Resolving Rural Disputes: servitude rights and car parking

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This article, by Stephanie Hepburn, a Senior Associate in our rural disputes team, takes a closer look at the key issues arising from servitudes and car parking, including how the landmark case of ***Moncrieff v Jamieson*** has influenced recent decisions in this area.

Whether Scots law recognises a right of parking was the subject of much legal and academic commentary until the landmark decision of the House of Lords in the case of ***Moncrieff v Jamieson***[1], which confirmed that it is possible for a servitude right to park to be implied as a necessary accessory to an express right of access. Their Lordships also opined that a freestanding right to park (being a right that is not ancillary to a right of access) would also be competent, although it was not relevant to the facts of the case and so it was not judicially determined. The principle that a freestanding right to park can exist in Scots law was confirmed in 2016 by the Sheriff in the case of ***The Firm of Johnson, Thomas and Thomas and Others v Thomas Smith***, ***T G & V Properties Limited and Others***[2], and was reaffirmed in March 2020 in the case of ***McCabe v Patterson***[3].

Creation of servitude rights

There are several ways in which a servitude can be created, including by express or implied grant[4] (or reservation), or by use. Before the Title Conditions (Scotland) Act 2003 came into force, there was no requirement that servitudes show on the title sheet of the burdened property so the policy of the courts was to restrict servitudes to those "known to the law" or very close to one known to the law. The Scottish courts had in effect created a fixed list of servitudes. The idea was that a purchaser could be sure that only a limited number of types of unregistered right could affect the property. Thus an attempt to establish a servitude of sign-hanging[5] failed because it was not a recognised servitude known to law. However, the fixed list is not regarded as closed and the courts have been willing to adopt a flexible approach, recognising a new servitude because of economic, social or technological change, provide it is similar to a recognised type of servitude. For example, the courts have recognised the servitude of projection[6].

When the 2003 Act came into force, it brought a requirement that, unless it is a servitude to run a pipe, servitudes expressly created in a deed had to be registered against both the burdened and benefited properties. Section 76 of the 2003 Act also expressly provides that servitudes that are created in a deed do not require to be known to the law. So servitudes created expressly by deed since the 2003 Act came into force are not restricted by the so called fixed list and so can be for any use, provided the use is not too invasive of the burdened proprietor's right of ownership. While the fixed list no longer applies to servitudes that are expressly granted in a deed, it continues to apply to all other servitudes, including those that are created by implication or by prescription.

1 Moncrieff v Jamieson [2007] UKHL 42. See our detailed commentary on the case here
2 The Firm of Johnson, Thomas and Thomas and Others v Thomas Smith, T G & V Properties Limited and others [2016] SC GLA 50. See our commentary on the case here
3 Alexander Meikle McCabe, Patricia Anne Marie McCabe, Michelle Rose McCabe and Simon McCabe v Rhoderick Patterson and Anne Patterson [2020] SC GLA 14
4 ASA International v Kashmiri Properties (Ireland) Limited [2016] CSIH 70. See our commentary on this case here
5 Mendelssohn v The Wee Pub Co Ltd 1991 GWD 26-1518
6 Compugraphics International Limited v Colin Nikolic [2011] CSIH 34. See our commentary on this case here

Ancillary rights

Servitudes that are expressly granted in a deed may also have ancillary rights attaching to them, either because the ancillary right is expressly created by the deed, or because the ancillary right is implied. An ancillary right will only be implied if it is necessary for the convenient and comfortable enjoyment of the servitude, and it was within the reasonable contemplation of the parties at the time the servitude was created. A servitude of access to allow to you repair and maintain a wall for example is likely to carry with it ancillary rights to rest ladders on the access strip if a ladder is necessary to reach the wall.

Moncrieff v Jamieson

Mr and Mrs Moncrieff, the owners of a property in Shetland, raised court proceedings to prevent their neighbours Mr and Mrs Jamieson from erecting a wall over part of the access road by which the Moncrieffs gained access to their property, by virtue of an express access right in their title. The geography of the properties is significant, in that the route of the access road was down a steep slope. Alternative means of access were not available.

