

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2018] SC ABE 43

A431/15

JUDGMENT OF SHERIFF ANDREW MILLER

In the cause

PRALHAD KOLHE

Pursuer

Against

WILLIAM SMITH ROBERTSON

First Defender

EWEN ADAM

Second Defender

ROY CHARLES JAMIESON

Third Defender

GEORGE SKINNER

Fourth Defender

JAMES ADAM

Fifth Defender

WILLIAM WESTLAND

Sixth Defender

THE OCCUPIERS, Cove Bay, Aberdeen

Seventh Defenders

**Pursuers: R Sutherland**  
**Second to Sixth Defenders: M MacKay, Sol Adv**

ABERDEEN: 2 July 2018

The sheriff, having resumed consideration of the cause, Finds the following facts admitted

or proved:

**Findings in Fact**

- 1) The pursuer is Pralhad Kolhe.
- 2) This action was dismissed against the first defender, with no expenses found due to or by any party relating to the action against the first defender, on 2 December 2016.
- 3) The second defender is Ewen Adam.
- 4) The third defender is Roy Charles Jamieson.
- 5) The fourth defender is George Skinner.
- 6) The fifth defender is James Adam.
- 7) The sixth defender is William Westland.
- 8) The seventh defenders are other occupiers of the ground at Cove Bay, Kincardine to which this action relates, whose names and residences are not known to the pursuer and cannot reasonably be ascertained by him.
- 9) This court has jurisdiction.
- 10) The pursuer purchased his home at The Watch House in 1992. The Watch House stands on a hill overlooking the harbour at Cove Bay, Kincardine (hereafter “the harbour”) to which this action relates.
- 11) The pursuer is the owner of ground at the harbour, consisting of an irregularly shaped area of land which lies immediately adjacent to, and to the north of, the beach (the beach is referred to hereafter as ‘the foreshore’), a pier which projects southwards from the foreshore, a private road extending northwards from the pier to the public road at the intersection of Colsea Road and Stoneyhill Terrace, known locally as Balmoral Brae, and part of a rock formation (hereafter ‘the forelands’) immediately adjoining and to the east of the pier and private road. The subjects owned by the pursuer at the harbour are shown coloured pink and blue on

production number 5/1/1 copy Land Certificate and Title Plan relative to the pursuer's title, which is registered in the Land Register of Scotland under Title No. KNC10841.

- 12) The area shown coloured blue on the Title Plan consists of (i) the pier, extending 87.5 metres or thereby as measured from south to north, and (ii) the private road, extending 62.5 metres or thereby extending northwards from the northern boundary of the pier until it joins the public road at Balmoral Brae.
- 13) A number of small boats are currently stored on mobile trailers on part of the land falling within the pursuer's title and lying immediately to the north of the foreshore at the harbour. The boats stored there include boats owned by the second to seventh defenders. None of the boats stored on the pursuer's land belongs to the pursuer.
- 14) Boats of a similar nature to those owned by the second to seventh defenders have been kept by members of the public on the land now owned by the pursuer, on which the boats owned by the second to seventh defenders are kept, and have been used for similar purposes as those boats, throughout living memory.
- 15) A number of winch huts, each containing a diesel-powered mechanical winch, are also positioned on the same area of land, falling within the pursuer's title, as the boats. The winch huts positioned on the pursuer's land include winch huts owned by the second, third, fourth, fifth and sixth defenders (hereafter 'the defenders').
- 16) The positions of the boats stored and winch huts positioned on the pursuer's land as described in the preceding findings in fact are shown on the plan at appendix 7 of production 5/1/11 being a report by Messrs C K D Galbraith, Chartered Surveyors.
- 17) When one of the boats stored on the pursuer's land is to be taken to sea, the boat is pushed from its berth down the foreshore on its trailer and into the sea. When the

boat is subsequently to be retrieved from the sea, its trailer is positioned in the sea at the foreshore, the boat is floated on to the trailer and then the boat and trailer are pulled back to the boat's usual berth on the pursuer's land using one of the diesel powered winches positioned there.

- 18) Prior to the advent of diesel powered winches during the 1960s, boats were winched from the water manually, using fixed capstans. The position of one such capstan is shown on ordnance survey map 6/6/1 from 1962.
- 19) In addition to boats, trailers, winches and winch huts, the defenders and others who own boats stored on the pursuer's land also keep associated equipment there.
- 20) In the 19<sup>th</sup> century the village of Cove was owned by Alexander Kilgour, who built the harbour in around 1877 in more or less its present configuration. In addition to the pier which still exists at the harbour, Mr Kilgour also built a second pier which protruded into the waters of the harbour from its north western shore in a generally south easterly direction. That second pier fell into disuse over time. Its remains are still visible at low tide but are fully submerged at high tide.
- 21) Fishing activities have been carried on from the harbour throughout living memory and beyond. Within living memory, the rights to fish salmon from Cove Harbour were owned by Hector (Aberdeen) Limited, which operated a vessel from the harbour to fish commercially for salmon. The salmon boat, known as a 'coble,' was crewed by employees of the company and, when not at sea, was berthed alongside the existing pier in the harbour.
- 22) Until around 1987 the harbour was owned by Hector (Aberdeen) Limited.
- 23) The salmon fishing season ran from around February to late August each year and the salmon coble generally went to sea between about 4 am and late morning each

day. A number of crew members of the salmon coble also owned their own smaller boats, which they used in the afternoons in order to fish on their own account for lobster, crab and shell fish. Some of those smaller boats were kept on the land now owned by the pursuer, on which the defenders' boats are now stored.

- 24) In around 1987 Hector (Aberdeen) Limited sold the harbour in two lots, one of which was sold to Robert Sutherland, who was called as a witness by the defenders.

Mr Sutherland still owns the land which he purchased from Hector (Aberdeen) Limited, and which lies immediately to the west of the area of land owned by the pursuer and lying immediately to the north of the foreshore, on which the defenders' boats and winch huts are positioned. At about the same time Hector (Aberdeen) Limited sold the rest of its land at the harbour in a separate lot to Mr Hugh Moir along with its salmon fishing rights.

- 25) Mr Moir continued to operate a commercial salmon fishing business, including the salmon coble, until 1999, which was the final season of salmon fishing from the harbour. No commercial salmon fishing has been conducted from the harbour since then.

- 26) In 2001, after the death of Hugh Moir, his executors sold the land at the harbour which he had purchased from Hector (Aberdeen) Limited to the pursuer.

- 27) Thus, the land now owned by the pursuer at the harbour was previously owned by Hugh Moir and, before Mr Moir, by Hector (Aberdeen) Limited.

- 28) The pursuer took entry to the land which he owns at the harbour on 7 December 2001.

- 29) Separately from the commercial salmon fishing activities carried on at Cove Harbour, throughout living memory and beyond individuals have carried on creel

fishing activities using small boats launched from the foreshore at the harbour.

During the currency of the commercial salmon fishing activities at the harbour, some of those who owned and operated small creel fishing boats were also crew members of the salmon coble. However, other individuals who were not connected to the salmon coble also carried on creel fishing activities from the harbour.

- 30) Creel fishing involves fishing for crab, lobster and other shell fish from small boats using specially designed pots known as creels.
- 31) In the past some of those who carried on creel fishing activities from the harbour earned their livelihood from that activity. Others carried on creel fishing as a pastime.
- 32) Throughout living memory some of the small boats used for creel fishing at the harbour have been kept on the land now owned by the pursuer, on which the boats owned by the second to seventh defenders are kept.
- 33) At present the only person who is known to earn a living by means of creel fishing from the harbour is the third defender, Roy Charles Jamieson. All of the other individuals who own boats now positioned on the defenders' land carry on creel fishing as a pastime when their other commitments permit and when the weather is favourable.
- 34) The trailers on which the boats kept on the pursuer's land sit are on wheels and are therefore capable of being moved from their present locations without significant difficulty if required.
- 35) The winch huts and winches positioned on the pursuer's land are affixed to the ground on which they stand but they are small, the winch huts are made of wood

and the winches and huts could be moved from their present locations without significant difficulty if required.

- 36) The associated equipment kept on the pursuer's land is moveable and is capable of being moved from its present location without significant difficulty if required.
- 37) In addition to the defenders, other individuals have occasionally carried on fishing activities from the harbour before and after the pursuer took entry to the property there in 2001. Those individuals did not store their boats on the pursuer's land but instead transported their boats to the harbour as and when required on mobile trailers towed by vehicles. Until 2015 those individuals accessed the foreshore in order to launch and retrieved their boats via the public road at Balmoral Brae and the private road, and then reversed their trailers on to the foreshore.
- 38) However, it has not been possible to gain vehicular access to the foreshore since 2015, when obstructions were placed on the instructions of the pursuer in order to prevent vehicular access to the foreshore.
- 39) The pursuer took no steps to intimate to the defenders any objection to their use of his land for the storage of boats, winches and associated equipment until April 2014, when his solicitors wrote on his behalf to some of the defenders in the terms set out in production 6/4/54, intimating that the pursuer did not wish any vessels to be stored on his land and intimating that the pursuer may be forced to take legal steps for the removal of the vessels stored there if they were not removed within 14 days, but stating that: "Mr Kolhe's plans will not, however, affect your continued use of the harbour itself from which you conduct your fishing activities, the use of the foreshore to launch into and remove your vessel from the harbour or the use of the access roads to the harbour for these purposes".

- 40) At an unknown point during 2014, a sign was erected within the harbour on the instructions of the pursuer, which read: "Cove Bay Harbour – Private Property".
- 41) This action was warranted for service on 7 December 2015.
- 42) Until 2015 members of the public were able to gain vehicular access, via Balmoral Brae and the private road, to areas immediately to the east of the private road, which were informally used for parking, onto the pier and to areas to the west of the private road, including the land on which the defenders' boats and winch huts are presently positioned, all of which are within the pursuer's title. It was also possible for members of the public to gain vehicular access to the foreshore by the same means.
- 43) During 2015 boulders were placed on the instructions of the pursuer along the Eastern and Western borders of the private road, thus preventing vehicular access from the private road to any areas to the east or west of the road including the aforementioned areas used for parking, the area on which the defenders' boats and winch huts are positioned and the foreshore. Similar boulders were also placed across the entrance to the pier, which prevented vehicular access onto the pier.
- 44) At around the same time as the boulders were put in place, contractors acting on the instructions of the pursuer placed a bank of stones in a line approximately perpendicular to the private road on its western side, running immediately to the north of the area on which the defenders' boats and winch huts are positioned. The combined effect of the boulders and the bank of stones made it impossible to gain vehicular access from the private road to the area in which the boats and winch huts are stored.
- 45) At no point during living memory has permission ever been sought by the owners of creel fishing boats from the pursuer or from any of his predecessors in title for the

keeping of boats, winches, winch huts or associated equipment on the land now owned by the pursuer on which the defenders' boats, winch huts and associated equipment are currently positioned.

- 46) No harbour dues have ever been payable by any members of the public who wished to use the harbour for fishing.
- 47) No formal system has ever existed for the allocation of berths for boats on the land now owned by the pursuer. Instead the local custom has always been that, when a berth became vacant, any member of the public who wished to store a boat there could do so.
- 48) At no point has the pursuer ever positively made it known to the public generally or to the defenders or other owners of boats, winches or associated equipment kept on his land that he consented to or approved of them keeping their boats, winches or associated equipment there.
- 49) The defenders, in continuing to keep their fishing boats, winches and associated equipment on the pursuer's land since 2001, have not done so in reliance upon any belief that the pursuer has positively indicated his consent to or approval of their storage of boats, winches and associated equipment on his land.
- 50) The defenders and others who have stored boats, winches and associated equipment on the land now owned by the pursuer throughout living memory have done so in the belief that they had a right as members of the public to do so.
- 51) The pursuer was aware prior to his purchase of the harbour in 2001 that members of the public kept boats, winches and associated equipment on the land now owned by him, on which the defenders' boats, winches and associated equipment are kept.

- 52) Throughout the period since the pursuer took entry to the property at the harbour in 2001, the defenders and others who have stored boats, winches and associated equipment there have carried out annual routine maintenance to their boats and winches.
- 53) In the aftermath of a severe storm in the winter of 2013/2014 members of the public including the fifth defender carried out work at their own expense over a brief period extending no more than a few days in order to clear storm debris from the harbour area and fill in holes gouged by the storm in the areas which were at that time used for parking immediately to the east of the private road. The financial cost of this work was not significant.
- 54) No permission has ever been sought from or given by the pursuer for the carrying out of such routine maintenance to boats and winches or for the carrying out of the work to clear storm debris from the harbour during the winter of 2013/2014 and no financial contribution was sought from the pursuer in relation to the latter work.
- 55) The routine maintenance work to boats and winches and the work to clear storm debris from the harbour were all undertaken primarily for the benefit of the defenders.
- 56) If necessary the defenders' boats, winches, winch huts and associated equipment could be removed from the pursuer's land without significant difficulty or expense to the defenders.
- 57) Since he took entry to the land at the harbour in 2001 the pursuer has been aware that boats, winch huts and associated equipment were kept on his land and that it would have been open to him to take steps to secure their removal.

- 58) From that time the pursuer was also aware that the boats kept on his land were used for fishing and that the owners of those boats exercised both pedestrian and vehicular access from the private road to the area on which the boats and winch huts were kept for associated purposes.
- 59) The pursuer's land immediately to the north of the foreshore, on which the defenders' boats, winches and associated equipment are kept, is not part of the foreshore.
- 60) Throughout living memory and beyond, members of the public have exercised unrestricted pedestrian access to the foreshore, along the full length of the pier and over the full extent of the forelands, including the part thereof which falls within the pursuer's title. Such pedestrian access has been exercised openly, regularly and to a significant level throughout each year by a significant number of members of the public.
- 61) The purposes for which pedestrians have exercised such access to the foreshore, pier and foreland have included walking, picnicking, bathing, paddling, fishing, diving, snorkelling, swimming, kayaking and launching, retrieving and attending to boats and other craft, and associated purposes.
- 62) The pursuer has been aware of the level of pedestrian access to the foreshore, along the full length of the pier and over the full extent of the forelands throughout the period since he took entry to the land owned by him at the harbour in 2001.
- 63) No permission has ever been sought from the pursuer or from any of his predecessors in title or from any other person for such pedestrian access. The members of the public who have exercised pedestrian access to the foreshore, pier and forelands have done so in the belief that they had a right to do so.

- 64) The primary route by which pedestrians have accessed the foreshore, pier and forelands has been the private road leading from the public road at Balmoral Brae to the pier.
- 65) Although it is possible to access the forelands from numerous points along the private road and the pier, the primary means of pedestrian access onto the forelands throughout living memory has been via a number of steps cut in to the rock of the forelands close to the southern tip of the pier, where a curved sea wall meets the rocks to the east of the pier. Those steps are of considerable age and are shown in photographs produced as productions 6/4/43 and 6/4/44.
- 66) The forelands comprise a rocky tidal area, parts of which are submerged and inaccessible to pedestrians at high tide.
- 67) Within the forelands, to the east of the area thereof falling within the pursuer's title, are located two particular pools known as the "Outer Beattie" and "Inner Beattie", both of which have been places of significant resort for local people, tide and weather permitting, throughout living memory.
- 68) Pedestrian access continues to be possible to the foreshore, along the full length of the pier and onto the forelands by the routes described above despite the placing of boulders on the instructions of the pursuer during 2015.
- 69) The pursuer has never taken any steps to prevent or obstruct members of the public from exercising pedestrian access to the foreshore, along the full length of the pier and onto the forelands.
- 70) It has never been possible for vehicular access to be exercised onto the forelands.
- 71) A number of the defenders and others who keep or have kept boats, winches and associated equipment on the land now owned by the pursuer were, prior to the

placing of obstructions by the pursuer during 2015, in the habit of driving vehicles from the private road into the area now owned by the pursuer on which the defenders' boats, winches and associated equipment are stored, for purposes connected with carrying out maintenance to boats and winches, removing catch after fishing trips and transporting fuel, creels, detachable boat engines and other items for use in connection with fishing activities.

- 72) No permission has ever been sought from the pursuer or any of his predecessors in title for such vehicular access to the area where the defenders' boats, winches and associated equipment are stored. Those who have exercised such access within living memory have done so in the belief that they had a right to do so as members of the public.
- 73) Such vehicular access to that area has been impossible since the placing of boulders and stones on the instructions of the pursuer during 2015.
- 74) Such vehicular access as was exercised onto the foreshore prior to the placing of boulders and stones on the instructions of the pursuer during 2015 was irregular and occasional. On the occasions on which boats were brought to the harbour on trailers towed by vehicles, the vehicle drivers would generally reverse the trailers on to the foreshore but would not reverse the vehicles fully on to the foreshore, unless the vehicles were equipped with four wheel drive. Otherwise vehicles tended to be reversed only until their rear wheels entered the foreshore, and no further.
- 75) Prior to the placing of boulders across the entrance to the pier on the instructions of the pursuer during 2015, members of the public exercised vehicular access onto the pier on a regular basis each year throughout living memory. Such vehicular access

was exercised openly, regularly and to a significant level throughout each year by a significant number of members of the public.

