

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FORFAR

[2018] SC FORF 27

B110/17

JUDGEMENT OF SHERIFF GREGOR MURRAY

*in causa*

MR AND MRS B

Pursuers

against

MR AND MRS C

Defenders

**Pursuers: Campbell QC; Miller Hendry**

**Defenders: MacDougall; Jackson Boyd**

Forfar, 29 March 2018

The Sheriff, having resumed consideration of the cause, sustains the Defenders' pleas-in-law, repels the Pursuers' pleas and dismisses the action; sanctions the cause as suitable for the employment of Junior Counsel; finds the Pursuers liable to the Defenders in expenses as the same may be taxed; allows an Account of Expenses to be ingiven and remits same to the Auditor of Court to tax and report.

**Introduction**

[1] Woods ("the Woods") lie in the heart of a picturesque small community in the Angus hills.

[2] The Woods form a rough triangle which points north towards a village. To their west is a C class public road, to their east a track from the village to the former village school. To

their south is Public Right of Way X (“PROWX”), which leads east from the public road to the former school.

[3] Immediately south of PROWX is the Pursuers’ home, which is accessed from the public road over the western part of PROWX.

[4] A path (“the Path”) runs from north to south through the Woods. From the north, it is accessed through a gate in the village (“the North Gate”). From the south, it Path is accessed by a gate on PROWX (“the South Gate”) which leads into an area known as the Paddock.

[5] En route, the Path passes an infilled quarry (“the Quarry”) directly opposite which the Defenders have built their home and workplace (“the House”), access to which is taken from the North Gate over the Path.

[6] In 2010, the Path was designated by Angus Council as a Core Path for the purposes of the Land Reform (Scotland) Act 2003. In August 2016, at the request of the Pursuers, Angus Council realigned the Core Path away from the House to the east of the Quarry.

[7] In this Summary Application under section 3 of the Prescription and Limitation (Scotland) Act 2003, the Pursuers seek Declarator that the Path as originally designated is a Public Right of Way. The action was intimated to the Second Defender’s father, who owns the majority of the Woods. Though he chose not to enter the process, he gave evidence on behalf of the Defenders, who oppose the Pursuers’ claim.

### **Procedural History**

[8] Notwithstanding the action is a Summary Application, proof was necessary as sharp issues of fact arose. The proof was heard on 17 and 18 January 2018 and submissions were

heard the following day. Case management, a Joint Minute of Admissions, use of an agreed plan of area, Affidavit evidence and a site meeting all reduced court time. Electronic copies of documents have assisted me preparing this Judgement. I am grateful to both sides for their co-operation in these respects. Over one hundred productions were lodged. References to them below adopt the numbering used by parties during the proof.

[9] The Pursuers, the First Pursuer's sister AB, their employee CD, the Second Defender and her father EF all gave oral evidence. Each adopted Affidavits sworn in advance, which formed the majority of their evidence in chief.

[10] The Defenders also relied on Affidavits by the First Defender and eight others. Though those witnesses did not give oral evidence, the Joint Minute of Admissions records agreement that each Affidavit represents their evidence to the court.

### **The Pleadings**

[11] The factual basis of the Pursuers' case and the Defenders' response are set out in *Condescence* and Answer 3 of the Record.

[12] In *Condescence* 3, the Pursuers aver:-

"The (Path is)...generally open and suitable for walking and horseriding...The Pursuers and their employees use (the Path) regularly and frequently for walking and riding and have done so peaceably, consistently and (until 2017) without interruption since they occupied (their present home) in April 1996..a period in excess of 20 years duration. (The Path) is well defined, open and patent...is available to, and has and is used by the Pursuers, their employees, friends and family, and by members of the general public in taking recreation, both on foot or on horseback. Historically, (the Path) was a route on foot, and through which passage is permitted...(the Path) has to the Pursuer's (sic) knowledge been patent and accessible since his (sic) arrival in the area in 1995...both before and since the forestry harvesting was completed...Even during (excavation and infilling of the Quarry), (the Path) was patent and open for passage on foot and by horseback and was regularly and frequently so used by the Pursuers..(the Path) existed in 1996. A pathway had existed for many years prior to that date..."