In addition to exercising the right of access however, the Moncrieffs had also used the access road to stop and unload vehicles and turn them to return up the hill, and also to park next to their property – the nearest alternative parking being at the top of the hill on the public road, some distance away, and they did this for a number of years without objection from the Jamiesons. The wall which the Jamiesons started to build on their property would compromise the Moncrieffs' ability to park in the area they habitually used for this purpose, and so they raised an action of interdict in respect of the erection of the wall, which the sheriff granted on the basis that the Moncrieffs had a right to park as accessory to their right of access.

The issue in this case was whether the express right of access enjoyed by the Moncrieffs carried with it an ancillary right to park. The House of Lords found unanimously in favour of the Moncrieffs and confirmed that - in the particular circumstances of this case - an ancillary right to park was necessary for the comfortable and convenient enjoyment of the servitude. Their Lordships also opined, obiter, that a freestanding right to park (being a right that is not ancillary to a right of access) would also be competent, although it was not relevant to the facts of the case and so it was not judicially determined.

Freestanding servitude rights to park

Whether you can have a freestanding servitude right to park was litigated in the case of ***The Firm of Johnson, Thomas and Thomas and Others v Thomas Smith, T G & V Properties Limited and Others***. In that case, the pursuers owned an area of land in Rutherglen which was used as a residential site for showmen's caravans. They claimed that they had a servitude right of parking over a narrow strip of vacant ground owned by the defenders. The parking area was integral to the operation of the site, and was the only location where these large vehicles could be parked. The pursuers argued that a right to park had been created by prescription as they and their tenants had parked vehicles (including articulated lorries) on the strip as of right, openly, peaceably and without judicial interruption, for over 20 years thus meeting the test required to establish a servitude by use.

As noted above, prescriptive servitudes must still be known to law so that prospective purchasers are protected from a never ending class of unregistered rights. The so-called fixed list of servitudes known to law historically did not include car parking. The Sheriff considered Moncrieff and noted that, although it was not the point the House of Lords decided, the judgments had indicated in passing that a freestanding right of parking could exist and the Sheriff could think of no compelling reason why a right of parking should be confined to an ancillary status. It would be illogical to recognise the ancillary right, if it was not also capable of existing independently.

The Sheriff had little difficulty in finding a freestanding right to park can competently exist in Scots law and that could be created by 20 years' use, thus adding car parking to the so-called "fixed list" of servitudes, however, the issue of whether or not prescriptive test had been met was one that had to be established by evidence.

Recent authority

The existence in Scots law of a free-standing servitude right to park was again confirmed by the Sheriff Court in the case ***McCabe v Patterson*** from March 2020, and there was little dispute between the parties in the case on this point. The Pattersons offered to prove that vehicles had been parked on the land in question on a daily basis, as of right, for a continuous period, openly, peaceably and without judicial interruption since at least 1980, thus meeting the legal test required for creation of a servitude by use. The Pattersons also offered to prove that coaches parked on the area for approximately 80 years prior to them acquiring title to their property. They argued that the right to park is an exercise of a praedial interest over their land and furthers their enjoyment of their land. Sheriff Anwar found the analysis in the ***Johnston v Smith*** case compelling and agreed that a free standing right to park existed in Scots Law. Similarly to *Johnston*, the case was heard at a legal debate with no evidence, and the Sheriff found it was necessary for evidence to be led to ascertain the extent of the prescriptive use of the purported right to park and whether the prescriptive test was met.

Repugnancy

Where a servitude creates a right to use land, it must not be repugnant with the burdened proprietor's ownership. The question of whether the right in the *Johnston* case was repugnant with ownership was also swiftly dismissed by the Sheriff. The partial or total exclusion of an owner from physical occupation of the land did not necessarily prevent the right from being a servitude. That too was recognised in Moncrieff, since many well recognised servitudes involve placing objects or erecting structures on the land and *"the fact that the servient proprietor is excluded from part of his property is not necessarily inimical to the existence of a servitude"*. There will always be some use that is prevented by a servitude, but even a substantial restriction on the use of the land caused by extensive parking rights does not prevent the owner from enjoying other proprietorial rights.

Whether the pursuer in *Johnston* or *McCabe* successfully established a freestanding right to park in court would have depended on the outcome of any proof on all the facts and circumstances. We are not aware of any reported decision on either case.

The principle that a servitude right of car parking can exist has now been set and reaffirmed and the issue can now, for once, be parked.

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