- 76) Such access was generally exercised for the purpose of parking vehicles on the pier so that the occupants could engage in activities at the harbour of the kind previously described in connection with pedestrian access but particularly so that the occupants could engage in activities in the water of the harbour.
- 77) In particular, members of the public engaged in kayaking, scuba diving or other activities at the harbour which involved the transportation of equipment to the harbour often chose to park on the pier in order to minimise the distance over which such equipment would require to be carried to the water of the harbour.
- 78) The pursuer was aware of the level of vehicular access onto the pier throughout the period between taking entry to the land owned by him at the harbour in 2001 and the placing of boulders across the entrance to the pier on his instructions during 2015.
- 79) No permission has ever been sought from the pursuer or from any of his predecessors in title or from any other person for such vehicular access onto the pier. The members of the public who have exercised vehicular access onto the pier have done so in the belief that they had a right to do so.
- 80) The only route by which members of the public have ever been able to exercise vehicular access onto the pier is from the public road at Balmoral Brae, via the private road.
- 81) The purpose of the private road is to provide vehicular access between the public road at Balmoral Brae and the pier.
- 82) Until the late 1980's or early 1990's a fixed iron crane stood on a tripod at a position towards the southern end of the pier close to the location of the steps leading to the

forelands. The fixed crane was used in connection with the commercial salmon fishing activities which were carried on from the harbour at that time. It was not possible for vehicles to drive beyond the fixed crane to the southern tip of the pier.

- 83) In the late 1980's or early 1990's the fixed crane was removed and replaced by a mobile crane on a wheeled chassis. The mobile crane performed the same function as the fixed crane but was able to be driven on to the pier as required, from its repository in an area adjacent to the east of the private road. When the mobile crane was in position on the pier it generally occupied approximately the same position as the fixed crane.
- 84) When the mobile crane was position on the pier it was not possible for vehicles to drive past it to the southern tip of the pier.
- 85) The placing of boulders across the entrance to the pier on the instructions of the pursuer during 2015 prevented vehicular access to the pier.
- 86) As a result of the movement of one of the boulders by an unknown person, without the consent of the pursuer, it subsequently became possible for vehicles to pass between the boulders and to access the pier.
- 87) The only member of the public who has been known to take vehicular access to the pier with any regularity since the said interference with the boulders is the third defender, Roy Charles Jamieson, who regularly reverses a tractor and trailer on to the pier in order to take water from the harbour for purposes connected with his creel fishing business.
- 88) Apart from Mr Jamieson, members of the public have been discouraged from taking vehicular access to the pier since the said interference with the boulders by the combined effect of the placing of the boulders across the entrance to the pier and the

placing of boulders along the eastern and western borders of the private road, as a consequence of which it is difficult for a vehicle which drives forwards on to the pier to turn in order to face back towards the public road at Balmoral Brae.

### **Findings in Fact and Law**

- 1) The pursuer is not personally barred from seeking the orders craved by him against the second to seventh defenders in the principal action.
- 2) The public road at Balmoral Brae is a public place which is capable of forming the terminus of a public right of way.
- 3) Each of the foreshore, the pier and the forelands at the harbour is a public place which is capable of forming the terminus of a public right of way.
- 4) A public right of way for pedestrians from the public road at Balmoral Brae to the foreshore via the private road and the ground falling within the pursuer's title which lies between the southernmost end of the private road and the foreshore has been possessed by the public for a continuous period in excess of 20 years openly, peaceably and without judicial interruption.
- 5) A public right of way for pedestrians between the public road at Balmoral Brae and the forelands via the private road, the pier and the steps cut in to the rock of the forelands towards the southern tip of the pier has been possessed by the public for a continuous period in excess of 20 years openly, peaceably and without judicial interruption.
- 6) A public right of way for pedestrians between the public road at Balmoral Brae and the full length of the pier, via the private road, has been possessed by the public for a

continuous period in excess of 20 years openly, peaceably and without judicial interruption.

- 7) A public right of way for vehicles between the public road at Balmoral Brae and the pier, via the private road, has been possessed by the public for a continuous period in excess of 20 years openly, peaceably and without judicial interruption.
- 8) The parking of vehicles on the pier as a result of the exercise of the said public right of way for vehicles is a lawful activity.
- 9) *Esto* the pier is not a public place which is capable of being the terminus of a public right of way between the public road at Balmoral Brae and the pier, the pier forms part of the said public right of way for pedestrians between the public road at Balmoral Brae and the forelands.
- 10) No public right of way for vehicles exists between the public road at Balmoral Brae and the foreshore, or between the public road at Balmoral Brae and the forelands.
- 11) The pursuer has wilfully obstructed the exercise by the public of the said public right of way for vehicles between the public road at Balmoral Brae and the pier and the defenders have reasonable grounds to apprehend that the pursuer intends to continue to do so.
- 12) The pursuer has not obstructed the exercise by the public of the said public rights of way for pedestrians between the public road at Balmoral Brae and the foreshore, the pier and the forelands and the defenders have no reasonable grounds to apprehend that the pursuer intends to obstruct the exercise of said rights of way for pedestrians in the future.

**Findings in Law**

- 1) The pursuer not being personally barred from seeking the orders craved by him against the second to seventh defenders inclusive in the principal action is entitled to decree in terms of craves 3 to 14 inclusive in the principal action.
- 2) The existence of a public right of way for pedestrians and vehicles over the pursuer's ground at Cove Bay, Aberdeen from the public road at Balmoral Brae on to the pier at Cove Harbour Bay being exempt from challenge by virtue of section 3(3) of the Prescription and Limitation (Scotland) Act 1973, the defenders are entitled to decree in terms of crave 1 of the counterclaim.
- 3) The existence of a public right of way for pedestrians over the pursuer's ground at Cove Bay, Aberdeen from the public road at Balmoral Brae to the foreshore at Cove Harbour Bay being exempt from challenge by virtue of section 3(3) of the Prescription and Limitation (Scotland) Act 1973, the defenders are entitled to decree in terms of crave 2 of the counterclaim only to the extent of the grant of a declarator that said public right of way for pedestrians exists.
- 4) The existence of a public right of way for pedestrians over the pursuer's ground at Cove Bay, Aberdeen from the public road at Balmoral Brae to the forelands at Cove Bay being exempt from challenge by virtue of section 3(3) of the Prescription and Limitation (Scotland) Act 1973, the defenders are entitled to decree in terms of crave 3 of the counterclaim but only to the extent of declarator that said public right of way for pedestrians exists.

**Interlocutor**

THEREFORE: Repels the pursuer's first, second, third and sixteenth pleas-in-law in the principal action; Repels the defenders' first, third and fourth pleas-in-law in the principal action; Refuses the pursuer's first, second and fifteenth craves in the principal action; Sustains the pursuer's fourth to fifteenth pleas-in-law inclusive in the principal action; Grants decree in terms of the pursuer's third to fourteenth craves inclusive in the principal action; Repels the defenders' first and second pleas-in-law in the counterclaim and the pursuer's first, third and fourth pleas-in-law in the counterclaim; Sustains the pursuer's second plea-in-law in the counterclaim; Sustains the defenders' third plea-in-law in the counterclaim; Sustains the defenders' fourth and fifth pleas-in-law in the counterclaim only with regard to the existence of a public right of way for pedestrians; Grants decree in terms of the defenders' first crave in the counterclaim; Grants decree in terms of the defenders' second and third craves in the counterclaim both under deletion of the words "and vehicles" and under deletion of the subsidiary craves therein for interdict and for orders for the removal of obstructions, and in terms thereof:

Orders granted in terms of principal action

- 1) Finds and declares that the second defender has no right or title to occupy and use the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, by bringing on to said ground the boat named "Jacqueline" having the fishing vessel registration A13, any motor vehicle or other goods, gear or other equipment or effects, or by keeping, storing and maintaining on said ground said boat, or other goods, gear or other equipment or effects.

- 2) Ordains the second defender within 28 days to flit and remove himself and the boat named "Jacqueline" having the fishing vessel registration A13, together with his other goods, gear, equipment and effects from the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, and to leave the same void and redd that the pursuer and others in his name may enter thereto and peaceably possess and enjoy the same, and failing removal by the second defender grants warrant to officers of court summarily to eject the second defender and the said boat "Jacqueline" together with his other goods, gear, equipment and effects from the said ground.
- 3) Finds and declares that the third defender has no right or title to occupy and use the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, by bringing on to said ground the boat named "Rachel" having the fishing vessel registration A974, any motor vehicle or other goods, gear or other equipment or effects, or by keeping, storing and maintaining on said ground said boat, or other goods, gear or other equipment or effects.
- 4) Ordains the third defender within 28 days to flit and remove himself and the boat named "Rachel" having the fishing vessel registration A974, together with his other goods, gear, equipment and effects from the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, and to leave the same void and redd that the pursuer and others in his name may enter thereto and peaceably possess and enjoy the same, and failing removal by the third defender grants warrant to officers of

court summarily to eject the third defender and the said boat "Rachel" together with his other goods, gear, equipment and effects from the said ground.

- 5) Finds and declares that the fourth defender has no right or title to occupy and use the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, by bringing on to said ground the boat named "Dag Dan" having the fishing vessel registration A5, any motor vehicle or other goods, gear or other equipment or effects, or by keeping, storing and maintaining on said ground said boat, or other goods, gear or other equipment or effects.
- 6) Ordains the fourth defender within 28 days to flit and remove himself and the boat named "Dag Dan" having the fishing vessel registration A5, together with his other goods, gear, equipment and effects from the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, and to leave the same void and redd that the pursuer and others in his name may enter thereto and peaceably possess and enjoy the same, and failing removal by the fourth defender grants warrant to officers of court summarily to eject the fourth defender and the said boat "Dag Dan" together with his other goods, gear, equipment and effects from the said ground.
- 7) Finds and declares that the fifth defender has no right or title to occupy and use the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, by bringing on to said ground the boat named "Samyra" having the fishing vessel registration A950, any motor vehicle or other goods, gear or other equipment or

effects, or by keeping, storing and maintaining on said ground said boat, or other goods, gear or other equipment or effects.

- 8) Ordains the fifth defender within 28 days to flit and remove himself and the boat named "Samyra" having the fishing vessel registration A950, together with his other goods, gear, equipment and effects from the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, and to leave the same void and redd that the pursuer and others in his name may enter thereto and peaceably possess and enjoy the same, and failing removal by the fifth defender grants warrant to officers of court summarily to eject the fifth defender and the said boat "Samyra" together with his other goods, gear, equipment and effects from the said ground.
- 9) Finds and declares that the sixth defender has no right or title to occupy and use the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, by bringing on to said ground the boat named "Albatross" having the fishing vessel registration A252, any motor vehicle or other goods, gear or other equipment or effects, or by keeping, storing and maintaining on said ground said boat, or other goods, gear or other equipment or effects.
- 10) Ordains the sixth defender within 28 days to flit and remove himself and the boat named "Albatross" having the fishing vessel registration A252, together with his other goods, gear, equipment and effects from the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, and to leave the same void and redd that the pursuer and others in his name may enter thereto and peaceably possess and

enjoy the same, and failing removal by the sixth defender grants warrant to officers of court summarily to eject the sixth defender and the said boat "Albatross" together with his other goods, gear, equipment and effects from the said ground.

- 11) Finds and declares that the seventh defenders are occupiers of the ground owned by the pursuer at Cove Bay in the County of Kincardine being those subjects registered in the Land Register of Scotland under Title No. KNC10841, whose identities are not known to the pursuer, and who occupy said ground without any right or title to do so by bringing on to said ground an unnamed boat without any fishing vessel registration number, and by keeping, storing and maintaining on said ground said boat, together with other goods, gear or other equipment or effects.
- 12) Ordains the seventh defenders within 28 days to flit and remove themselves within and the unnamed and unregistered boat, together with their other goods, gear, equipment and effects from the ground owned by the pursuer at Cove Bay in the County of Kincardine, being those subjects registered in the Land Register of Scotland under Title No. KNC10841, and to leave the same void and redd that the pursuer and others in his name may enter thereto and peaceably possess and enjoy the same, and failing removal by the seventh defenders grants warrant to officers of court summarily to eject the seventh defenders and the said unnamed and unregistered boat, together with their other goods, gear, equipment and effects from the said ground; and
- 13) On the pursuer's unopposed motion, Ordains the pursuer to affix copies of this interlocutor to any boats, winches or gear situated on the subjects registered in the Land Register of Scotland under Title No. KNC10841 which he has reason to believe

are unnamed or unregistered boats or are boats, winches or other gear not owned by the second, third, fourth, fifth or sixth defenders.

Orders granted in terms of counterclaim

- 14) Finds and declares that there exists a public right of way for pedestrians and vehicles over the pursuer's ground at said Cove Bay from the public road at the intersection of Colsea Road and Stoneyhill Terrace (known locally as Balmoral Brae) on to the pier at Cove Bay; Interdicts the pursuer from interfering with the second to sixth defenders, or other members of the public, in the lawful use and enjoyment of said public right of way, or from impeding the same in any way; and Ordains the pursuer within 28 days to remove all obstructions placed by him on said right of way which prevent such use and enjoyment.
- 15) Finds and declares that there exists a public right of way for pedestrians over the pursuer's ground at said Cove Bay, from the public road at the intersection of Colsea Road and Stoneyhill Terrace (known locally as Balmoral Brae) to the foreshore at Cove Bay.
- 16) Finds and declares that there exists a public right of way for pedestrians over the pursuer's ground at said Cove Bay, from the public road at the intersection of Colsea Road and Stoneyhill Terrace (known locally as Balmoral Brae) to the forelands at Cove Bay.

Assigns 8 August 2018 at 10 am within Aberdeen Sheriff Court, Civil Annexe, Queen Street, Aberdeen as a hearing on expenses.

## Note

### *Relevant statutory provisions*

Section 3(3) of the Prescription and Limitation (Scotland) Act 1973 provides as follows:

“If a public right of way over land has been possessed by the public for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the right of way as so possessed shall be exempt from challenge.”

### *Relevant procedural history*

[1] On 2 December 2016 this action was dismissed on joint motion *quoad* the first defender, who I was advised has sadly since died. No appearance has ever been entered by the seventh defenders, who I understand to be the unidentified owners of a number of boats stored, along with boats owned by the second to sixth defenders, on land belonging to the pursuer. The second to sixth defenders (hereafter ‘the defenders’) had common representation and a common position throughout the proceedings. On 17 August 2017, when the parties were allowed a proof before answer, the presiding sheriff ordained the defenders to lead. The action proceeded to proof before answer before me on 19, 20 and 21 March 2018. At the conclusion of the defenders’ proof on 21 March Mr Sutherland, counsel for the pursuer, indicated that no evidence would be presented by or on behalf of the pursuer. I assigned a hearing on legal submissions for 1 June 2018. In advance of that hearing parties lodged written outline submissions. A more detailed written submission was lodged on behalf of the defenders at the hearing on 1 June. The written submissions lodged were expanded upon during the hearing on 1 June. I then made *avizandum*.

[2] Although the principal action was dismissed in relation to the first defender on 2 December 2016, the craves and pleas in law directed against him do not appear to have been specifically addressed at that time. I have dealt with them in this judgment.

Mr Sutherland confirmed in his written submissions that the pursuer no longer insisted upon his crave 15 (interdict) in the principal action. The defenders' second plea in law in the principal action was repelled of consent at a rule 18 hearing on 17 August 2017 and Mr Mackay confirmed at the hearing on submissions that the defenders consented to their second plea-in-law in the counterclaim being repelled.

### *Background*

[3] This action concerns issues which are of considerable significance not only to the parties but to others with an interest in the harbour at Cove Bay, which lies on the coast south of Aberdeen. It appears that as a matter of long-standing practice extending throughout and beyond living memory small, privately owned boats have been kept on land (most of which is now owned by the pursuer) above, but adjoining, the shingle beach of Cove harbour by individuals who have used the boats for creel fishing in the waters offshore. This practice has continued to the present day. The owners of the boats have generally been local people who have a connection to Cove or the surrounding area but no rights to ownership of the beach, the adjacent land on which the boats are kept or any of the land which requires to be crossed in order to access the beach from its landward side. Until the dispute which led to these proceedings arose, it appears that the storage of boats and associated equipment on land above the shingle beach was generally a matter of informal local practice. There appears to have been no formal system in place for permission to be sought from or granted by any particular individual or body in relation to the storage of boats and associated equipment on the land or the allocation of particular 'berths' there for the storage of boats and associated equipment there.

[4] Other features of the harbour which are of significance to these proceedings are a concrete pier immediately to the east of the beach, which extends southwards into the bay, a privately owned road which leads from the pier northwards towards the village of Cove and which becomes the publicly-maintained Balmoral Terrace *en route* and a substantial formation of rocks which lies immediately to the east of, and which is contiguous to, the private road and the pier. In the Record the beach is referred to as 'the foreshore' and the rocks as 'the forelands.' I will use that terminology for the remainder of this judgment. All of these features are shown on production 6/6/57, a "Google Map" of the relevant area.

[5] In 2001 the pursuer purchased an irregular shaped area of land adjacent to the foreshore, including the pier, the private road leading northwards from the pier towards the village, an area of land immediately adjoining and to the north of (but not including) the foreshore and also part of the forelands. Prior to his purchase of this land the pursuer already owned and occupied the Watch House, a house which sits on a hill overlooking the harbour, which he purchased in 1992.