[13] In response, the Defenders essentially deny those averments and respond in

Answer 3:-

“(the Woods have) from at least the 1950’s been used as commercial forestry, under exception of (the Paddock) until about late 1997 or early 1997. No defined route or path historically ran across that land. (The Paddock) was owned by (EF) and used by him and his parents...for various purposes and principally the keeping of animals until around about 1996. (The Paddock) was fully enclosed until about late 1996 or early 1997...(and)...comprised agricultural stock fencing and two wooden field gates of about a metre in height. The first of these gates allowed access to (the Paddock). The second was a similarly sized field gate in the (paddock’s) northern fence-line but which gate was incapable of being opened in the 1990’s. (EF) ploughed (the Paddock) in 1996 allowing trees to be planted in late 1996 or early 1997. As part of that exercise, (EF) removed said fencing and gates...(and)...installed new deer fencing along the front of the Paddock where it faced (PROWX) running parallel to them. He also installed a new deer gate. The timber was felled and harvested from the then woodlands and these woodlands generally cleared in about 1996 and new trees were planted in or about late 1996 or early 1997. No reasonably accessible route was available through the then (Woods) prior to the felling and harvesting of the trees....While access could have been taken through the newly planted woodlands from about late 1996 or early 1997 that would have been relatively quickly blocked by the growing trees by about 2000 and thereafter no reasonably passable route...was available...until about June 2001 and...the winter of 2001 -2 during which period (EF) cleared a rough path for forestry management purposes...accessed by...(the South Gate) and ran to the said metal deer gate. A gate located west of (the Paddock) historically was available to secure access to (the Woods) prior to construction of the Core Path but did not lead to (the route of the Path)...For several weeks during 2008 access to (the Path) was closed to the public on or towards the northern end (during the excavation and infilling of the Quarry)...until...the...Core Path was created in about 2008 there was no prescribed route through (the Woods) and (the Path) was not used by members of the public and any general use of (the Woods) by the public including any by the Pursuers and their friends, family and employees was by reason of (EF’s) agreement or tolerance as landowner and was not capable of creating a public right of way. Said agreement was given to specified users including the Pursuers to whom (EF) gave permission to walk through the woods in about 1996. Similar agreement was given to (GH, a local resident)....Agreement or tolerance was principally allowed to dog owners who would walk their dogs on various routes through the (Woods)...involving circular journeys entering and exiting (the North Gate).”

### **Evidence relating to the Path**

[14] The factual disputes between the parties mainly relate to the period in which the Path has existed, its accessibility and the extent and nature of its use. The following narration deals only with evidence relating to those topics. The remaining evidence is discussed below.

[15] It is a matter of admission that the Pursuers purchased their present home in April 1996 and, until renovations to it concluded, stayed nearby for around three months. The Joint Minute of Admissions records agreement that the Path existed in that year.

[16] In his Affidavit, the First Pursuer states that he has regularly ridden along the Path on ponies since the spring of 1996, when the Path and South Gate already existed. In oral evidence, he spoke to doing so before or after work perhaps twice a week in summer and every 2 – 3 weeks in winter. He would ride the length of the Path and return home either by the public road or, much more commonly, by riding north then east around the village, south on a track towards the old school then west along PROWX. He occasionally used other routes.

[17] The First Pursuer also spoke to what he said were contemporaneous productions. Number 5/3/32 of process was an aerial photograph which he thought had been taken in 1988. He maintained the Path could be seen on it. Numbers 5/3/25 - 27 of process were pre-purchase photographs he took in 1996, as verified by his diary. Number 5/3/24 of process was a family photograph taken, he estimated from the ages of the people and horses shown in them, in late 1997 and number 5/3/24 of process was a further photograph taken in 1999; both showed the Paddock in the background.

[18] Number 5/3/18 of process was a photograph of the Second Pursuer in the Woods, about 75 metres north of the South Gate. Number 5/3/29 was a photograph of him entering the South Gate in September 2009. Number 5/3/31 contained two photographs showing himself, his wife and their groom on the Path in 2008. Number 5/3/30 contained two photographs showing him riding a horse and his sister leading a pony on the Path in 2010.

