to lock a gate exists in Scots law; there is no known servitude of locking a gate, nor is it a right akin to any known servitude. Counsel for the defenders certainly did not suggest that there were any "habits and requirements of life, varying and extending with advancing civilisation" (per Lord Ardmillan in *Patrick* v *Napier, supra* p 709) which would justify the recognition of such a right. Had such a right existed, it would have been recognised centuries ago.

[94] The preponderance of judicial authority and academic discussion (see *Oliver* v *Robertson; Borthwick* v *Strang* and Cuisine & Paisley at paragraph 12.98) deals with situations in which the servient proprietor has erected a gate on the servient tenement and provided, or refused to provide, a key to the dominant proprietor. In such cases, the installation of a

locked gate has amounted to an unjustified obstruction of a servitude of access. The provision of a key in *Borthwick* v *Strang*, did not obviate the inconvenience to the dominant proprietor because:

> "the key may be lost or missing; the lock may be spoiled; every member of the family cannot have a key at all times with him when he stirs abroad; still less can every stranger have a key, who has occasion to come to the house." (at p 514).

[95] On behalf of the defenders, reliance was placed upon the decision in *Oliver* v *Robertson* (1869) 8 M 137. It was submitted that the reason the servient proprietor in *Oliver* was not found entitled to lock a gate over a right of access was because the right had not been exercised for the relevant prescriptive period, thus a right to lock a gate which might not exist *ab initio* might be created by the operation of prescription. In my judgment, *Oliver* v *Robertson* properly understood does not deal with the acquisition of prescriptive rights but rather with the extinction of rights by the operation of negative prescription; the brief note of the decision (which appears to take the form of a recital of the interlocutors pronounced by the court rather than a record of the reasoned opinion) would suggest that it was concerned with the potential loss of a right to challenge an obstruction of a servitude right of access, rather than the acquisition of a right to lock a gate. *Oliver* does not provide a sound basis upon which to conclude that a servitude right to lock a gate is known to the law.

[96] I was not referred to any judicial authority dealing with the assertion of such a servitude right by the dominant proprietor. That is unsurprising. Were such a right to exist it would, in my judgment, be repugnant with ownership of the servient tenement (Gloag & Henderson, supra, 34.40; *Dyce* v *Hay*, *supra*; *Moncrieff*, *supra; Johnson* v *Thomas & Thomas, supra).* As explained by Lord Hope in *Moncrieff* "the fact that the servient proprietor is excluded from part of his property is not necessarily inimical to the existence of a servitude" (at paragraph [24]). However, the exclusion must not negate the very concept of ownership.

[97] The correct test, identified by Lord Scott in *Moncrieff* (with whom Lord Neuberger agreed) is whether the servient proprietor retains "possession and control" of the servient tenement:

> "if, for example, the nature of the purported servitude were to place the dominant owner in such occupation of the servient land as to bar the servient owner from possession and control of the land I would find it very difficult to accept that the right could constitute a servitude" ((*Moncrieff* at [47] and [54]-[59]).

[98] A purported servitude right to lock a gate would grant to the dominant proprietor possession and control of the servient tenement. The dominant proprietor would choose who can enter, when and for what purpose. Ownership has been described by Gordon as "the concept used by the law to translate into legal terms the claim, 'This is mine'." (*Scottish Land Law*, 3rd edition, volume 1, at paragraph 13-01). Few acts indicate "this is mine" more clearly than the act of controlling entry and egress to a property.

[99] Unlike the position in *Moncrieff* and *Johnson* v *Thomas & Thomas*, while the servient proprietor may build over the servient tenement, build under it and advertise on hoardings around it without interfering with a servitude right of parking, access to any such buildings or hoardings would be controlled by the dominant proprietor, if a servitude of locking a gate were to be recognised. The provision of a combination for a padlock does not assist, for the reasons articulated in *Borthwick* v *Strang*. Moreover, were the servient proprietor to undertake any activity upon his property (as simple as perhaps providing a bench for community use), which involved allowing members of the general public access to the servient tenement, provided he does not interfere to any material extent with the reasonable exercise of the dominant proprietor's servitude rights, there would be obvious practical difficulties in supplying all such persons with the combination for the padlock to the gates.

A servitude right to lock a gate would represent an unwarranted interference with the servient proprietor's rights of ownership.

[100] Accordingly, for all of the foregoing reasons, I shall exclude from probation the defender's averments *anent* an ancillary right to lock the gate situated at the south most boundary of the pink strip.

Acquiescence: Issue 4

[101] The defenders aver as follows:

> "The gates have been in their present position and in continuous use since at least 1980. Believed and averred that the pursuers' predecessors in title (if any) acquiesced in their installation and, along with the pursuers, the gates use. Their presence and use were obvious, apparent and should have been known to the pursuers prior to, at the time of and subsequent to the pursuers' purchase of their property. They purchased their property notwithstanding, failed to object to raise any issue with the defenders for a substantial period of time and acquiesced thereby."

[102] In my judgment, counsel for the pursuers' submissions in relation to these averments is well founded. Whether the pursuers or their predecessors have acquiesced in the installation, presence or use of the gates is of no moment. The relevant question is whether the pursuers have acquiesced in the locking of the gates, that being the alleged wrong in respect of which the interdict second craved is sought. The defenders' averments *anent* acquiescence do not address that question. The defenders' fourth plea in law is not directed to any plea of acquiescence in relation to the locking of the gates; it refers only to their installation and use.