[6] According to paragraph 18 of the joint minute of admissions, the length of the pier is 87.5 metres measured from south to north. The private road within the pursuer's title then extends northwards for a further 62.5 metres to the boundary of the pursuer's title, where it joins the public road known as Balmoral Brae.

[7] Part of the land purchased by the pursuer comprises the area immediately to the north of the foreshore on which most of the boats now used for fishing from the harbour are stored.

[8] In the present action the pursuer seeks declarators that the defenders have no right or title to occupy and use the ground owned by him immediately to the north of the foreshore for the storage of their boats, vehicles and associated equipment and effects and

orders requiring the defenders to remove their boats and associated equipment and effects from that ground. As explained above, at the hearing on submissions the pursuer departed from his crave for interdict to prevent the defenders from using and occupying that ground for the storage of boats, vehicles and associated equipment and effects in future.

[9] The defenders maintain that the pursuer is personally barred by reason of mora, taciturnity and acquiescence from insisting in the principal action. The defenders also have a counterclaim, in terms of which they seek declarators that there exist public rights of way for pedestrians and vehicles from the public road at Balmoral Terrace, immediately to the north of the pursuer's title, on to the pier, to the foreshore and to the forelands at the harbour, interdicts to prevent the pursuer from interfering with the enjoyment of said rights of way by the defenders or other members of the public and orders requiring the pursuer to remove obstructions placed by him which, according to the defenders, prevent the defenders and other members of the public from using and enjoying said public rights of way.

[10] Paragraph 20 of the Joint Minute of Agreement confirms that parties agree that a public right of way for pedestrians exists over the part of the pursuer's land lying between the south of the private road and the foreshore. None of the defenders' other contentions are agreed by the pursuer.

[11] The reader should be aware that 'Mr Sutherland' is the name both of the pursuer's counsel and of a witness called by the defenders, and that 'Mrs Moir' is the name both of a witness called by the defenders – the solicitor who acted for the pursuer in relation to the purchase of the land to which this action relates – and of one of the executors who sold the land to the pursuer. I have sought to avoid any confusion in the passages of this judgment in which either of these names appear.

*Evidence led on behalf of the defenders*

[12] I heard evidence from James Adam (fifth defender), Robert Sutherland, Charles Abel, Roy Jamieson (third defender), Hazel Moir, Jonathan Penny, Simon Atkin, George Stroud, Margaret Viera, Kevin Fenwick, George Skinner (fourth defender), Ewen Adam (second defender), Alexander Henson, Andrew Ritchie, William Westland (sixth defender), David Stuart and Brian Burnett. In the course of their evidence James Adam, Robert Sutherland, Charles Abel, Roy Jamieson, Hazel Moir, George Skinner, Alexander Henson and Brian Burnett adopted affidavits sworn by them prior to the proof before answer. At the conclusion of the defenders' proof, Mr MacKay stated that the defenders also relied upon affidavits sworn by a number of witnesses who were not called at proof, namely: Richard Hempseed, Louise Bennett, Eric Baillie, Dr Clayton Grove, Murray Coutts, Liam Holt, Alisdair Baghurst, Martin Leiper, Harry Scott, Audrey Gunn and Marie Milton, along with the joint minute of admissions lodged on the first day of the proof before answer.

[13] Prior to the proof Mr Sutherland (counsel) lodged a document, number 77 of process, headed 'Submission for the pursuer concerning affidavits,' which set out a number of objections to and observations upon passages in a number of the affidavits relied upon by the defenders. At the hearing on submissions Mr Sutherland adhered to, but did not expand upon, the points raised in this document. I deal with these points below.

[14] The evidence given, and affidavits sworn, by these witnesses was generally concerned with local practice in relation to the use not only of the foreshore and adjacent land for the storage, launching and recovery of the boats used for fishing but also of the pier, the forelands, the foreshore and the surrounding area for a variety of other leisure activities, pastimes and water sports.

[15] It appears from evidence led during the defenders' case that the village of Cove was owned by Alexander Kilgour in the 19<sup>th</sup> century. Mr Kilgour built the harbour at Cove in around 1877, in more or less its present configuration. In addition to the pier which still exists at the harbour, it appears that Mr Kilgour also built a second pier which protruded into the waters of the harbour from the north western shore in a generally south easterly direction. That second pier fell into disuse over time. Its remains are still visible at low tide but are fully submerged at high tide.

[16] Fishing activities have been carried on from the harbour throughout living memory and prior to living memory. One significant aspect of Cove's fishing history relates to salmon fishing. Within living memory, the rights to fish salmon from the harbour were owned by a company, Hector (Aberdeen) Limited, apparently run by Mr John Hector. In exercise of these salmon fishing rights, the company operated a vessel from the harbour to fish commercially for salmon. The salmon boat, known as a "coble", was crewed by employees of the company and was berthed alongside the existing pier in the harbour. The salmon fishing season ran from around February to late August each year and the salmon coble generally went to sea between about 4 am and late morning each day. A number of crew members of the salmon coble also owned their own smaller boats, which they used in the afternoons in order to fish on their own account for lobster and crab.

[17] Hector (Aberdeen) Limited also owned Cove harbour. In around 1987 the company sold the harbour in two lots, one of which was sold to Robert Sutherland, who gave evidence for the defenders. Mr Sutherland still owns the land which he purchased from the company. Although Robert Sutherland's title was not examined during the proof, it appeared from his evidence that his title comprises land lying immediately to the west of the

pursuer's land, including further land immediately to the north of, but not forming part of, the foreshore.

[18] The rest of the company's land at the harbour was sold to Mr Hugh Moir, along with the salmon fishing rights. Mr Moir continued to operate a commercial salmon fishing business, including the salmon coble, until 1999, which was the final season of salmon fishing from the harbour. No commercial salmon fishing has been conducted from the harbour since then.

[19] In 2001, after the death of Hugh Moir, his executors sold the land which he had owned at the harbour to the pursuer. Thus, the land now owned by the pursuer at the harbour was previously owned by Hugh Moir and, before Mr Moir, by Hector (Aberdeen) Limited. The pursuer's title is registered in the Land Register of Scotland under Title No. KNC10841. The pursuer took entry on 7 December 2001. The pursuer's title is depicted on the plan attached to land certificate 5/1/1. The area coloured blue on the plan depicts the pier, extending from its southern extremity for 87.5 metres until it meets the private road, which extends for a further 62.5 metres to the boundary of the pursuer's title. The area coloured pink on the plan depicts land immediately adjoining the pier and private road to the east and west. The land coloured pink which is shown to the east of the pier and private road would appear to include not only ground immediately contiguous to the road and pier but also part of the forelands.

[20] I pause here to emphasise, for reasons which become significant when examining the defenders' submissions relating to the issue of whether the foreshore is a public place which is capable of forming the terminus of a public right of way, that the pursuer's title does not include the foreshore at the harbour, which I understand to be the area marked 'shingle' on the title plan 5/1/1. As I understand it the term 'foreshore' refers to the shore between the

high and low water marks of ordinary spring tides (Gloag and Henderson, *The Law of Scotland*, 14<sup>th</sup> Edition, paragraph 34.06; Gordon, *Scottish Land Law*, 3<sup>rd</sup> Ed. Vol 1, paragraph 3-25). I address the significance of the important distinction between the foreshore and the land (owned by the pursuer) situated above the foreshore in the 'Discussion' section below.

[21] Thus the pursuer's title does not include any part of the foreshore but does include land situated adjacent to, and lying immediately to the north of, the foreshore.

[22] The borders of the pursuer's land are marked on a plan which comprises appendix 7 on the final page of a report by CKD Galbraith, surveyors, which forms production 5/1/11. This plan shows the relationship between the foreshore and the pursuer's land immediately adjacent to and to the north of the foreshore.

[23] In terms of paragraph 19 of the joint minute of admissions, it is agreed that a public right of way for pedestrians exists over the length of the private road which falls within the pursuer's title.

[24] In terms of paragraph 20 of the joint minute of admissions, a public right of way for pedestrians exists over "that part of the pursuer's ground at Cove Bay, Aberdeen being the southernmost part of the area shown pink on the title plan of the subjects ... which lies to the north of the area shown coloured blue ... insofar as said right of way lies between the southernmost end of the private road and the foreshore." As I understand it what is agreed in these two paragraphs is that there is a public right of way for pedestrians from the public road to the north of the pursuer's title, southwards along the private road owned by the pursuer to the southern end of the private road and then to the southwest across the area of the pursuer's land insofar as pedestrians may require to cross the pursuer's land in order to walk from the southernmost end of the private road on to the foreshore.

[25] However, there is no agreement that any public right of way for vehicular access exists over any part of the pursuer's land. Neither is there any agreement that there exists any public right of way for pedestrians to access either the pier (crave 1 of counterclaim) or the forelands (crave 3 of counterclaim), as contended for by the defenders. The agreement in paragraph 20 of the joint minute does however seem to cover at least part of the second crave in the counterclaim, which seeks declarator that there exists a public right of way for pedestrians and vehicles over the pursuer's land from the public road to the north of the private road owned by the pursuer (and therefore along the pursuer's private road) to the foreshore at the harbour.

[26] In addition to the commercial salmon fishing, evidence was led of a lengthy history of other fishing activities carried on from the harbour. This activity focussed on 'creel fishing,' which as I understood the evidence involves fishing from small boats for crab, lobster and other shellfish using purpose-made pots (creels). As previously indicated, I heard evidence that during the days of commercial salmon fishing, some members of the crew of the salmon coble would return to sea in the afternoons in their own small boats in order to carry out creel fishing on their own account. However, others who had no connection with the salmon fishery also carried out creel fishing from the harbour. That activity continues to the present day. The third defender Roy Jamieson gave evidence that creel fishing from Cove harbour is his full-time occupation. He was the only person who gave evidence of earning his living fishing from Cove harbour. Others clearly regard creel fishing and indeed other fishing activities carried out from the harbour as more of a pastime which they pursue when their other commitments permit and when the weather is favourable.

[27] It appears that the creel fishermen of Cove harbour have traditionally kept their boats on the land immediately to the north of the foreshore. The land upon which the boats are now stored falls within the adjacent titles of the pursuer and Robert Sutherland. The plan forming appendix 7 to the surveyor's report 5/1/11 shows the general positions in which a number of boats are currently stored on the land owned by the pursuer and on the adjacent land owned by Mr Sutherland. I shall return to this plan in due course.

[28] The boats used to carry out creel fishing are comparatively small and have the general appearance of pleasure craft. They have detachable engines. They are stored on mobile trailers which stand on the land immediately to the north of the foreshore, owned by the pursuer and, immediately to the west of the pursuer's land, by Mr Sutherland. Their owners launch the boats by pushing the trailers down the beach and into the water. The method by which a boat is retrieved from the water at the end of a fishing trip is that the trailer is placed in the water, the boat is floated on to it and the boat and trailer are then winched back across the foreshore to its berth on the land immediately to the north of the foreshore, where it remains until it is required for its next trip.

[29] The removal of the boats from the water in the manner described requires the use of diesel-powered winches. A number of such winches, which are permanently positioned immediately to the north of the berths on which the boats are stored (and therefore on land owned either by the pursuer or Mr Sutherland), are owned by individuals who also own boats which are berthed there. The position of the winches which are currently in use at the harbour are shown on appendix 7 of plan 5/1/11.

[30] Prior to the advent of the mechanical winches, apparently during the late 1960s, boats were winched from the water manually, using fixed capstans. The position of one such capstan is shown on ordnance survey map 6/6/1, from 1962. According to the fifth pursuer

James Adam, another of these capstans, positioned slightly to the west of that marked on this map, survives to this day.

[31] The modern diesel-powered mechanical winches are stored within small wooden 'winch huts' which keep the winches safe from interference and protected from the elements.

[32] The Google Map 6/6/57 shows the general configuration of the boats and winch huts which are stored to the north of the foreshore. Appendix 7 to surveyor's report 5/1/11 depicts the positions of the boats and winch huts relative to the boundary of the pursuer's title.

[33] Paragraphs 2 to 6 of the joint minute attribute ownership of four named boats, each of which are agreed to be stored on the pursuer's land, to the third, fourth and fifth defenders and to two other named individuals, neither of whom is named as a defender in the action. Each of the defenders gave evidence of owning a boat which is kept on this part of the pursuer's land.

[34] According to paragraphs 8 to 13 of the joint minute, winch hut No. 4 on the surveyor's plan is owned by the fourth defender, winch hut No. 5 by the sixth defender, winch hut No. 6 by the fifth defender, winch hut No. 10 by the second defender and winch hut No. 11 by the third defender.

[35] I heard evidence from a number of witnesses, including each of the defenders, who are or have been engaged in creel fishing activities from Cove harbour. Some of those who gave evidence (Andrew Ritchie, John Adam and Robert Sutherland) were able to describe from personal experience the practices followed by those involved in creel fishing at the harbour from the mid 1950's. I heard evidence from a number of witnesses to the effect that their fathers and grandfathers had carried on creel fishing activities from the harbour in

much the same way as those activities are carried out now, having due regard to the modernisation of a number of attendant practices. Those who gave evidence on the issue were unanimous in stating that they had never sought permission from the pursuer, from Robert Sutherland or from any of their predecessors in title to store boats or equipment on the land immediately adjacent to the foreshore or to access the foreshore, the pier or the forelands via the land now owned by the pursuer and by Robert Sutherland. None of those who gave evidence was aware of any of their associates or family members having ever sought any such permission. The general picture which emerged was of a widespread belief that the foreshore, the pier and the forelands were essentially public places to which the public had a right of access and which the public were entitled to use as a matter of universal local custom and practice. The fact that the pier and other areas of land around the harbour were in private ownership seems to have been little known until the issues which gave rise to these proceedings arose.

[36] There has apparently never been any clear system for the allocation of berths on the land adjacent to the foreshore, owned by the pursuer and by Robert Sutherland, on which those currently engaged in creel fishing from Cove harbour store their boats. According to Mr Sutherland (witness), on whose land some boats and winch huts are stored, individuals who wished to store a boat on the land immediately to the north of the foreshore now owned by him and by the pursuer simply had to wait until a space became available. This could happen if, for example, someone who had stored a boat at the harbour removed his boat for any reason. If and when a space became available, it was open to anyone to claim it and store a boat there, so long as the position of the boat did not obstruct the access of other boats to and from the water. Mr Sutherland was unaware of any difficulties ever having arisen as a result of disagreements over spaces at the harbour but speculated that, if any

such difficulties did arise, they would be resolved amicably or via the intervention of the police.

[37] Mr Sutherland made reference to a particular owner who stores a boat on land adjacent to the foreshore which is within Mr Sutherland's title and whom Mr Sutherland barely knows. This individual did not ask Mr Sutherland's permission to store his boat in the position which it now occupies. A space was available and, so far as Mr Sutherland was concerned, this individual was therefore entitled to use it.

[38] Until obstructions were put in place on the instructions of the pursuer in 2015, those engaged in creel fishing at the harbour would generally access the harbour by driving from Cove along Balmoral Terrace and then south along the private road now owned by the pursuer. They would either park in one of the areas adjacent to the eastern boundary of the private road, as shown on the Google Map, or they would turn right (west) from the road and drive along behind the winch huts and the boats. Any proprietor who took this course would attempt to park as close as possible to his own boat. Some users of the harbour drove their cars along behind, or sometimes in between, the winch huts and boats because they needed to unload heavy equipment such as the detachable engine for a boat, fuel for a boat or for an associated diesel-powered winch, or creels or other equipment for use whilst fishing. In addition, some other users of the harbour who did not store their boats there drove to the harbour, towing their boats on trailers, and would turn and reverse their cars and trailers partially on to the foreshore or fully onto the foreshore if the car had four-wheel drive, to enable their boats to be launched.

[39] Vehicular access for these purposes is now impossible. At some point during 2015, on the instructions of the pursuer, boulders were placed by contractors along the east and west borders of the private road within the pursuer's title. The effect of this has been to

block off access to the areas immediately to the east of the road which were formerly used for parking and turning and to the foreshore and the area immediately to the north of it where the boats and winch huts are stored. Boulders were also placed across the width of the entrance to the pier, approximately in line with the shoreline. In addition to the boulders, at about the same time the pursuer arranged for contractors to construct a mound of stones in a line perpendicular to the private road running along behind the area where the boats and winch huts are kept. As a result it became impossible for users of the harbour to park or turn in the areas to the east of the private road and it is impossible to drive on to the foreshore, the area above the foreshore where the boats and winch huts are stored or the pier.