[19] In cross examination, he maintained the photographs showed a well-worn path. While there had been overhanging branches in places, the Path was not blocked between 1997 and 2001. He did not see EF clearing the Woods in 2001. There had been no forestry operations on the Path since around April to June 1996. EF's Affidavit to the contrary was wrong.

[20] He was surprised the Defenders had not seen him on the Path more often since the House was built. He was less surprised that others had not as he often used the Path early in the morning.

[21] In her Affidavit, the Second Pursuer states that she walks the Path daily, occasionally in the company of her husband or sister-in-law. She regularly sees other local residents when she does, including GH, IJ, KL and another lady whose name she does not know. Her husband and their groom CD regularly ride ponies along the path. In evidence, she said that her husband's evidence (during which she sat in court) was correct.

[22] AB, the First Pursuer's sister, states in her Affidavit that she visits the Pursuers frequently. When she does, she often uses the Path to walk her dog up to the village and, occasionally, round a nearby Loch. She has done so for over 20 years. She gave similar evidence in the witness box.

[23] In her Affidavit, the Pursuers' groom CD states that she has regularly either ridden the Path or led ponies along it since she started working for the Pursuers in June 2007. She has seen the Second Pursuer lead ponies along it and knows the First Pursuer regularly rides on it. She has seen evidence of other horses having been on the Path. In evidence, she said the Path was clear and well defined and that she used it frequently, at least once every couple of months. She accepted she could not speak about anything which occurred before 2007 and that the only other person she had seen riding on the Path was the First Pursuer. In cross, she said that after the House was built, the Defenders did see her when she passed. She saw them through the windows.

[24] In his Affidavit, EF states that when he stayed at the Pursuers' present home as a child, he often played in the Woods or helped those working in them. His father replanted the Woods soon after he bought them in the 1960's. At that time, though the Woods could be entered on foot by the South Gate or by tractor at the North Gate, there was no defined route through them. He rarely saw anyone in the Woods unless his father had instructed work in them or pheasant shooting was taking place. In any event, they were largely inaccessible as a rabbit fence then surrounded the Woods and a roe deer fence was later erected in about 1988.

[25] After he came to own The Woods, they became increasingly impassable. In the early 1990's, he decided to fell, restock then manage them with the assistance of contractors, RTS Limited. The work included ploughing up the Paddock and planting trees there. Forestry Commission permission was obtained, the work took place and concluded in early 1997. Vermin control carried on for some time afterwards.

[26] EF's Affidavit also reviews correspondence between him and RTS Limited which details the above work being carried out. He also recalls that local residents were verbally warned to avoid the Woods at that time because of ongoing vermin control work. While he estimated he attended the woods around twice a week around this time, he did not see the Pursuers there.

[27] Between 2001 and 2002, while he wrote his Masters dissertation, EF cleared out the Woods again as they were once more overgrown.

[28] EF also recalls a dinner in 1996 at a restaurant in the village which he attended with his parents and the Pursuers, shortly after the Pursuers bought their present home. At that, he told the First Pursuer he was free to use the Woods if he wanted to, the Pursuers having declined to exercise an option to buy them along with the house. In his evidence, while he recalled the dinner, the First Pursuer denied any such conversation took place.

[29] In evidence, EF confirmed his Affidavit was accurate. In cross, he accepted that both Gates were always accessible, although the South Gate was stuck until 1995. He accepted the Path first became identifiable between 1995 and 1996 when he created (or, if it had existed before, re-created) a route through the Woods with a tractor to enable RTS Limited and himself to manage forestry and shoot rabbits. Work then took place until as late as 1998.

[30] In his Affidavit, the First Defender states that he and the Second Defender visited the proposed House site almost daily from 2010 onwards, more frequently after building work commenced in 2014. They did not see the Pursuers on the Path, and certainly no-one on horseback, until the summer of 2015.

[31] At that time, the Pursuers came past the House walking a horse and returned the other way shortly after. On further occasions, they saw the First Pursuer standing in the

Woods photographing the House and at other times simply standing in the Woods. The First Defender had the impression he was trying to goad them. The First Pursuer returned the day the court papers were served. On a later date, he and the children met the Second Pursuer on the Path; she was entirely civil and pleasant.