[103] A failure to address the relevant question is a sufficient basis upon which to exclude the defenders' averments from probation. However, even if I am wrong so to conclude, in my judgment, the defenders' averments fall far short of what is required to assert the creation of a servitude right by the operation of acquiescence.

[104] On behalf of the defenders, reliance was placed upon the following passage from Bell, *Principles*:

> "947 Although it is rightly said that mere acquiescence cannot confer a right of property, it may confer a right of use of property or servitude."

The defenders also relied upon *Munro* v *Jervey (*1821) 1 S 161, being one of the authorities cited by Bell in support of the statement at passage 947. Insofar as the decision in *Munro* v *Jervey* is concerned, I regret that I am unable to reflect, without speculation, upon any discernible *ratio,* the report of the decision being no more than a sketch or a synopsis of the outcome rather than a considered analysis of the law.

[105] However, the immediately preceding passage in Bell provides both context to the statement in passage 947 and a more detailed commentary. Passage 946 reads:

> "The principle seems to be, that mere acquiescence may, as *rei interventus,* make an agreement to grant a servitude, or to transfer property, binding, or may bar one from challenging a judicial sentence; but that where there is neither previous contract nor judicial proceeding, there must be something more than mere acquiescence, something capable of being construed as an implied contract or permission, followed by *rei interventus*. Where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right".

[106] Bell in this passage is concerned with two scenarios. One, where there is an informal agreement to create a servitude or to transfer property; mere acquiescence may make that agreement binding. The second, where this is no informal agreement, "something more than mere acquiescence" is necessary. The defenders do not aver the existence of any informal agreement and thus it must follow that they seek to rely upon the second scenario.

[107] In *William Grant & Sons Ltd* v *Glen Catrine Ltd*, *supra*, Lord President Rodger summarised the position thus:

> "What Bell seems to envisage is that someone who would stop, say costly building operations, sees those operations being carried out and does nothing, or else he sees some manifestly irreversible step being taken and does nothing to stop it. In these circumstances, the law presumes that there is an agreement or conventional permission for the work to be done or the step to be taken. . . . It follows, in my view, that in para 946 Bell analyses the situation as one where the party carrying out the operations, or taking the irretrievable step, does so on the faith of the consent or the conventional permission which he has assumed to exist, on the basis of the other party seeing what is happening and doing nothing to stop it."

[108] Bell's second scenario was also considered by the Inner House in *Moncrieff* v *Jamieson*. Their Lordships were favoured with an extensive citation of authorities in relation to an argument advanced on behalf of the respondent, similar to that advanced by the defenders in this case (which argument was later not insisted upon by the respondent on appeal to the House of Lords). Lord Marnoch concluded at paragraph [27]:

> "Having consulted all of these authorities I am, however, of the opinion that none go so far as to suggest that parties' actings can of themselves set up for the future a real right of praedial servitude. On the contrary, with the possible exception of *Munro v Jervey*, the decisions or dicta relied upon are, in my opinion, referable to the principle well encapsulated by the Lord Ordinary in *Melville v Douglas' Trs* ((1828) p188), namely, 'that the extension of rights of servitude or the like may not be challenged, if the party entitled to object has suffered that extension to be made, and operations attended with expense to be carried on, with his knowledge and approbation, without question.' I might add that in every case the expenses incurred was very considerable . . . . . in *MacGregor v Balfour* (p352) Lord President Balfour appears to suggest that, in order to affect singular successors, the works in question must only be substantial but also remain 'visible and obvious'. So far as the case of *Munro v Jervey* is concerned, the report is brief in the extreme and I consider that the decision may well have rested on an implication of personal contract between the two parties to the action."

[109] In my judgment, the defenders do not properly invoke the equitable plea of acquiescence as a bar to the interdict second craved. While the defenders aver that the gates have been in their present position since 1980, they make no averments regarding when any padlock was fitted to the gate. They make no averments of any "great cost" associated with the locking of the gate or of what "irretrievable step" they have taken in reliance upon the pursuers' silence. They make no averments that the pursuers knew, or ought to have

known, that the gates were being locked outwith normal business hours, nor on what basis the actings or failure to act on the part of their predecessors in title, bind the pursuers. They make no averments from which it might be inferred that the pursuers (or indeed their predecessors in title) consented to the locking of the gates in perpetuity.

[110] Accordingly, in my judgment, the defender's pleadings in relation to the issue of acquiescence are without merit.

Precision of orders sought: Issue 5

[111] I am not persuaded that the orders sought by the pursuers are lacking in precision. Each of the pursuers' craves makes reference to the terms of their title and to the title plan which sets out the extent of their title. Such craves are common place and are routinely granted. In the absence of any meaningful challenge to the pursuers' title, the court must proceed on the basis that the pursuers' registered title is accurate.

Other miscellaneous averments: Issue 6

[112] The defenders' challenged the relevancy of the pursuers' averments *anent* the content of the defenders' Form 1 application for registration, the correspondence issued to the defenders' predecessors in title and the marketability of the pursuers' property. Counsel for the pursuers conceded that these averments were irrelevant.

[113] Accordingly, I shall exclude these averments from probation.

Decision

[114] Having excluded various averments from probation on issues 3 and 4 in relation to the locking of the gates by the defenders, I shall grant decree *de plano* in terms of the

pursuers' second crave. I will exclude the averments from probation referred to in the body of this decision and thereafter remit the cause to a proof before answer on the remaining pleas in law.

[115] While I was addressed by counsel on the issue of expenses, I was not addressed on expenses in the event of mixed success. As there has been a degree of mixed success, I shall assign a hearing on the expenses and on further procedure, in light of the terms of this decision.