[40] Quite apart from creel fishing activities, I heard evidence of a wide variety of other activities carried on by members of the public at Cove harbour throughout living memory. Again, I heard evidence that a number of these activities have been carried on for generations. These activities include walking on the foreshore, the pier and the forelands, fishing from the pier and the forelands using rod and line, or sometimes creels, swimming, kayaking and canoeing in the waters of the harbour, families enjoying picnics on the foreshore and at other points around the harbour and on the forelands, children playing in rock pools around the foreshore and amongst the rocks of the forelands at low tide and people scuba diving, kayaking, swimming and snorkelling within and outwith the harbour, sometimes launching boats from the harbour to support those activities. The earliest evidence of scuba diving came from the affidavit of Brian Burnett, which refers to logs kept by the Deeside Sub Aqua Club from 1981. The earliest eyewitness testimony of anyone who played in or around the harbour as a child came from the mid 1950's (Andrew Ritchie, John Adam and Robert Sutherland). Multiple witnesses gave evidence of directly taking part in,

or of witnessing others taking part in, all of the activities listed above. In addition to pedestrian access along the private road owned by the pursuer and all over the foreshore, pier and forelands there is evidence that local people have long used another route in order to access the foreshore on foot, namely a winding path which runs from the village and past the west of the pursuer's home at The Watch House down to the foreshore.

[41] The longstanding practice on the part of local people of accessing the forelands from the pier is demonstrated by the presence of a number of steps cut into the rock towards the southern tip of the pier, where the curved sea wall along the eastern border of the pier meets the adjacent rocks (Google Map 6/6/57). Photos showing those steps are produced as productions 6/4/43 and 44. The steps are clearly of significant age and were clearly constructed specifically in order to enable pedestrians to access the forelands from the pier. A number of witnesses gave evidence of having accessed the forelands via those steps on many occasions, in order to gain access to the rocks to the east of the pier and, at low tide, to rock pools at the eastern extremities of the forelands. The rock formation to which the steps give immediate access is known locally as 'the Berryhillock.' Two particular rock pools which lie to the eastern extremities of the forelands, and which have apparently been used by generations of local children for swimming and fishing, are known as the 'Outer Beattie' and the 'Inner Beattie.'

[42] In relation to access to the forelands, the evidence from a number of witnesses indicated that access to that area can be gained from practically anywhere along the eastern border of the private road or the pier, and that local people have gained access to the forelands from many points along that border throughout living memory. However the steps from the pier were referred to by a number of witnesses as a favourite and particularly well known and used means of accessing the rock formation known as the Berryhillock and,

as I have indicated, it is clear to me that the steps were constructed as part of a well-defined route onto the forelands from the pier, which multiple witnesses gave evidence of having used on many occasions over a period of decades.

[43] In addition to pedestrian access, I also heard evidence from multiple witnesses of people exercising vehicular access along the private road now owned by the pursuer and onto the pier in order to carry out the activities I have listed above. The earliest eyewitness testimony I heard of vehicular access onto the pier was from the mid-1950s (James Adam and Robert Sutherland) and early 1960s (Margaret Viera). George Skinner gave evidence that he would ride his motor scooter to the southern tip of the pier from around 1970 onwards to check the condition of the sea before deciding whether to go fishing. According to multiple witnesses, quite apart from the fishermen who would park to the east of the private road or drive along the land above the foreshore where the boats and winch huts are situated and sometimes onto the foreshore, other members of the public attending the harbour in their vehicles would park either in one of the areas immediately to the east of the private road or on the pier itself. A number of witnesses gave examples of vehicles driving along the pier and parking there, particularly if the occupants of the vehicles were involved in activities such as scuba diving or kayaking, which required equipment to be taken as close as possible to the water's edge. I heard evidence that the pier is approximately four metres wide. Vehicular access along the pier was complicated by the presence until the late 1980s or early 1990s of an iron crane which was fixed on a tripod towards the southern end of the pier, approximately where the curved sea wall at the eastern edge of the pier meets the adjacent rocks. Witness David Stuart produced and spoke to defenders' production 6/6/59, a photograph of unknown provenance which he had found on a website containing old photographs of Cove. The photograph shows a number of vehicles parked along the

pier. Although the photograph is undated, I think it is safely within judicial knowledge that the vehicles appear to date the photograph to a time in or close to the 1970s. The impression given by the balance of the evidence was that such vehicular use of the pier continued at a substantial level and on a regular basis each year until the pursuer placed boulders across the entrance to the pier in 2015. By way of illustration, Mr Stuart also spoke to another photograph, 6/6/58, taken within the past four years or so, which shows a Land Rover or similar 'jeep'-style vehicle with a trailer attached sitting on the pier towards its southern tip.

[44] I heard evidence that a fixed iron crane was used for purposes associated with the salmon fishing business which operated from Cove harbour until 1999. That crane was positioned towards the southern tip of the pier approximately level with the steps leading up onto the forelands (see photograph 6/6/59). That crane was used for loading fuel and supplies on to the salmon coble which was moored alongside the pier, for unloading the catch and, in extreme weather, for removing the salmon coble entirely from the water. In the late 1980s or early 1990s the fixed crane was removed and replaced by a mobile crane on a wheeled chassis, which was driven on to the pier as required, from its repository in the northmost parking area to the east of the private road. When the mobile crane was on the pier it sat in approximately the same position as had been occupied by the fixed crane and it fulfilled much the same function as the fixed crane. The mobile crane has not been positioned on the pier since the closure of the salmon fishing business in 1999. When either the fixed crane or the mobile crane was in position on the pier it was not possible for vehicles to drive beyond them to the southern tip of the pier. However, the mobile crane was withdrawn from the pier when it was not required, for example after the end of the salmon fishing season. When the mobile crane was not on the pier it was possible for vehicles to drive along to the southern tip of the pier. This was the position from the end of

the salmon fishing in 1999 until the pursuer placed boulders across the entrance to the pier in 2015.

[45] According to the defenders' witnesses, those involved in the creel fishing and leisure activities described above have never sought or been granted permission from the pursuer, Mr Sutherland or any of their predecessors in title to take pedestrian or vehicular access over the private road leading to the pier or to exercise vehicular access along the pier, onto the foreshore or onto the area above the foreshore where the defenders' boats, winches and associated gear are stored or to exercise pedestrian access over any part of the pier, the forelands, the foreshore or the adjoining land.

[46] The boulders put in place on the pursuer's instructions during 2015 along the eastern and western borders of his private road and across the entrance to the pier have made it more difficult for members of the public to access the harbour area in vehicles, due to the absence of parking and turning places for vehicles. Margaret Viera, a lady who has performed valuable community activities on a voluntary basis since the 1970s, including taking parties of children and elderly people to the harbour for a variety of purposes, gave evidence that she is now unable to take parties of elderly people there because it is not possible for her to park or turn a vehicle.

[47] I heard evidence that, within a few weeks of boulders being placed across the width of the pier in late 2015, at least one of the boulders was deliberately moved, by implication without the consent of the pursuer, in order to maintain sufficient width to allow *de facto* vehicular access onto the pier. One witness gave evidence that he believed that this was done by the third defender, Roy Jamieson. However the matter was not raised with Mr Jamieson in his evidence. As previously indicated, Mr Jamieson makes a living from fishing activities carried on from the harbour. He keeps some of the crab and lobster which

he catches in tanks within the grounds of his home in order to preserve them for sale. He requires regular supplies of seawater in order to replenish the water in his tanks. He obtains seawater by driving a tractor with a water tank mounted on a trailer down to the harbour. He reverses the tractor and trailer on to the pier and uses a mechanical pump to extract seawater from the harbour into the water tank, which he then takes home to replenish the water in his tanks.

[48] Accordingly it seems that there are still boulders in position across the pier, approximately in line with the foreshore, which were placed there on the pursuer's instructions with the intention of preventing vehicular access along the pier, but that vehicular access along the pier remains possible by virtue of unauthorised interference with the position of at least one of the boulders.

[49] The general impression created by the evidence led by the defenders is that members of the public who use and have used the harbour, whether for fishing or for the other purposes described, have regarded the use of the foreshore, the pier and the forelands as being a matter of public right consistent with the customs and habits of generations of local people.

[50] I heard evidence of work carried out by creel fishermen over the years in relation to the maintenance of their own boats and associated mechanical winches, for which no permission has ever been sought from either the pursuer, Mr Sutherland (witness) or their predecessors in title. The fifth defender James Adam gave evidence that he replaced his winch in the early 2000s at unspecified cost. Answer 3 in the principal action (lines 675 to 678) avers that winches belonging to another two of the defenders were also replaced in 2010 and 2013 respectively. However I can find no note of any evidence having been given to that effect by either of those defenders, either by parole evidence or by affidavit. The only

evidence I heard of any works carried out by the fishermen to any of the land owned by the pursuer came from the second defender James Adam, who gave evidence to the effect that he, his brother William (who was himself a creel fisherman at Cove harbour but who is now deceased) and others carried out work to clear boulders and storm debris from the pier, the foreshore and the surrounding area at the end of 2013 or in early 2014 in the aftermath of a severe storm. This included the use of a JCB organised by Mr Adam's brother. In addition to clearing away debris, this work included filling in holes gouged by the storm in the ground to the east of, and immediately adjacent to, the private road owned by the pursuer, which was used for parking and turning vehicles before boulders were placed along the borders of the private road on the pursuer's instructions in 2015. It was put to Mr Adam in cross-examination that this was essentially a matter of the creel fishermen serving their own interests. However, his evidence was that this work was more a question of good neighbourliness and keeping the general environment tidy. According to Mr Adam, the pursuer's permission was not sought for any of this work and he was not asked for and did not contribute any money towards its cost. Nor did he intervene to prevent or object to this work.

*Evidence in relation to the pursuer's attitude*

[51] The pursuer did not give evidence at the proof. Very few of those who did give evidence have ever met him other than in passing. However, there was evidence from a number of sources of comments attributed to the pursuer which may potentially shed some light on the question of the pursuer's attitude towards the use of the harbour, particularly in connection with the storage of boats and equipment on the land owned by him immediately adjoining the foreshore.

[52] The sixth defender William Westland gave hearsay evidence of a comment which, according to Mr Westland, his late father, George Westland, told him that the pursuer had made during a conversation between the pursuer and Mr Westland senior at an unspecified point subsequent to the pursuer's purchase of the land at the harbour in 2001. The line of questioning which elicited this evidence was the subject of an objection by Mr Sutherland on behalf of the pursuer. I deal with this objection below. I allowed the line to proceed under reservation of the question of admissibility. According to Mr Westland, the pursuer told his father that "the reason he bought it [the land at the harbour] was that he wanted it to remain as it was – boats, pier, harbour," and that the pursuer had not wanted a developer to buy the harbour. Mr Westland rejected the suggestion that his father may not have reported his conversation with the pursuer accurately and the suggestion that any comments made by the pursuer to his father would have been in terms consistent with the pursuer's instructions at proof, which according to Mr Sutherland were to the effect that the pursuer did not object to creel fishermen continuing to use his land in order to facilitate their fishing activities; he merely objected to them storing their boats and equipment on his land in between fishing trips. Mr Westland maintained that his father had a very high regard for the pursuer because of his occupation (the pursuer is a consultant surgeon) and that there was no reason for his father to misunderstand or misrepresent his conversation with the pursuer. There was no evidence that either Mr Westland or his father communicated the comments attributed to the pursuer to anyone else or that either Mr Westland, his father or anyone else did anything, or refrained from doing anything, in reliance upon the belief that the pursuer had made any such comments.

[53] According to paragraph 11 of the affidavit of the third defender, Roy Jamieson, on an unspecified date after the pursuer's purchase of the land at the harbour, the pursuer

approached Mr Jamieson and told him that he was “a stupid boy as [he] shouldn’t be on the harbour with [his] tractor and trailer”. According to the affidavit, Mr Jamieson and the pursuer “had a few words”, whereupon Mr Jamieson drove off in his tractor. Mr Jamieson was not asked about this episode during his evidence.

[54] I heard evidence that a number of the defenders received letters in substantially identical terms dated 25 April 2014 from the solicitors who then acted for the pursuer. One example of this letter, addressed to the third defender Roy Jamieson, is produced as production 6/4/54. That letter reads as follows:

“We have been consulted by Mr Pralhad Kolhe, the owner of the pier and adjacent ground at Cove Bay harbour.

We understand that you are the owner of [a vessel] which fishes from Cove Bay harbour and whilst not at sea, the vessel is stored on the adjacent ground and you may also have winch and other equipment located on that ground.

As you may be aware, that adjacent ground is private land owned by Mr Kolhe. Mr Kolhe wishes to improve this land for amenity use. Currently he is unable to make any use of his land because of the presence of a number of stored fishing vessels including your vessel. You’ll appreciate that it is not a satisfactory position for Mr Kolhe.

Mr Kolhe’s plans will not, however, affect your continued use of the harbour itself from which you conduct your fishing activities, the use of the foreshore to launch into and remove your vessel from the harbour or the use of the access road to the harbour for these purposes. But given the private status of the adjacent ground, Mr Kolhe does not wish your vessel or any other vessel to be stored on that ground.

The purpose of this letter is to advise you of the position and to give you 14 days’ notice from the date of this letter to make alternative arrangements for the storage of your vessel. If you continue to store your vessel on Mr Kolhe’s land after the expiry of this period, Mr Kolhe may then be forced to take legal steps for its removal. We trust this will not be necessary”.

[55] It appears that none of the defenders took any action to remove their boats or equipment in response to these letters.

[56] I also heard evidence that, in 2014, a sign was erected at an unspecified point within the harbour reading: "Cove Bay Harbour – Private Property." I think it is reasonable to infer that the sign in question would have been put up by or on the instructions of the pursuer.

*The evidence of Hazel Moir*

[57] Evidence bearing upon the pursuer's state of knowledge and attitude was also given by Mrs Hazel Moir, a solicitor specialising in agricultural property law who is a partner with Ledingham Chalmers LLP, solicitors, Aberdeen. Mrs Moir acted for the pursuer during his purchase of the land to which the present action relates in 2001. Prior to commencement of Mrs Moir's evidence, Mr Sutherland confirmed that the pursuer had waived any claim of privilege in connection with her evidence.

[58] Mrs Moir adopted her affidavit. In 2001 she was an associate with Ledingham Chalmers and it was in that capacity that she acted for the pursuer in his purchase of the property to which this action relates. During her evidence Mrs Moir made numerous references to production 6/2/12, the relevant conveyancing purchase file.

[59] Mrs Moir's affidavit indicates that the pursuer was very keen to proceed with this purchase but that he did not intend to redevelop or alter the character of the property subsequent to purchase. He simply intended to improve general amenity given that the subjects to be purchased were situated very close to his home at the Watch House.

[60] Mrs Moir stated in her evidence (and in her affidavit) that she made it clear to the pursuer during discussions and in correspondence in advance of the purchase that her understanding, having examined the title, was that it appeared that the public had a right of access over the property to be purchased and a right to use the pier. In that connection the pursuer was given advice by her in advance of the purchase about the need for him to put in

place public liability insurance given that “the ground and pier is open to the public” (affidavit, para 16).

[61] Mrs Moir submitted an offer on the pursuer’s behalf to purchase the property on 31 October 2001. One condition of that offer was that “no part of the subjects of purchase is affected by any rights of way, servitudes or other third party rights”. Mrs Moir confirmed in cross-examination that this term was included as a matter of habitual professional practice. In fact she had reason to believe, having examined the titles, that the public had a right of access over the pier and the other subjects to which the offer related. The agents acting for the sellers (the executors of the late Hugh Moir) replied by qualified acceptance dated 1 November 2001 which deleted that condition included in the offer and stated that:

“Whilst the subjects of purchase are not subject to any formal grants of lease or rights of occupancy, the purchaser accepts that the subjects of purchase would be subject to rights of way in favour of the public at large and possible servitude rights in relation to the use of the pier by third parties for the prescriptive period”.

[62] Mrs Moir sent copies of the offer and qualified acceptance to the pursuer for his consideration. On 13 November 2001 she spoke to the pursuer by telephone when he confirmed that he had “read through everything and it seems to be okay”. The pursuer also stated on that occasion that he wanted to speak with Mrs Moir (one of the selling executors) or another direct contact on the sellers’ side about “various practicalities”. The selling agents wrote to Mrs Moir on 27 November indicating that the pursuer had, by that stage “spoken to Mrs Moir” (executor). A file entry dated 27 November also records the pursuer as having told Mrs Moir (witness) that he had spoken to Mrs Moir (executor).

[63] In a further letter to the sellers’ agents dated 22 November 2001, Mrs Moir included a condition that “The sellers will, prior to the date of entry, ensure that the subjects have been

cleared of all rubbish and debris". Mrs Moir was not able to recall precisely what the pursuer's concerns were with regard to rubbish and debris.

[64] Mrs Moir then referred to production 5/1/1, the pursuer's title, which describes the subjects purchased by him as "subjects lying to the east of THE WATCH HOUSE, 16 COLSEA ROAD, COVE BAY, ABERDEEN, AB12 3GP tinted pink and blue on the title plan, together with the right **along with the other parties entitle thereto** to use the pier erected on the subjects tinted blue on the said plan" (emphasis added). The area tinted blue on the title plan is the pier and, extending northwards from the pier, the private road lying within the pursuer's title.

[65] Mrs Moir was taken to the opening lines of Article 2 of condescence in the principal action, which aver that the pursuer is the owner of ground at Cove Bay consisting of "an irregular shaped area of land above the foreshore at Cove Bay and a pier erected on the foreshore, which two areas of ground form the subjects registered in the Land Register of Scotland under Title No. KNC10841". Mrs Moir confirmed that, according to her investigation of the title prior to completion of the purchase by the pursuer, the pier is built partly on the foreshore.