[32] In her Affidavit and in evidence, the Second Defender corroborates her husband regarding the Defenders' visits to the site from 2010 onwards and the First Pursuer taking pictures of the House after it was built. She mentions him cutting grass on a lawnmower and cutting down branches. She saw the Second Pursuer and their groom leading a horse past immediately after the Core Path had been realigned and the First Pursuer come past on a horse the day the court papers were served.

[33] In his Affidavit, YZ states that he has lived in the area for over fifty years and is very familiar with it. He is employed by Scottish Water and has responsibility for a nearby Loch and water treatment works. Though he has regularly walked dogs in the Woods since before 1996, he was unaware of any path through the Woods between the North and South Gates until the Core Path was adopted by Angus Council. He has walked on parts of the Path since and has never seen the Pursuers on it.

[34] In his Affidavit, MN states that he has lived in the area for almost fifty years and regularly walks his dog in it. He was employed by Scottish Water between 1989 and around 2008 and visited the Quarry at least 3 or 4 times each week to deposit sludge cake. During that time, the Woods south of the Quarry were overgrown. He was unaware of the Path extending beyond the Quarry through the Woods. He rarely saw anyone else coming out of the Woods. He has never seen anyone on a horse there.

[35] In his Affidavit, OP states that he and his wife have owned a cottage in the village since 1971 and regularly visit it. Though he frequently walks in the area, he was unaware of the existence of the Path until after these proceedings were raised.

[36] In his Affidavit, QR states that he was employed by RTS Limited for about 2 years to manage rabbit numbers in the Woods. He was later directly employed by EF for the same purpose. At that time, the Woods were surrounded by a deer fence. The Path did not exist.

[37] In his Affidavit, ST states that he lived in the village between March 1996 and August 1999. During that time, he walked his dog in the Woods each day. He entered through the North Gate and followed the Path until the Quarry, where he walked along the line of a deer fence. He rarely saw anyone in the Woods. He saw no-one on horseback.

[38] In her Affidavit, GH states that from 1995 until 2002, she occasionally walked in the Woods. From April 2003, she did so regularly en route to picking up her children from the local school. Since her children left school there, she has continued to walk through the Woods almost daily. She occasionally uses the Core Path, or part of it. She has never seen the Pursuers on horseback in the Woods. She has never seen the First Pursuer in the Woods. She has seen the Second Pursuer in the Woods around three times.

[39] In his Affidavit, UV states that he carried out around eighteen weeks' work during the building of Humpty House between January 2014 and December 2015. During that time, he mostly worked outside the house. He saw around 12 dog walkers in that time, most frequently GH. He did not see the Pursuers on horses.

[40] In his Affidavit, WX states that he has visited the Woods once or twice annually for around 40 years to shoot there. He has never seen anyone walking or riding there.

## Relevant Law

[41] A helpful Joint List of Authorities was lodged, by which parties agree that the test for creation of a public right of way is established by a combination of statute and common law.

[42] Section 3(3) of the Prescription and Limitation (Scotland) Act 1973 provides:-

“(3) 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.”

[43] The three elements of that test – possession by the public, a continuous period of 20 years and open, peaceable possession without judicial interruption – must be considered in conjunction with the common law.

[44] In *Rhins District Committee of Wigtownshire County Council v Cuninghame* (1917) 2 SLT 169 the Outer House specified five particular requirements which must all be present in any public right of way:-

- a. public termini;
- b. a continuous journey from end to end;
- c. a definite route;
- d. a right to continuous use
- e. use for the prescriptive period.

[45] In *Servitudes and Rights of Way* by Cusine and Paisley, it is said:-

“20.24 It may seem trite to say that in order to constitute a public right of way, the use must be made by members of the public. However, in some instances, the question whether the route was being used by members of the public was in issue and it not therefore prudent or appropriate to assume that those using a route between what are proved or admitted to be public places must be using it qua members of the public. This issue is not easily divorced from another requirement which is that the use should be ‘as of right’ and not the basis of tolerance. The matter was put this way by Rankine:

'The use of a road by the servants or dependants of the proprietor, or by the occupier of the adjacent lands or of the lands within the same estate and his dependants, or by persons visiting or trading with of these cannot avail the public. Their possession is not as members of the public, but only derivative of the landowner. Possession by neighbouring landowners or occupiers and their servants will, if nothing to the contrary appear, be ascribed to the humbler right of servitude...'