[66] Mrs Moir was then referred to lines 535 to 538 of Article 3 of condescence in the principal action, which aver that the pursuer was unaware that the harbour was privately owned until he saw an advertisement indicating that land at the harbour was for sale, that he had previously believed that the harbour was owned and operated by a local authority and that:

"[T]he pursuer had no contact with the seller of the ground at any time, and his only knowledge of the name of the seller is from the title deeds to the land".

Mrs Moir confirmed that this did not accord with her recollection of having been advised both by the sellers' agents and by the pursuer himself, according to her file entry dated 27 November 2001 and the selling agents' letter of the same date, that he had spoken with Mrs Moir, one of the selling executors.

[67] In cross-examination Mrs Moir confirmed that she had never visited Cove harbour and had no knowledge of the area prior to her involvement in this purchase. She became aware that the land which the pursuer wished to purchase had previously been owned by Hugh Moir and, before him, by "John Hector", whom I understand to be the person who controlled Hector (Aberdeen) Limited. She confirmed that she did discuss the extent of the subjects with the pursuer prior to the purchase, including any potential burdens affecting the land. She would not have expected the pursuer himself to have an independent understanding of the technicalities of the different burdens which were capable of affecting land or of the legal mechanisms by which different burdens may potentially have been constituted. Her understanding was that, in addition to land, the pursuer was purchasing the pier and a boat house (the building which lies to the northeast of the boats, in between the private road and the pursuer's home, as shown on Google Map 6/6/57). The clause in the selling agents' qualified acceptance dated 1 November 2001 which made reference to rights of way and possible servitude rights indicated to her that she should check the titles for any servitudes. However, she conceded that titles may only indicate the existence of expressly granted servitudes and would be unlikely to confirm the existence of servitudes or other rights of way constituted by prescription. No servitudes were noted in the titles. She did not carry out any further investigations in order to establish whether there were any potential dominant tenements whose proprietors may have claimed servitude rights over the property which the pursuer wished to purchase.

[68] Mrs Moir was asked whether she had ever explained to the pursuer the difference between a servitude and a public right of way. She replied that she would have explained that people could have rights over the property he wished to purchase, but probably not the differences between servitudes and public rights of way or the technicalities of positive prescription. Her understanding was that members of the public had a right at common law to use the foreshore and, by extension, a pedestrian right of way over the property which the pursuer intended to purchase in order that they could access the foreshore. This right of access, she believed, would relate to the whole of the land the pursuer wished to purchase, unless it was fenced off.

[69] Mr Sutherland pointed out that Mrs Moir's file note of 13 November 2001, indicating that the pursuer had "read through everything and it seems to be okay" did not indicate that she had discussed each clause in the offer to purchase and qualified acceptance with the pursuer and that he had understood them. Mrs Moir stated that she was "pretty sure" she would have gone through that process with the pursuer, even although the file entry does not say so explicitly. That would accord with her normal practice. In response to Mr Sutherland's suggestion that no such detailed discussion took place, Mrs Moir stated that she would be very surprised if she had not gone through the clauses in the offer and qualified acceptance individually with the pursuer. However, she conceded that these events were so long ago that she could not remember precisely what she had discussed with the pursuer on that occasion. Similarly, Mrs Moir stated that she would be surprised if she had not discussed the possibility of "prescriptive rights" over the pier with the pursuer. Once again however, she could not be certain due to the passage of time. She believed that she and the pursuer had a discussion about a footpath which was situated close to the pursuer's house and which members of the public used as a means of pedestrian access to

the foreshore and which she identified as the “twisting” path shown to the south of the pursuer’s house on Google Map 6/6/57. However, that path only came up for discussion at a very late stage, when the pursuer attended her office to deliver two cheques comprising the settlement funds. The pursuer had commented on that occasion that this path was one of the routes used by members of the public in order to get to the beach.

[70] By the time of Mrs Moir’s further missive dated 22 November 2001 which made reference to the clearance of rubbish and debris from the subjects, she had not had any discussion with the pursuer in relation to any boats or winch huts on the property. This particular qualification had, in any event, not been accepted by the selling agents. In their letter of 27 November the selling agents had stated that the pursuer had spoken to Mrs Moir, one of the executors, who had explained that it was impractical for her to clear the property of rubbish and debris. The fact that the pursuer had spoken with Mrs Moir (executor) was also confirmed by a file entry dated 27 November, which Mrs Moir (witness) believed related to the same discussion as that referred to in the selling agents’ letter of the same date.

[71] The same file entry of 27 November records a discussion with the pursuer about insurance, with particular reference to public liability insurance and also records that the pursuer asked whether there is any public or private contribution towards maintenance of the pier. The file entry also records that the pursuer intended to “put up a sign saying that anyone going on to the pier would do so at their own risk”. This comment was made by the pursuer in the context of the discussion concerning public liability insurance, arising from the access which Mrs Moir (witness) believed that members of the public exercised to the pier.

[72] Mrs Moir was referred to a further file entry, this time dated 4 December 2001. On that day the pursuer attended at her office and handed in the settlement cheques. A

discussion took place about the practicalities of settlement and collection of keys to the boat house. The file entry describes a degree of confusion on the pursuer's part as to precisely what he was purchasing, which was resolved by reference to discussion of a plan of the subjects. The entry then records that:

“... there are some boats outwith the area that he is purchasing which makes the place an awful eyesore and he would really like to find out who they were from. Access to this bit would be through his ground and he would ideally like them tidied. Whilst this is not material to his purchase (he stressed on numerous occasions he wanted to go ahead whatever) they do detract from the area. He confirmed it probably is no man's land given that it is foreshore”.

Mrs Moir's evidence was that the pursuer told her that the boats to which he referred were on ground adjacent to the land he was purchasing. In fact, it seems clear that he must have been referring to boats kept on the same area of land as the boats shown in Google map 6/6/57 and on the surveyors' plan forming Appendix 7 to production 5/1/11, most of which are on land which in fact forms part of the pursuer's title.

[73] Mrs Moir was then referred to her file entry from 6 December 2001, indicating that on that date she spoke with the pursuer by telephone and told him that the selling agent had advised her that his clients did not know who the boats belonged to and that “they suggested [that the pursuer] simply put a notice on asking them to be removed so that he can tidy the area up”. Mrs Moir (witness) did not know whether this suggestion had come from the sellers or from their solicitors.

[74] Finally, Mrs Moir was taken to a file copy of the disposition in favour of the pursuer. The description of the property includes “... a right along with the other parties entitled to use the pier erected on the subjects ...” Mrs Moir confirmed that the reference to “other parties entitled to use the pier” would simply have been intended to acknowledge the general right which she believed that members of the public had to use the pier, and the

possibility that rights of access over the pier may have been constituted by positive prescription but not noted in the titles.

### **Submissions**

[75] Both Mr Sutherland for the pursuer and Mr MacKay for the defenders lodged extensive written submissions, which were adhered to at the submissions hearing. Mr MacKay's written submissions were supplemented by a lengthy table analysing the evidence in some detail, which I have considered, although of course the assessment of evidence is entirely a matter for me. All of these documents form part of the process.

### *Submissions on behalf of the defenders*

[76] Mr MacKay asked me to sustain the defenders' third and fourth pleas-in-law in the principal action, the defenders' third, fourth and fifth pleas-in-law in the counterclaim and all of the defenders' craves in the counterclaim. He accepted that the defenders' second plea-in-law in the counterclaim ought to be repelled on the basis that personal bar did not feature in the counterclaim.

[77] Mr MacKay submitted that the case, at least with regard to the defenders' counterclaim, ultimately turned on the evidence concerning the use actually made, over a prolonged period, of the pier, foreshore and forelands by members of the public, irrespective of who owned those areas. They are all areas which are open to the public and to which the public has had resort for a very long period beyond living memory. The pursuer would have been aware of this by the time of his purchase of the property at the harbour, having lived in close proximity to the harbour since 1992. Further, his solicitor, Mrs Moir, made it clear to him prior to completion of his purchase of the land at the harbour that the title may

well be subject to rights in favour of third parties or the public generally to use the property purchased by him.

[78] Mr MacKay made reference to section 1 of the Fisheries Act 1705 (which does not appear in his written submissions), which provides that:

“Her Majesty with advice and consent of the Estates of Parliament Authorises and Impowers all her good subjects of this Kingdom to take buy and cure herring and white fish in all sundry and seas, channells bays firths lochs rivers & sea of this Her Majesties ancient Kingdom and Islands thereto belonging wheresoever herring or white fish are or may be taken And for their greater conveniency to have the free use of all ports harbours shoars fore-lands and others for bringing in pickeling drying unloading and loading the same upon payment of the ordinary dues where harbours are built that is such as are paid for ships boats and other goods and Discharges all other exactions as a nights fishing in the week commonly called Saturday’s fishing top money stallage and the like ...” (sic).

[79] Mr MacKay submitted that this legislation, which remains in force, created rights which members of the public were entitled to exercise by using the forelands, foreshore and the pier at Cove Harbour. He made reference to production 5/1/1, the pursuer’s Land Certificate, and specifically to the burdens section at page 4 which sets out a number of burdens applicable to the pursuer’s title which bear to prohibit, without the written consent of the Board of Trade, a number of activities including the placing of any materials or the doing of any other act on the property “which may in the opinion of the Board of Trade prejudice or obstruct navigation or be or become injurious to the public interest”.

Mr MacKay accepted that this particular line of reasoning had never been put to the pursuer’s solicitor, Mrs Moir, during her evidence but submitted that it was entirely consistent with Mrs Moir’s evidence to the effect that she made the pursuer aware that his title may be subject to burdens.

[80] Turning to the defenders’ plea of personal bar manifested by mora, taciturnity and acquiescence in the principal action, Mr MacKay founded principally on evidence indicating

that, between 2001 and the sending of his solicitors' letters in April 2014, the pursuer was well aware of the use of his land for the storage of boats, winches and associated gear but raised no objection. The pursuer's failure to object over such a lengthy period constituted conduct on his part which was inconsistent with the rights which he now seeks to enforce. That was of particular significance where, as here, the use of his land which he now sought to prevent was, to his knowledge, well established when he purchased the property in 2001 (*Muirhead v Glasgow Highland Society* (1864) 2 M 420; *Cusine and Paisley, Servitudes and Rights of Way*, para 17.43; *Stodart v Dalzell* (1876) 4 R 236; *Millar v Christie* 1961 SC 1).

[81] As to the question of any unfairness which might result to the defenders from the enforcement by the pursuer of the rights claimed by him to eject the defenders and their boats and equipment from his land, the only issue relied upon by Mr MacKay was that fishermen including at least the second to sixth defenders have carried out routine repairs to their boats and winch huts each year throughout their presence on the pursuer's land and that at least one of the defenders, with others, was involved in clearing storm debris from the beach, harbour and surrounding areas over a two-day period in late 2013/early 2014. Mr MacKay submitted that, where there is sufficient evidence of mora, taciturnity and acquiescence, there is no need for any unfairness to be demonstrated in order to found the successful plea of personal bar. However he was unable to refer me to any authority for that proposition.

[82] Mr Mackay also submitted that the pursuer was not only personally barred from objecting to the use of his land by the defenders to store their boats and equipment but that he was also, by virtue of precisely the same conduct on his part, barred from objecting to any such use in the future by other members of the public. Even the raising of these proceedings by the pursuer would not limit the future reach of the bar to which the defenders

maintained that the pursuer was subject. Mr Mackay did not refer me to any authority for that proposition.

[83] With regard to the defenders' craves in their counterclaim, Mr MacKay submitted that there was no reason why land in private ownership could not constitute a public place and therefore the terminus of a public right of way – *Cusine & Paisley*, paragraph 20.12 and the case of *Smith v Saxton* 1927 SN98, which is quoted there. Whether a place is a public place for these purposes depends on evidence that the public has resort to it. When a place acquires the character of a public place, it can be used by the public for all lawful purposes (*Cusine & Paisley*, paragraph 20.03). Both termini of a public right of way simply require to be places where the public are entitled to be, having regard to the evidence about how the public came to be in those places, what they were doing there and whether or not the circumstances under which the public came to be in those places were such as to indicate the existence of a public right of way between those places (*Jenkins v Murray* (1866) 4 M 1046). A private road can be a public place for these purposes if members of the public have unrestricted access to it (*Magistrates of Dunblane v McCulloch* 1951 SLT (Notes) 19).

[84] Mr Mackay also submitted that, if the pier is not a public place by virtue of the conditions of the pursuer's title, to which reference has already been made, then it is a public place by virtue of the fact that it gives access for members of the public to the sea and that it is a place of public resort for purposes connected with access to the sea. *Colquhoun v Paton* (1859) 21 D 996, in which a privately owned quay was held not to be a public place, could be distinguished on the basis that, in the present case, the evidence indicated that members of the public had unfettered access to and use of the pier until obstructions were placed there at the behest of the pursuer in 2015.

[85] Mr MacKay accepted that the owner of land over which a public right of way exists is entitled to place boulders or fence posts at the verges of the right of way, so long as he does not thereby incidentally block the route (*Elrick & Co v Lovie* A 32/84, Banff Sheriff Court – *Cusine & Paisley, Unreported Property Cases from the Sheriff Courts*, page 338).

[86] The activities which members of the public are permitted to carry out at a public place which is the terminus of a public right of way depend upon the evidence of what members of the public have actually been known to do in that place, so long as the activities in question are lawful. Therefore it is perfectly permissible for members of the public to park vehicles on a public place which is the terminus of a public right of way so long as it is lawful to park there. This was of particular relevance in relation to the defenders' craves concerning the pier and foreshore.

[87] There is no reason why a harbour cannot be a public place, whether it is a natural harbour or an artificial harbour. The only question is whether the harbour has been used by the public as a place of resort (*Scott v Home Drummond* (1867) 5 M 771; *Darrie v Drummond* (1865) 3 M 496). The very fact that the area with which the case is concerned is known as a harbour tends to indicate that the entire area is a public place, and an area which has the character of a public place will not readily lose that character (*Duncan v Lees* (1871) 9 M 855).

[88] Where, as in the present case, a quay or pier is built on the foreshore, it is not open to the proprietor to exclude the public from the foreshore (*Earl of Stair v Austin* (1880) 8 R 183). In considering the significance of the pier, the court was entitled to regard the sea, to which the pier gave members of the public access, as the "common highway" (*Marquis of Bute v MacMillan* 1937 SC 93 per Lord Ordinary (*Mackay*) at page 107).

[89] Against the background of his legal submissions, Mr MacKay invited me to accept the evidence led on behalf of the defenders as credible, reliable and mutually consistent. So

far as the question of vehicular access to the pier was concerned, the evidence demonstrated that, whilst the fixed crane was in position, there was a public right of way for vehicular access up to the fixed crane and that, when the mobile crane replaced the fixed crane, there was a public right of way for vehicular access along the whole of the pier given that there were occasions on which the mobile crane was kept adjacent to the pursuer's private road to the north of the pier, thus allowing vehicular access which was exercised along the whole of the pier. The mobile crane replaced the fixed crane at some point prior to 1992, given that the mobile crane was shown in video evidence from 1992 which was spoken to by the defenders' witness Charles Abel.

[90] I raised the question of vehicular access to the forelands, which is referred to in the defenders' third crave in the counterclaim. Mr MacKay accepted that this was impossible. Mr MacKay clarified that, with regard to the defenders' third crave of the counterclaim, what they sought to establish was a public right of way for pedestrians to the forelands via the steps cut into the rocks at the southern end of the pier, rather than via any other point of access.

*Submissions on behalf of the pursuer*

[91] Mr Sutherland's written submissions made it clear that the pursuer no longer insisted upon his crave for interdict (crave 15). Given that the seventh defenders had never entered appearance, Mr Sutherland requested that, in the event that the pursuer succeeded in the principal action, the court make an order authorising the pursuer to attach copies of the decree to the boats stored on the pursuer's land which do not belong to the other defenders.

[92] Mr Sutherland submitted, under reference to Gordon, *Scottish Land Law*, 3<sup>rd</sup> edition, volume 1, paragraphs 8 - 08 *et seq* and his own research of the session papers from the case of *MacKinnon v Ellis* (1878) 5 R 832, which is referred to at footnote 20 therein (and which I was told are stored in the Advocates' Library), that the Fisheries Act 1705 appeared to have been implicitly repealed by virtue of the repeal (by the Sea Fisheries Act 1868 and the Inshore Fishing (Scotland) Act 1984) of the Fisheries (Scotland) Act 1756, which was to similar effect as section 1 of the 1705 Act. Alternatively, Mr Sutherland submitted that the 1705 Act had fallen into desuetude. Finally, Mr Sutherland submitted that, even if the 1705 Act remains in force, it is of no relevance to the present case because it is concerned with activities relating to fishing for "herring or white fish" whereas the evidence in the present case clearly indicates that the boats stored on the pursuer's land are used primarily to fish for crab, lobster and other shell fish.

[93] Turning to the principal action, the pursuer's case was based on the general proposition that, as the owner of the land on which the defenders' boats, winches, etc. are stored, he is entitled to take steps to have the defenders and their property removed so that he could enjoy his proprietary rights over his land to their full extent. The defenders' plea of personal bar by virtue of mora, taciturnity and acquiescence required evidence that some act on the part of the defenders, involving an invasion of the pursuer's rights which could be described as unjustifiable and not easily remediable, was done with the knowledge of and without objection from the pursuer in circumstances inferring that the pursuer should be barred from now insisting upon the right invaded because unfairness would otherwise result to the defenders (Gloag and Henderson, *The Law of Scotland*, 14<sup>th</sup> edition, paragraph 3.09). The defenders had failed to prove the presence of either conduct on the part of the pursuer inconsistent with the rights he now seeks to enforce or unfairness to

them in the event that the pursuer is permitted to exercise those rights now. Both elements are essential to the success of a plea of personal bar (Gloag and Henderson, paragraph 3.05; *Gatty v MacLaine* (1921) SC (HL) 1 per the Lord Chancellor at page 7), although there may be cases in which there is some overlap between the evidence of inconsistent conduct manifested by mora, taciturnity and acquiescence and the issue of prejudice.

[94] Where the allegedly inconsistent conduct consists only of inaction, personal bar only arises where the indications of unfairness are strongly present (Gloag and Henderson, paragraph 3.06; Reid & Blackie, paragraphs 2–55 to 2–61).

[95] *Muirhead v Glasgow Highland Society* could be distinguished because that case concerned a building which, to the knowledge of the pursuer prior to his purchase of the dominant tenement, interfered with a servitude. The circumstances were quite different from the present case, in which moveable property was situated on the pursuer's land. Further, the fact that the pursuer had been the owner of the nearby Watch House since 1992 did not assist the defenders because it was only in 2001, when he purchased the land at the harbour, that the pursuer became entitled to seek to have the defenders and their boats and equipment removed.

[96] Even where personal bar is established on the basis of acquiescence in relation to previous activities, it was only in unusual cases that the same acquiescence could infer a "licence" in relation to future activities (*William Grant & Sons Limited v Glen Catrine Bonded Warehouse Limited* 2001 SC 901 per Lord President at pages 923H to 925E). This principle provided a complete answer to the defenders' assertion that the pursuer was not only personally barred from objecting to their use of his land to store their boats and equipment but that he was also barred from objecting to any such use in the future by other members of the public.

[97] The routine maintenance by the defenders of their boats and equipment and the replacement by Mr Adam of his winch in the early 2000s were all activities carried out by the defenders for their own benefit. There was no evidence that the pursuer was aware of those activities. In any event the defenders had enjoyed the use of their boats, winches and equipment and could easily remove them from the pursuer's land and use them elsewhere without any prejudice to them. So far as the work undertaken to clear storm debris during the winter of 2013 was concerned, there was no evidence that the pursuer was aware of those activities. If he did become aware of them there was no basis upon which the court could conclude that there was any realistic opportunity for him to intervene, such as by seeking an interdict, during the currency of the work. There was no evidence that he could have discovered the identities of the individuals involved. There was no evidence of any costs incurred by any of the defenders in undertaking this work or that they only undertook this work in reliance upon any belief or understanding as to the pursuer's attitude towards their use of his land. In any event the pursuer took steps via his solicitors soon afterwards, in April 2014, to write to the defenders asking them to remove their boats and equipment. As to the evidence given by Mr Westland of comments allegedly made by the pursuer to Mr Westland's father in 2001 to the effect that the pursuer wished the harbour to remain as it was, Mr Sutherland insisted upon his objection (based on lack of Record) but in any event submitted that this evidence did not assist the defenders because there was no evidence that any such comments attributed to the pursuer were communicated by Mr Westland senior to anyone other than Mr Westland junior or that he or any of the other defenders did anything, or refrained from doing anything, in reliance upon the belief that the pursuer had made any such comments. None of the other defenders or their witnesses made reference to these

alleged comments in their evidence and the evidence suggested that there had been very little contact of any kind between the pursuer and the defenders or their witnesses.

[98] The defenders' case went no further than to indicate that, having purchased the property in 2001, at which time it was apparent to him that unknown persons kept boats and equipment on his land adjacent to the foreshore, the pursuer thereafter did not actively seek the removal of the boats and other equipment from his land until his solicitors wrote to the defenders in April 2014. However the defenders had failed to establish mora, taciturnity and acquiescence and had failed to establish any prejudice to them arising from the pursuer's wish to exercise his rights to have them and their boats and equipment removed from his property. They had failed to establish their plea of personal bar. In any event the second defender, Ewen Adam, was not entitled to rely on the plea of personal bar because his evidence was that he only became the owner of a boat stored on the pursuer's land in October 2013 following the death of his uncle. Given that the pursuer's solicitors wrote to the defenders in April 2014 making clear his wish for the defenders' boats and equipment to be removed from his land, he could not maintain a plea of personal bar against the pursuer.

[99] With regard to the defenders' craves in their counterclaim, the pursuer conceded that the foreshore, by which was meant only the area between the high and low spring tides and not the adjacent area within the pursuer's title immediately to the north where the defenders' boats are kept, is a public place and conceded the existence of a public right of way for pedestrian access from the public road on to the foreshore via the pursuer's private road and his adjacent land which it was necessary to cross in order to walk from the southern end of the private road on to the foreshore (Joint Minute of Agreement, paragraphs 19 and 20). However, the pursuer did not accept that a public right of way had been established for vehicles on to the foreshore.

[100] The pursuer did not accept that either the pier or the forelands were public places which were capable of being the termini of any public right of way. If they were public places the pursuer did not accept that a public right of way had been established to either location. The pier is private property. The forelands are a tidal rocky area. Section 3(3) of the Prescription and Limitation (Scotland) Act 1973 required proof of the existence of a public right of way in respect of the right claimed, the exercise of that right for a continuous period of 20 years as of right rather than by tolerance, permission or on any other basis openly, peaceably and without judicial interruption. The use must be of sufficient frequency as to be consistent with the assertion of a right. A public right of way implies only a right of passage, by a more or less defined route, from one place to another. It does not imply a right to park or leave property along the right of way.

[101] Mr Sutherland conceded that it was possible, in principle, for the pier to be classed as a public place for these purposes so long as the court was satisfied that the evidence demonstrated the requisite quality and extent of public use and resort. However, in this case it was clear that the pier was a place of work, used in connection with the salmon fishing businesses which previously owned it, until the end of the last salmon fishing season in 1999. Until then the salmon fishing businesses controlled the use which the public were able to make of the pier and significant obstructions to vehicular access along the pier were represented by the fixed crane and then by the mobile crane which replaced it. Even if the pier became a public place at some point after 1999, when the commercial salmon fishing ceased, such use as had been made of it since then was self-evidently not for the continuous period of 20 years which was necessary to establish a public right of way. Prior to 1999 any use of the pier by members of the public, whether in vehicles or on foot, was by virtue of the tolerance of the salmon businesses which then owned the pier.

[102] However, Mr Sutherland explicitly recognised in paragraph 29 of his written submissions that “... it is patent that the purpose of the private road is to provide for vehicular access on to the pier”. In my view this is indeed a reasonable inference of fact.

[103] The defenders’ alternative argument that the pier should be regarded as a public place because it gives access to the sea, characterised by Mr MacKay as “the common highway” had no foundation in the defenders’ pleadings or in the evidence led by them. It was also denied to the defenders because of the terms of paragraph 18 of the Joint Minute of Agreement, which clearly makes a distinction between the private road and the pier.

[104] As in the case of the pier, Mr Sutherland accepted that, as a matter of principle, it was possible for the forelands to be regarded as a public place if the court was satisfied as to the evidence of the nature and extent of public resort to that area.

[105] However, the mere fact that members of the public choose to visit a place is not, of itself, sufficient to give that place the character of a public place for these purposes (*Duncan v Lees* (1870) 9 M 274). In the present case the mere fact that members of the public chose to visit the forelands did not confer upon that area the character of a public place. The forelands are simply a tidal rocky area with no particular defined public use. Many of the places of local interest within the forelands are inaccessible at high tide.

[106] Mr Sutherland accepted that, if the forelands were regarded as a public place and a public right of way for pedestrians was declared to exist between the public road to the north of the pursuer’s title and the forelands, the pier would fall to be regarded as part of that right of way, even if the pier was not regarded as a public place which was itself capable of being the terminus of a public right of way.

## Discussion

### *The pursuer's objections*

[107] As indicated above, on the third day of evidence Mr Sutherland for the pursuer objected to Mr MacKay's line of questioning of the sixth defender, William Westland, concerning an occasion in around 2001 when, according to Mr Westland, his father told him about a conversation he had had with the pursuer. According to Mr Westland, his father told him that the pursuer had commented that "the reason he bought it [the land at the harbour] was that he wanted it to remain as it was – boats, pier, harbour," and that the pursuer had not wanted a developer to buy the harbour. Having heard Mr Sutherland's objection to this line of questioning and Mr MacKay's response, I allowed the line to proceed under reservation of admissibility. I will deal with this issue now. The objection was taken on the basis that, although the evidence was clearly relevant, in particular to the question of the giving by the pursuer of an indication of his attitude towards the use which he was contemplating allowing others to make of the harbour, in the context of the defenders' plea of personal bar in the principal action, nevertheless the line should not be allowed because there was no basis for it in the defenders' pleadings on record. Mr MacKay submitted that, although this particular episode did not feature explicitly in the defenders' averments, the defenders were not obliged to plead evidence, the defenders had put the pursuer's attitude in issue in a number of ways, particularly in Answer 3 in the principal action which, in addition to averring the pursuer's failure to object to the defenders' storage of boats and other equipment on his land between 2001 and 2014, also avers (lines 637 to 641) that the pursuer made comments of a similar nature to those described by Mr Westland in his evidence to a different person, named as Colin Moir, during a separate conversation in 2001. The pursuer averred (Article 3 of Condescence, line 573) that the day after he purchased

the property at the harbour he told unnamed fishermen who were present there that he wanted them to move. This was challenged in terms of the general denial on behalf of the defenders in Answer 3 at line 628. The general impression which the pursuers' averments sought to give was of consistent opposition by him to the storage of boats and associated equipment on his land. Any evidence which contradicted that was relevant, particularly in light of the defenders' plea of personal bar and having regard to the fact that the defenders had been ordained to lead at the proof before answer. It would be open to the pursuer to give evidence, should he wish to do so, to contradict the account given by Mr Westland of his comments to Mr Westland's father. This objection was not revisited in any detail at the hearing on submissions. Mr Sutherland did, however, confirm that it was insisted upon by the pursuer.

[108] I repel Mr Sutherland's objection to this line of questioning and to the admissibility of the evidence which resulted from it. I accept Mr MacKay's submissions to the effect that the defenders' averments, particularly in Answer 3 of Contumaciousness in the principal action, gave sufficient notice that the pursuer's attitude towards the use of the harbour was in issue as to render this line of questioning legitimate and the resulting evidence admissible. Although the exchange described by Mr Westland in his evidence, between his late father and the pursuer, did not specifically feature in the defenders' averments, a broadly similar exchange with another named individual (Colin Moir), to similar effect and around the same time, did. I was told by Mr MacKay that evidence would be led of the pursuer's comments to Colin Moir. In fact no such evidence was led. However, the pursuer could have been in no doubt from the defenders' averments that any comments of the kind which the defenders averred that he had made to Colin Moir would be likely to be of relevance to the defenders' case in relation to the question of personal bar in the principal

action. Finally, Mr Westland's evidence related to a conversation which was alleged to have involved the pursuer. It would have been open to him, had he chosen to do so, to give evidence to contradict Mr Westland's account. In the event he chose not to, as was his right.

[109] However, this passage of evidence ultimately came to be of no real significance given that, even if the pursuer did make the comments attributed to him by Mr Westland, as I understood the pursuer's position as put in cross-examination by Mr Sutherland, he did not object to fishermen launching their boats from the foreshore at the harbour. Rather his objection was to the storage of the boats on his land adjacent to the foreshore when they were not in use, a position which is entirely consistent with the terms of his solicitors' letters to the defenders dated 25 April 2014 (see the text of production 6/4/54 above). On one view, the comments attributed to the pursuer by Mr Westland are consistent with that position. More importantly however, there was no evidence that the comments attributed to the pursuer by Mr Westland were communicated to anyone else (apart from Mr Westland junior) or that either Mr Westland, his father or anyone else did anything, or refrained from doing anything, in reliance upon the belief that the pursuer had made any such comments.

[110] I now deal with the objections and observations set out in the Note (number 77 of process) lodged by Mr Sutherland in advance of the proof before answer in relation to the affidavits relied upon by the defenders from a number of witnesses who were not called to give evidence. The only significant objection to the admissibility of the contents of these affidavits which is set out in Mr Sutherland's note concerns references in some of the affidavits to the parking of cars on or adjacent to the private road and the pier forming part of the pursuer's title, on the basis that a public right of way does not imply a right to stop, park or store vehicles or other property on or adjacent to the right of way and therefore that evidence of parking should not be admitted, being irrelevant to the issue of whether a public

right of way existed. I repel this objection for two reasons. Firstly, such references as there may be in these affidavits of vehicles parking on or adjacent to the private road or pier are broadly consistent with evidence given by a number of witnesses during the proof before answer, to which no objection was taken. Secondly, it seems to me that, although a public right of way can only establish a right of passage via a particular route, as opposed to a right to stop, park or store vehicles or other goods on or adjacent to that route, evidence of parking vehicles is clearly relevant to the issue of whether a public right of way for vehicular passage has been established where, as in the present case, the only means of accessing the areas used for parking is the route over which it is claimed that a public right of way for vehicular passage exists.

[111] The other issues raised in Mr Sutherland's note concerning these affidavits relate to the weight which ought to be attached to the contents of the affidavits rather than to any question of admissibility.

### *Assessment of evidence*

[112] I accept the evidence given by the defenders and their witnesses as credible and reliable. The contents of the affidavits which were introduced from witnesses who were not called to give evidence were broadly consistent with the evidence of the witnesses who were called. A generally coherent picture emerged of the use made of the land to which this action relates by members of the local community for a wide range of purposes throughout living memory and beyond. In truth there was no significant challenge to the credibility or reliability of the evidence led by the defenders. The real issue relates to the significance of that evidence in the context of the legal principles which are engaged by this case.

*The principal action and the issue of personal bar*

[113] In relation to the principal action there is no dispute that the pursuer is the owner of the land immediately adjacent to and to the north of – but quite separate from – the foreshore on which boats, winch huts and associated gear belonging to the defenders are kept or that, as a matter of general principle, a land owner such as the pursuer is entitled to possess and use his land to its full extent and to take steps to prevent others from entering upon it or keeping their property on it without his permission. The only basis upon which the defenders claim to be entitled to continue to keep their boats, winch huts and associated gear on the pursuer's land is their assertion that he is personally barred by mora, taciturnity and acquiescence from exercising any right to eject the defenders and their property from his land.

[114] The defenders do not assert that the property belonging to the pursuer on which their boats, winch huts and gear are situated is a public place and that they are entitled to store their property there by virtue of any public right of way.

[115] I reject Mr MacKay's submission to the effect that, if the pursuer is personally barred from exercising any right to eject the defenders, he is thereby also personally barred for all time coming from exercising any such right against any other member of the public who may decide, at any time in the future, to store a boat or associated gear or install a winch hut on the part of his land currently used for those purposes by the defenders. Such a proposition would only hold in exceptional circumstances, which are not present here (*Grant v Glen Catrine* per Lord President at para [48]). In this case, quite apart from any other considerations, the pursuer, by instructing his solicitors to issue letters in April 2014 requesting the removal of the boats from his land and by placing physical obstructions to prevent vehicular access from the private road to the land on which the defenders' boats are

stored and raising these proceedings (both in 2015), has made it clear that, whatever may be the outcome of the defenders' plea of personal bar so far as the pursuer's entitlement to eject them is concerned, he does not consent to or acquiesce in the use of his land for similar purposes by others in the future.

[116] Mr MacKay was unable to refer me to any authority for his assertion that prejudice need not be established in order to found a successful plea of personal bar and that the plea can be established solely on the basis of actings on the part of a land owner which are inconsistent with the right which he seeks to enforce, manifested in this case by mora, taciturnity and acquiescence. It seems clear to me that both of the recognised elements of personal bar, namely conduct on the part of the pursuer which is inconsistent with the right he now seeks to enforce and unfairness to the defenders arising from enforcement of that right, require to be established in order for the defenders' plea of personal bar to succeed (Reid and Blackie, paras 2-12, 2-23, 2-40 and 3-05 and chapter 2 generally; Gloag and Henderson, para 3.05; *Gatty v Maclaine* per Lord Chancellor at p. 7; *Assets Co Ltd v Bain's Trs* (1906) 6F 692, per Lord President at p. 705; *Grant v Glen Catrine* per Lord President at paras [29], [38] and [44]). Further, I accept that, where the inconsistent conduct founded upon consists only of inaction, as in the present case having regard to the defenders' plea of personal bar manifested by mora, taciturnity and acquiescence (Reid and Blackie, paras 2-12 and 2-23; Gloag and Henderson, para 3.06), it appears that personal bar can arise only where the complementary indicators of unfairness are strongly present (Reid and Blackie, paras 2-12 and 2-23; Gloag and Henderson para 3.06).