20.25 The position therefore seems to be that if the use appears to be by members of the public, the onus shifts on those who are denying the existence of a public right of way to establish that there is something special about the people, either because they have a connection with the property or properties through which the route passes or that they have a special entitlement to use the route...In one case it was held, correctly in our view, that the use of a road by the pursuers who were owners of a property on the road, and people dealing with them fell to be disregarded."

[46] The passage from Rankine quoted above was approved in *Scotland v Wallace* 1964 SLT (Sh Ct) 9, in which the Sheriff said:-

"...something much more substantial in the way of user must be proved to establish a public right of carriage way over the area, and in this connection use by the pursuers themselves or those trading with them must be disregarded."

[47] In *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Limited* (1992) SC 357 Lord President Hope addressed the issue of standard of possession of a public right of way in the following way:-

"...The question remains, however, whether evidence of user alone may be relied on to exclude the possibility of its being ascribed to the tolerance of the proprietor.

In my opinion there are many indications in the authorities on this topic that the amount and quality of the user may indeed be decisive of this point. The significance of public user can be seen clearly from Lord Watson's speech in *Mann v. Brodie* at pp. 57 – 58 : "Although the principles of law which govern the acquisition of a prescriptive right of way are in themselves simple, yet, in their application to facts, questions of nicety frequently arise. It then becomes necessary to consider whether the user has been that of the public, whether it has been continuous and uninterrupted, and whether it has existed for the full period required by law. These are all questions of fact, and it would not be expedient to lay down any specific rules for their solution. As regards the first of these questions, which has occasioned much more controversy than the others, I think it is safe to say generally, that in order to constitute a public user of the kind of road claimed in the present action, the user must be of the whole road, as a means of passage from the one terminus to the other,

and must not be such user as can be reasonably ascribed either to private servitude rights or to the licence of the proprietor...

...The significance of these passages for present purposes is that, where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

### **Submissions**

[48] For the Pursuers, what was said to be an entrenched dispute between the parties and its context were clearly set out in the Record and Productions. It was submitted that on the balance of probabilities, the Pursuers had proved their case and that decree could be granted. The Pursuers' craves and pleas in law relating to interdict were no longer insisted on.

[49] Four issues, it was submitted, needed consideration. The first, whether there were public termini at either end of the route, was agreed in the Joint Minute of Admissions. The second, whether the route had been used continuously from one end to another, was proved by the joint plan and three pieces of evidence – EF's confirmation that he had opened up the route in 1995 to facilitate access to the trees and vermin control; the initial designation of the route as a Core Path and the evidence of the Pursuers that they had used it in that way. If, notwithstanding the continuous nature of the Path, the Pursuers were not believed, the question of use of the route became a live issue; in that regard, it was submitted that there was nothing in the Affidavits of the Defenders or the oral evidence of the Second Defender and EF that they did not ever see the Pursuers.

[50] The third issue, whether the Path was continuous, was not controversial – it was submitted that it obviously was. However, the fourth, whether the Pursuers had continuously used the Path for the prescriptive period was clearly controversial. It was accepted that the Pursuers had owned their house for a period in excess of the prescriptive period. Their evidence, and that of CD, was that they had continuously used the Path during all of that time. The Pursuers, CD and AB were all members of the public; that was sufficient to demonstrate public use.

[51] The First Pursuer's evidence was that it was understandable others had not seen him use the whole route – to do so, they would have had to follow him. There ought to be no question of him and his wife being reliable and credible witnesses; there was no reason for them to come to court and be untruthful. While it was accepted the court required to concentrate on objectively found facts, it was legitimate to ask why a retired businessman and his wife would lie. Neither the Second Defender nor EF in evidence had been able to answer that; in those circumstances, the Pursuers' evidence ought to be accepted as credible and reliable. The alternative was to conclude that the action was a vindictive step taken by a wealthy man.