[117] In the present case the pursuer purchased the relevant property in 2001. At that time, and for decades previously, boats, winches and other gear were kept on the land, now falling within the pursuer's title, on which the defenders' boats, winches and gear are kept.

Further, the pursuer must be taken to have been aware of the presence of boats, winches and gear on this land at least from the time of his purchase of the land at the harbour and probably prior to that, since he purchased the Watch House, which stands on a hill overlooking the harbour, in 1992. However there was no evidence of any steps having been taken by the pursuer subsequent to his purchase of the harbour in 2001 to positively indicate to the defenders or any other owners of boats, winches and gear stored on his land that he wanted these items to be removed until April 2014, when his solicitors wrote to at least some of the defenders requesting removal of the boats, winches and gear within 14 days but pointing out that the pursuer had no intention of preventing the use of the harbour for the launching and recovery of boats, his objection being to the storage of boats and associated equipment there.

[118] I admitted the hearsay evidence given by Mr Westland of comments which he understood the pursuer to have made to his father during a conversation in 2001. I accept that Mr Westland's evidence about his understanding of those comments was credible in that it was truthfully given to the best of his understanding and memory. With no criticism of Mr Westland, the reliability of this chapter of his evidence is less clear given that he was only able to report comments which had in turn apparently been reported to him by his father, presumably during 2001. However, even on the hypothesis that the comments attributed to the pursuer were accurately reported to Mr Westland by his father, they are as capable of being interpreted as being consistent with the position set out in the pursuer's solicitors' letters of April 2014 as with any interpretation more favourable to the defenders, such as that he wished to allow the continued storage of fishing boats, winches and associated gear on his land. More importantly however, there was no evidence that these comments attributed to the pursuer by Mr Westland were communicated by Mr Westland

senior to anyone other than Mr Westland junior, and there was no evidence of anyone having done anything, or having refrained from doing anything, in the belief that the pursuer had made any such comments. This chapter of Mr Westland's evidence therefore came to be of no assistance to the defenders in the context of their plea of personal bar.

[119] Thus, the inconsistency founded upon by the defenders in support of their plea of personal bar takes the form of inaction alone.

[120] Apart from his failure to intimate any objection to the use of his land by the defenders and others between 2001, when he purchased the land at the harbour, and April 2014, when his solicitors issued letters requesting the removal of boats, another respect in which the pursuer could be said to have behaved in a manner inconsistent with the rights he now seeks to enforce is his failure to intervene to prevent the work carried out by at least one of the defenders, in conjunction with other members of the public, over a couple of days in late 2013 or early 2014 to clear storm debris from the harbour. However there is nothing in the evidence to indicate whether the pursuer was aware at the time that this work was being carried out, or whether he was even at home on the days in question. Even if he was at home and aware of the work to clear up the storm debris, it is difficult to see what the pursuer could realistically have been expected to do in order to register any objection to the works, beyond approaching those involved and asking them to stop which, according to the evidence, he did not do. In my view he could not realistically have been expected to have taken steps to seek an interdict within the short timescale of the works, even if he had been aware that the work was being done.

[121] In my view, taken at its highest from the defenders' point of view this is simply another example of inaction on the part of the pursuer rather than any positive action inconsistent with the rights which he now seeks to enforce. The case of *Muirhead v Glasgow*

*Highland Society*, which was founded upon by Mr MacKay, can be distinguished. In that case the owner of the dominant tenement sought the removal of a building which had been put up on the servient tenement, so as to prevent the exercise of a servitude across the servient tenement, in circumstances in which the dominant proprietor knew, when he purchased the dominant tenement, that his predecessor in title had acquiesced in the building work. In the present case the pursuer, at most, delayed in objecting to the presence of moveable property on his land.

[122] I am prepared to accept that the pursuer's failure to take any steps between purchasing the property at the harbour in 2001 and his solicitors' letters to the defenders in April 2014 to make it clear to the defenders and the other owners of boats, winches and gear which he must have known were being kept on his land without his consent throughout that period, that he wished those items to be removed could be characterised as conduct inconsistent with the right, of which the pursuer must also be taken to have been aware throughout that period, to seek to have the defenders and their property ejected from his land.

[123] However I am not satisfied that the defenders have demonstrated that, even if the pursuer's failure to take action prior to his solicitors' letters in April 2014 was inconsistent with the rights he now seeks to exercise, the consequences for them of the pursuer exercising those rights now would give rise to such unfairness as to support their plea of personal bar, having regard to the analysis of unfairness as an essential element of a plea of personal bar which appears in *Reid and Blackie*, Personal Bar, paras 2-03 and 2-40 et seq.

[124] It appears that, in cases such as the present case in which the inconsistent conduct relied upon as a basis for a plea of personal bar is simply silence or inactivity, the blameworthiness of such conduct is greater where there exists some form of relationship or

proximity between the parties which could be said to have given rise to an obligation or expectation to object at an earlier stage (Reid and Blackie, para 2-44; *Grant v Glen Catrine* per Lord President at para [49]). No such relationship or proximity appears to me to exist between the pursuer and the defenders in the present case.

[125] Another element of unfairness is that the defenders reasonably believed that the pursuer would not exercise his rights to require them to remove their boats, winches and associated gear from his land or seek orders from the court requiring them to do so.

However there is little evidence, if any, to indicate that the defenders and others who kept their boats, winches and gear on the defender's land during this period knew or believed that the pursuer owned that land at all or that the pursuer or anyone else who may have owned that land had any right to have them ejected. It seems to me that this is of some significance in the context of the defenders' plea of personal bar. My impression from the evidence was that it was widely believed that the land at the harbour was, in one way or another, 'public land' and that members of the public had a right to keep boats, winches and associated gear there. According to the evidence there has been very little contact of any kind between the pursuer and the defenders from which the defenders would have been in a position to form any belief as to the pursuer's attitude towards their use of his land. The evidence appeared to me to indicate that the defenders and others kept their boats on the pursuer's land at the harbour not because they had any reason to believe that the pursuer intended to refrain from exercising any rights he may have had to request that they remove their boats, winches and gear, or to seek orders from the court to force them to do so, but because they believed that they had a right to keep their boats, winches and gear there.

[126] A further element of unfairness is that the defenders, in reliance upon a reasonable belief created by the pursuer's failure to object, behaved in a way which was proportionate.

This element causes no difficulty in itself for the defenders, given that they simply continued to use the pursuer's land after he purchased it for the purposes for which it had been used previously.

[127] The next element in unfairness as a basis for a plea of personal bar is that the exercise of the right would cause prejudice to the defenders which would not have occurred but for the pursuer's inconsistent conduct. In my view this aspect of the requirement of unfairness is not supported by the evidence. Between 2001, when the pursuer purchased the property at the harbour, and April 2014, when his solicitors wrote to the defenders, it appears that the defenders simply continued to use the defenders' land as they had done prior to 2001. They continued to store their boats, winches and gear there. They maintained their boats and winches and sometimes drove vehicles on to the land where the boats were stored for associated purposes. One example was given of a boat owner (the fifth defender James Adam) who replaced his diesel powered winch with a more modern version after 2001. The sixth defender William Westland gave evidence that he had bought a replacement engine for his winch but has chosen not to fit it yet due to these proceedings. However, these are all steps undertaken by the defenders for their own benefit. In my view, the same can be said of the clearing up of storm debris in 2013 or 2014, which simply involved the removal of boulders and other such debris thrown on to the beach and pier by the storm and the levelling of holes gouged in informal parking areas adjacent to the private road. There was no evidence that any of this work involved significant expenditure. Neither the defenders nor anyone else have constructed any permanent buildings or structures on the defenders' land in the reasonable belief that the pursuer has given an indication, by his statements, actions or inactions, that he would not object. If the pursuer succeeds in the principal action, the defenders will be required to remove items of moveable property from the defenders'

land, namely their boats, trailers, winches, winch huts and associated gear, the use of which they have enjoyed for their own benefit until now. There was no evidence that the defenders would be unable to continue to enjoy the use of their property at other locations or in other circumstances. This, in my view, does not constitute prejudice so as to found a plea of personal bar against the pursuer. Such unwelcome consequences as there may be for the defenders would appear to be mitigated by the indication given in the letters sent to the defenders by the pursuer's solicitors in April 2014 to the effect that the pursuer objected to the storage of boats and associated equipment on his land but not to the use of the foreshore for launching and retrieving boats. I do not know precisely how this would be accomplished but, assuming that the means can be devised to enable boats to be launched and retrieved at the foreshore, it would appear that the only prejudice suffered by the defenders in the event that the pursuer succeeds in the principal action will relate to the inconvenience of transporting their boats to and from the foreshore for each fishing trip, should the defenders wish to continue to fish from this harbour.

[128] The person with most cause for complaint, in the event that the pursuer succeeds, appears to me to be the third defender, Mr Jamieson, who gave evidence that he earns his living fishing from the harbour. However, even in his case I do not accept that there is evidence of prejudice of such a level as to establish a plea of personal bar. Mr Jamieson, like the other defenders, fishes from a comparatively small and mobile vessel. There was no evidence that Cove Harbour is the only location from which he could continue to fish.

[129] The final element of unfairness in the context of a plea of personal bar involves consideration of the value of the right which the pursuer seeks to enforce. Beyond the evidence that the letters issued by the pursuer's solicitors in April 2014 stated that he wished

to “improve [the] land for amenity use,” there was no evidence of the value of the affected land to the pursuer or of any work which he intends to carry out there.

[130] Ultimately I am satisfied that the evidence led by the defenders does not establish, on balance of probabilities, that the pursuer is personally barred from exercising his right as a proprietor to seek orders for the ejection of the defenders and their boats, winches and associated gear from his land. I therefore intend to grant decree in favour of the pursuer in terms of his third to fourteenth craves inclusive in the principal action.

### *The counterclaim*

[131] In their counterclaim, as clarified during Mr MacKay’s submissions, the defenders assert that public rights of way for pedestrians and vehicles have been established between the public road at Balmoral Brae and the foreshore and the pier, and for pedestrians between the public road at Balmoral Brae and the forelands, by the operation of prescription in terms of section 3(3) of the Prescription and Limitation (Scotland) Act 1973 (‘the 1973 Act’). As I understand it the defenders must therefore establish the continuous use, as of right and by means of a continuous journey, of a definite route between Balmoral Brae and each of the foreshore, pier and forelands, each of which must be shown to be a public place for these purposes, for a continuous period of at least twenty years openly, peaceably and without judicial interruption (Cusine and Paisley, para 20.01).

### *The counterclaim – public place*

[132] In order for a public right of way to exist, each terminus or end point must be a public place (Cusine and Paisley, para 20.02). There is no dispute that the public road at Balmoral Brae is a public place for these purposes (Cusine and Paisley, para 20.04). The

pursuer concedes that the foreshore is a public place but disputes the defenders' assertion that the pier and the forelands are public places, although Mr Sutherland accepted on behalf of the pursuer that, as a matter of principle, there is no reason why the pier and the forelands could not be public places for these purposes. The pursuer's position was simply that the defenders had failed to prove that they are public places.

[133] A place can be regarded as being a public place, which is thus capable of forming the terminus of a public right of way, if it is a place to which the public resort for some definite and intelligible purpose, even if it is not a place of great resort and even if it is in private ownership (*Cusine and Paisley*, para 20.03; *Duncan v Lees* per Lord President at p. 857; *Marquis of Bute v McKirdy and McMillan* per Lord President at p. 117; *Scott v Home Drummond* per Lord President at p. 772; *Smith v Saxton*). If a place is shown to be a public place by this measure then there appears to be no restriction on what members of the public do when they reach that place, so long as it is lawful (*Cusine and Paisley*, para 20.03). The nature of the use made of the right of way determines the right which is acquired, if any (*Cusine and Paisley*, paras 20.31, 21.10 and 22.3; 1973 Act section 3(3)). Therefore the level of pedestrian and vehicular use of each of the public rights of way whose existence is asserted by the defenders must be considered separately. However, whatever the nature of any right of way which is established, the principal right thereby conferred on members of the public is the right of passage along the way, as opposed to any right to store belongings or, in this case, park vehicles (*Gloag and Henderson*, para 34.52; *Sutherland v Thomson* (1876) 3R 485 per Lord Neaves at p. 489; *Jenkins v Murray*). Mr MacKay conceded in his written submissions that there is nothing to prevent a landowner from placing boulders and fence posts along the verges of a public right of way so long as he does not thereby obstruct the right of way, even incidentally (*Elrick & Co v Lovie*). The mere fact that members of the public attend to

view an unusual natural feature does not confer upon it the character of a public place

(*Duncan v Lees*).

[134] Section 3(3) of the 1973 Act provides as follows:

“If a public right of way over land has been possessed by the public for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the right of way as so possessed shall be exempt from challenge.”

[135] It appears that this provision requires that the use (possession) of the right of way must not only be open, peaceable and without judicial interruption but also substantial and continuous. What may amount to substantial and continuous use may vary according to the nature and location of the right of way (*Cusine and Paisley*, chapter 20). The use must also be as of right, rather than by tolerance or permission, and must be within the knowledge of the owner of the land over which the right of way passes (*Cusine and Paisley*, para 10.19).

*Public right of way to the forelands*

[136] As indicated by the title plan production 5/1/1, the pursuer's title includes part of the forelands to the east of the private road and pier. However, the portion of the forelands contained within the pursuer's title is encircled by the main body of the rock formation and Mr Sutherland accepted during submissions that the features of the forelands which were of principal interest to members of the public, for example, the well-known local rock pools known as the Inner Beattie and Outer Beattie, lie outwith the pursuer's title.

[137] I am satisfied that the evidence led by the defenders proves on balance of probabilities that the forelands, even to the extent that they lie within the pursuer's title, are a public place. They are clearly an area to which members of the public have had significant resort throughout living memory and well in excess of the prescriptive period. I heard

ample evidence to support that conclusion. I heard from a number of witness in their fifties and beyond who were able to speak from personal experience about their childhood memories of going walking, paddling or swimming on the forelands or fishing, swimming or diving from the forelands. As indicated, most of the areas of interest within the forelands lie outwith the pursuer's title. There was evidence that local people have traditionally accessed the forelands from many points along the private road and the pier. However, Mr MacKay's position at submissions was that the principal means by which members of the public gained access to the forelands was via the stone steps cut into the rock formation towards the southern tip of the pier. I heard from a number of witnesses that they personally used those steps in childhood, and were aware of others having done so, to access the rocks from the pier. The photographs of the steps which were produced in evidence (productions 6/4/43 and 44) appear to confirm that they are of considerable age. Their appearance and position clearly indicates that their sole purpose is to enable pedestrians to access the forelands from the southern tip of the pier and clearly supports the assertion that they form part of a long-established route for pedestrians onto the forelands from the pier.

[138] I am also satisfied that the defenders have established that the principal route from the public road at Balmoral Brae (which leads to the village of Cove) to the forelands is via the private road, the pier and the steps and that the use made of this route by members of the public has been substantial and continuous each year for a period well in excess of the prescriptive period. Further I am satisfied that the use made of this route has been as of right, in the belief that a right to use that route existed, as opposed to by tolerance or permission. I accept that no permission has been sought from any proprietor throughout living memory to allow members of the public to use this route. Finally I am satisfied that

the use made of this route between the public road at Balmoral Brae and the forelands was within the knowledge of the pursuer and his predecessors in title.

[139] Thus, I accept that the defenders have established the existence of a public right of way for pedestrians over the pursuer's land from a public road at Balmoral Brae, via the private road and the pier, on to the forelands via the steps cut into the rock towards the southern tip of the pier. To that extent, I intend to grant the defenders' third crave in the counterclaim. However, as Mr MacKay accepted, for obvious reasons no corresponding public right of way for vehicles to the forelands has been established. There were no examples of vehicles accessing the forelands and such access would clearly be impossible.

[140] The defenders' third crave in the counterclaim seeks to interdict the pursuer from interfering with the public right of way to the forelands which I have found to exist. I am not prepared to grant such an interdict, because there is, in my view, no basis upon which the defenders or any other members of the public could be reasonably apprehensive that the pursuer would seek to interfere with a public right of way for pedestrians to the forelands, via the private road, the pier and the steps. The pursuer has done nothing so far to interfere with any pedestrian access to the forelands by that route and no evidence has been led to found any reasonable apprehension that he will seek to do so in future.

[141] The defenders' third crave in the counterclaim also seeks an order ordaining the pursuer to remove all obstructions placed by him which prevent the use and enjoyment of the public right of way to the forelands which the defenders seek to establish. Again, I decline to grant any order to that effect. I have heard no evidence indicating that the pursuer has placed any obstruction to any pedestrian right of access to the forelands by this route or that he intends to do so in the future. The obstructions placed by him at the mouth of the pier were clearly intended to prevent vehicular access to the pier.

[142] For the reasons given I propose to grant the defenders' third crave in the counterclaim only to the extent of finding and declaring that there exists a public right of way for pedestrians over the pursuer's land from the public road at Balmoral Brae to the forelands at the harbour.

*The counterclaim – public right of way to the foreshore*

[143] The foreshore at the harbour is outwith the pursuer's title. The foreshore is not automatically a public place. Foreshore may be a public place if there is evidence of the necessary level of resort to it by members of the public (*Cusine and Paisley*, para 20.09). In this case the pursuer concedes that the foreshore is a public place for these purposes and concedes the existence of a public right of way for pedestrians to the foreshore from the public road at Balmoral Brae via the private road and part of the land between the southern boundary of the private road, where it meets the pier, and the foreshore (Joint Minute of Agreement, paragraphs 19 and 20). The only dispute relates to the issue of whether the defenders have established the existence of a public right of way for vehicles from the public road to the foreshore. In my view they have not.

[144] During Mr MacKay's submissions a degree of confusion appeared to arise as to whether the area immediately to the north of the foreshore on which the defenders' boats are kept is or is not part of the foreshore for these purposes. When I asked Mr MacKay to identify the evidence of vehicular use which might found the conclusion that a public right of way for vehicles had been established to the foreshore, he referred to the evidence of boat proprietors driving vehicles behind and between boats in order to carry out maintenance work and for related purposes. However, at no point was it maintained on behalf of the

defenders that the area where the boats are kept is part of the foreshore or that that area is a public place which could form the terminus of a public right of way.

[145] Although there was no analysis of this technical legal issue on behalf of the defenders, as I understand it the term ‘foreshore,’ which features in the pleadings of both the pursuer and defenders, refers to the shore between the high and low water marks of ordinary spring tides (Gloag and Henderson, paragraph 34.06; Gordon, *Scottish Land Law*, 3<sup>rd</sup> Ed. Vol 1, paragraph 3-25). The area owned by the pursuer on which the defenders’ boats, winches and associated gear are stored is clearly above the high water mark; that is clearly why the boats are kept there. It is therefore self-evidently not part of the foreshore. The distinction between the foreshore and adjoining land above the foreshore is important and well recognised (Cusine and Paisley, paragraph 20.09; *Marquis of Bute v McKirdy and McMillan* per Lord Moncrieff at pp 130 and 131).

[146] The pursuer’s written pleadings make it clear that his position is that the land owned by him on which the defenders’ boats, winch huts and associated gear are kept is “above the foreshore” (principal action, article 2 of condescendence, lines 220 to 226). The defenders’ pleadings appear to make a similar distinction between the foreshore and the land owned by the pursuer adjacent to the foreshore. In Answer 2 in the principal action, the defenders answer a call from the pursuer (paragraph 1 of condescendence in the principal action, lines 297 to 300) to specify the legal basis upon which they aver that they have right to store their boats, winches and other equipment on the pursuer’s land, by averring that “[t]he legal basis upon which [the defenders] aver that they have a right to store their boats, equipment and winch huts, where they do, is that the Pursuer is personally barred through mora acquiescence and taciturnity from enforcing his rights of ownership” (emphasis added).

There is no suggestion that the defenders are entitled to store their boats, etc. on that part of

the pursuer's land because it is a public place, being part of the foreshore. The defenders' position is developed in Answer 3 in the principal action, which makes numerous references to the land owned by the defender on which the defenders' boats, winches and associated gear are stored, but which never characterises that land as forming part of the foreshore. Statement of fact 4 in the counterclaim avers that a public right of way exists over the pursuer's land to the foreshore and avers that the defenders have gained access to their boats "via said public right of way by pedestrian and vehicular access," but again does not aver that the land on which the defenders' boats, winches and associated gear are stored forms part of the foreshore. On the other hand, statements of fact 2 and 3 in the counterclaim also assert (lines 873-875 and 950-951) that the defenders have gained access to their boats via the public rights of way which are claimed between the public road and the pier and forelands respectively. Those assertions are difficult to understand in the context of the fact that the defenders' boats are stored not on or beyond the pier and forelands but above the foreshore.

[147] Paragraph 20 of the Joint Minute of Agreement confirms that parties agree that a public right of way for pedestrians exists over the part of the pursuer's land lying between the south of the private road and the foreshore. If the defenders' position was that the pursuer's land formed part of the foreshore, this agreement would make no sense, in the context of the defenders' assertion (which is accepted by the pursuer) that the foreshore is a public place for these purposes. If the boats, winch huts and associated equipment which the defenders claim that the pursuer is barred from seeking to have removed were situated on the foreshore, the pursuer would have no title to seek to have them removed (because they would not be on his land) and the defenders would not need to rely on personal bar in order to seek to prevent his attempts to have them removed.

[148] For all of these reasons it is clear to me that the area of the pursuer's land on which the defenders' boats, winches and equipment are stored, though immediately adjacent to and above the foreshore, is separate from the foreshore. Thus the evidence of the defenders and others driving vehicles behind and in between the boats stored on the pursuer's land above the foreshore does not assist the defenders in seeking to establish the existence of a public right of way for vehicles to the foreshore.

[149] So far as the foreshore is concerned there were some examples of vehicles accessing that area in order to manoeuvre boats on trailers, which were brought to the harbour rather than being kept on the pursuer's land there, close to the water's edge for launching. As I understood it drivers generally avoided reversing their vehicles on to the beach unless the vehicles were equipped with four wheel drive. Otherwise the picture which emerged was of vehicles occasionally attending at the harbour with boats on trailers and reversing the trailers on to the beach but avoiding any part of the vehicle other than the rear wheels from going on to the beach.

[150] I am not satisfied that the extent of vehicular use of the foreshore (as opposed to vehicular use of the pursuer's land immediately to the north of the foreshore) was of a level which could have established the existence of a public right of way, either in relation to the extent or continuity of any such vehicular use of the foreshore.

[151] Having regard to these factors I am satisfied that, in accordance with the pursuer's concession, the evidence led by the defenders establishes the existence of a public right of way for pedestrians from the public road at Balmoral Brae to the foreshore via the private road and the pursuer's land lying between the southern end of the private road and the foreshore. However, I am not satisfied that the defenders have established the existence of a corresponding public right of way for vehicles. Therefore I intend to grant the defenders'

second crave in the counterclaim only to the extent of finding and declaring the existence of a public right of way for pedestrians to the foreshore. For the same reasons as already given in relation to the defenders' third crave I propose, however, to refuse the interdict and the order to remove obstructions which are also sought in the defenders' second crave.

*The counterclaim – public right of way on to the pier*

[152] The whole of the pier falls within the pursuer's title. Nonetheless Mr Sutherland accepted during his submissions that, as a matter of principle, the pier was capable of being a public place if there was evidence that it was a place to which the public have had sufficient resort. I am satisfied that the pier is a public place for these purposes.

[153] Mr Sutherland relied upon the evidence that the pier was used for the purposes of the commercial salmon fishing business which operated from the harbour until the end of the last salmon fishing season in 1999 as a basis for the assertions that the use of the pier by members of the public during that period was effectively controlled by those who owned the pier (and who also ran the salmon fishing business) and that any use made of the pier by members of the public during that period was by tolerance rather than as of right.

[154] However these assertions are not supported by the evidence of the use made of the pier by the salmon fishing business and by members of the public. According to the evidence the salmon coble, although berthed alongside the pier, was at sea between the early hours of the morning and the late morning each day. The evidence that members of its crew carried on creel fishing on their own account from their own small boats in the afternoons infers that the working day of the salmon coble and those employed on it was effectively over by around midday. I heard no evidence to suggest that the pier was in active use by the salmon fishing business whilst the coble was at sea. There was no evidence that

any buildings associated with the salmon fishing business were ever put up on the pier, which might have rendered the pier a place of work at other times of the day. There were no signs telling members of the public not to use the pier. Until boulders were placed across the entrance to the pier on the instructions of the pursuer in 2015, there were never any gates, fences or other physical obstructions to prevent pedestrians or vehicles entering onto the pier. The fixed crane which stood towards the southern end of the pier until the late 1980s or early 1990s prevented vehicles from passing beyond it to the southern tip of the pier. The mobile crane which replaced it had the same effect only when it was actually in position on the pier. However it seems clear to me that the restrictions presented by the cranes to vehicular access to the southern end of the pier were simply incidental to the presence of the cranes in connection with the salmon fishing business; there was no deliberate intent, by the placing of the cranes on the pier, to thereby prevent vehicular access to the southern tip of the pier or to exert 'control' over the vehicular use which members of the public could make of the pier. No obstruction was ever placed to vehicular access onto and as far as possible along the pier whilst the cranes were in position. When the mobile crane was removed from the pier altogether, presumably at about the same time as the salmon fishing business ceased to operate in late 1999, there were no obstacles to vehicular access along the full length of the pier until boulders were placed across the entrance by the pursuer in 2015.

[155] So far as pedestrian use of the pier is concerned, I heard ample evidence that members of the public have exercised pedestrian access along the whole of the pier for well in excess of the prescriptive period, for reasons including sightseeing, walking, fishing from the pier, using the pier to access the forelands via the steps at the southern end of the pier, diving from the pier and checking the condition of the sea from the southern tip of the pier before deciding whether to engage in fishing or other activities at sea. I am satisfied that

such pedestrian access has been exercised by members of the public at a substantial level and frequency every year for a period in excess of the prescriptive period and that it has been exercised as of right and in the belief that the public were entitled to exercise pedestrian access along the whole length of the pier, rather than by permission or tolerance. According to the evidence no permission has ever been sought, whether from the pursuer or any of his predecessors in title, for pedestrian access along the pier. Such use of the pier by pedestrians must have been within the knowledge of the pursuer and his predecessors in title.

[156] So far as vehicular use of the pier is concerned, I heard evidence to generally similar effect. Members of the public have driven vehicles onto the pier and parked there for well in excess of the prescriptive period. Although there is no right to park vehicles along a right of way which connects two public places, it seems to me that if parking a vehicle is an otherwise lawful activity, there is no reason why members of the public should not park vehicles in one of the public places which form the termini of the right of way. The evidence indicates that the members of the public who have driven vehicles onto the pier and parked them there have generally done so in order to facilitate their involvement in the types of activity at the harbour which have already been listed in relation to pedestrians. However it seems that parking on the pier has been viewed as particularly attractive to members of the public who have engaged in activities such as fishing, kayaking or scuba diving, which require the use of heavy or unwieldy equipment. Parking on the pier has been viewed by members of the public who engage in such activities as a means of minimising the distance which their equipment has to be carried in order to reach the water.

[157] A significant piece of circumstantial evidence which supports my conclusion with regard to vehicular use of the pier is the very existence of the private road, the clear and

obvious purpose of which is to connect the public road at Balmoral Brae with the pier. There was no evidence that the salmon fishing business ever made any significant vehicular use of use of the pier. There was no obstacle or discouragement (prior to 2015) to the use of the private road by members of the public in their vehicles to access the pier from Balmoral Brae. These circumstances tend to support the evidence which I heard of the vehicular use made by pier by members of the public.

[158] Although the level of vehicular use of the pier was clearly lower than the level of pedestrian use, the issue of whether the level of vehicular use was substantial enough to satisfy the requirements of section 3(3) of the 1973 depends on the circumstances and on the nature and location of the place which is under consideration. Having regard to those considerations I am satisfied that the vehicular access which was exercised by members of the public to the pier until 2015 was at a sufficiently substantial level and frequency every year for a period in excess of the prescriptive period and that it was exercised as of right and in the belief that the public were entitled to exercise vehicular access as far along the pier as was physically possible, which was a substantial part of the pier whilst the cranes were in position and which became the whole length of the pier after the salmon fishing business ceased trading, rather than by permission or tolerance. According to the evidence no permission was ever sought, whether from the pursuer or any of his predecessors in title, for vehicular access along the pier. Again, such vehicular use of the pier must have been within the knowledge of the pursuer and his predecessors in title.

[159] Thus I am satisfied that the defenders have established the existence of a public right of way for pedestrians and vehicles from the public road at Balmoral Brae on to the pier.

[160] Although the pursuer has never obstructed pedestrian access along the pier, he clearly has made determined efforts to impede, obstruct and discourage the exercise of the

right of vehicular access onto the pier which I have found to be established by placing boulders across the entrance to the pier, even if it is possible for a vehicle to pass between the boulders he has placed there.

[161] Accordingly, I intend to grant the defenders' first crave in the counterclaim in its present form, including the orders for interdict and removal of obstructions which are included in that crave.

[162] Even if I am wrong in concluding that the pier is a public place for these purposes, Mr Sutherland accepted during his submissions that, if a public right of way for pedestrians exists from Balmoral Brae to the forelands via the steps at the southern end of the pier, the consequence would be that the pier would form part of that right of way. On this analysis members of the public would be entitled to walk along the pier in the course of their journey from the public road at Balmoral Brae to the forelands, via the steps at the southern end of the pier. However they would not be entitled to park their vehicles on the pier in order to facilitate that activity, since their only right in relation to the pier would be a right of passage over it. They would not be entitled to leave their property (vehicles) on the pier.

[163] In view of the decision which I have reached to the effect that the pier is a public place by virtue of the evidence of the use actually made of the pier by members of the public, Mr MacKay's alternative argument founded upon the terms of the Fisheries Act 1705 becomes unnecessary. However it is appropriate that I address it for completeness. I would not have given effect to Mr MacKay's submissions concerning the 1705 Act. If that Act confers any rights, it appears to do so in relation to fishing for herring and white fish. The balance of the evidence was that the fishing activities carried on from this harbour have not fallen into those categories, being generally concerned with either commercial salmon fishing (until 1999) and fishing for lobster, crab and other shellfish. More importantly

however, this argument was introduced only at the stage of submissions. No hint of it appeared in the defenders' pleadings, in the evidence led at proof before answer, in the four-page outline submission lodged on behalf of the defenders in advance of the hearing on submissions or even in the much more detailed written submission (extending to 14 pages) lodged by Mr MacKay on the morning of the hearing on submissions. Despite that, the first point which Mr MacKay sought to make during his submissions before me was this point founded on the terms of the 1705 Act, which rather suggests to me that it may have been a late addition to the defenders' case. The difficulty which this presented for Mr Sutherland was illustrated by his submission that the 1705 Act may have fallen into desuetude. In order to seriously consider that particular question the court would have been required to embark upon a potentially significant exercise (Gloag and Henderson, paragraph 1.34) for which no provision had been made, precisely because the defenders' reliance upon the 1705 Act had not previously featured in the proceedings. For all of these reasons I would not have given effect to this aspect of Mr MacKay's submissions.

*The placing of boulders along the verges of the private road*

[164] Having regard to the decision I have reached with regard to the existence of public rights of way from the public road at Balmoral Brae, via the private road, onto the foreshore, the pier and the forelands, it follows that the pursuer is not entitled to place boulders or other obstructions to the exercise of these rights (including the right of passage for vehicles onto the pier). However it seems to me that there is nothing to prevent the pursuer from placing boulders or other obstructions along the borders or verges of the private road so as to prevent vehicular access from the private road either to the informal 'parking places' adjacent to the private road on its eastern side or to the other land owned by the pursuer,

including the area on which the defenders' boats, winches and associated gear are stored, on its western side. The defenders have not sought to establish that the private road is a public place. The defenders' case is that the private road is part of the route by which the public are entitled to pass between the public road at Balmoral Brae and one or other of the foreshore, the pier and the forelands, each of which is a public place for the reasons given above.

Accordingly the only right which members of the public have with regard to the private road is the right of passage. There is no right to park vehicles or leave other property on or adjacent to the private road and accordingly the placing of boulders along the eastern and western borders or verges of the private road does not interfere with any right to which members of the public are entitled.

### **Decision**

[165] Accordingly, I shall repel the pursuer's first plea-in-law in the principal action and also the pursuer's second and third pleas-in-law in the principal action, which are directed against the first defender, against whom the action was dismissed on 2 December 2016, and the pursuer's sixteenth plea in law in the principal action, which was not insisted upon. I shall repel the first, third and fourth pleas-in-law for the defenders in the principal action, the defenders' second plea-in-law having been repelled of consent on 17 August 2017. I shall also refuse the pursuer's first and second craves in the principal action since those are also directed against the first defender. I shall refuse the pursuer's fifteenth crave in the principal action (interdict), since that was not insisted upon. I shall sustain the pursuer's fourth to fifteenth pleas in law inclusive in the principal action and grant decree in terms of the pursuer's third to fourteenth craves inclusive in the principal action, giving each of the defenders 28 days to remove his boat and associated equipment from the pursuer's land.

[166] So far as the counterclaim is concerned, I repel the defenders' first and second pleas-in-law, the latter not having been insisted upon, and the pursuer's first, third and fourth pleas-in-law. I shall sustain the defenders' third plea-in-law without restriction and also their fourth and fifth pleas-in-law, but those only in respect of the existence of public rights of way for pedestrian access to the forelands and foreshore respectively. I shall also sustain the pursuer's second plea-in-law, which follows from the refusal of the defenders' second plea-in-law. I shall grant decree in terms of the defenders' first crave, giving the pursuer 28 days to remove the obstructions to vehicular access onto the pier. I shall grant decree of declarator in terms of the defenders' second and third craves, in each case under deletion of the words "and vehicles." Otherwise the defenders' second and third craves are refused.

[167] I shall assign 8 August 2018 at 10:00am within Aberdeen Sheriff Court, Civil Annexe, Queen Street, Aberdeen as a hearing in relation to the question of liability for the expenses of the action.