[52] The Defenders' submissions approached the law in a similar fashion. It created a check list of requirements that the Pursuers required to satisfy before they could succeed. Though it was agreed the Path has two public termini, a definite route and had existed for the prescriptive period, the Pursuers still required to overcome a series of hurdles. At each of these, it was submitted, they fell. The Defender sought dismissal.

[53] The law on the first hurdle, evidence of use by members of the public, was clearly stated in *Cusine and Paisley* (paragraphs 20.24 and 20.25) and in *Scotland v Wallace* as quoted above.

[54] In this case the vast majority of the evidence led was of use only by the Pursuers, AB and CD, all of which was irrelevant. As was stated in *Scotland v Wallace*, “something much more substantial” was required. It was necessary for the court to be satisfied that members of the general public used the Path *qua* members of the public.

[55] The second hurdle was to prove use of the Path from one of the Gates to the other, not use of a self-contained loop within the Woods (*Cusine and Paisley*, 20.29; *Mann v Brodie*).

[56] In this case there was very little, if any, evidence, of use of the Path as part of a continuous journey. The evidence was that the Path was the journey, with the Pursuers and their civil agents walking its length then returning when they met the public road. The Second Pursuer said the public road is busy, not a place one would wish to ride on horseback or walk a dog. The pathway, it was said, formed a convenient route for the Pursuers to exercise their horses, not part of a continuous journey.

[57] The final hurdle was proof of use taken as of right, an adverse right capable of standing up to any challenge by the heritable proprietor (*Cusine and Paisley*, 20.37 and 20.38; *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Limited*). No evidence at all had been led of this.

[58] Consequently, it was submitted, the Pursuers fell at each hurdle. There was no evidence of public use on horseback; that relating to the First Pursuer and of his groom fell to be disregarded. Though there was evidence of use of the Path on foot, it fell down in relation to the further hurdles. There was little or no evidence that members of the public

used the Path as part of a continuous journey on foot. Even if there was, that evidence was not of sufficient volume or frequency to support any assertion of a public right. The Path was not the type of route that either Parliament or the courts intended public rights be created over. Even if it was a convenient pathway for the Pursuers, that did not make it a public right of way. Even if inconvenience to the Pursuers was relevant (which it is not) that would be mitigated by the existence of a core path which allows access through largely the same route. In these circumstances, the action fell to be dismissed.

### **Assessment of Evidence**

[59] The competing evidence on the disputed issues particularly that of the First Pursuer and EF, was of the variety often now described as binary. In determining that I prefer the Defenders' version, I have attached weight to several factors.

[60] The first is my assessment of the credibility and reliability of the First Pursuer's evidence. That assessment takes account of that evidence in context, its quality and in comparison to the other evidence.

[61] The context arises from evidence within the Affidavits and Productions which was, in one form or another, admitted, agreed or was not the subject of cross-examination. A convenient starting point is the agreed plan, which accurately depicts (i) the Path (ii) the Core Path as realigned (iii) PROWX (iv) the Pursuers' home (v) the House (vi) the Quarry (vii) the North and South Gates and (viii) the Paddock (*number 5/4/1 of process*).

[62] Thereafter, reference needs to be made to:-

a. the Woods have been owned by EF's family since 1962 and are presently owned by him (*number 6/2/13 of process*)

- b. a nearby loch is used by Scottish Water to supply public water. Before it is fed south, a substance known as sludge cake is removed from the water at a nearby Treatment Works. In 1988, EF leased the Quarry to what became Scottish Water as a site for the deposit of recovered sludge cake (*see e.g. number 5/3/10 of process*).
- c. in the early 1990's EF decided to fell and plant trees in the Woods. He instructed RTS Ltd to carry out much of that work and to manage the Woods afterwards. In October 1994, the Forestry Commission approved an application by EF to fell trees and, in December 1995 approved two further applications to restock the Woods and to plant trees in the Paddock. The plans for that work divide the Woods into compartments. The southern part of the Woods lay in compartment 7 and the Paddock formed compartment 7b. (*numbers 6/10 - 13 of process*)
- d. correspondence between RTS Limited and EF, which shows:-
- i. felling in compartment 7 took place between December 1994 and March 1995 (*number 6/17 of process*);
  - ii. the Paddock was ploughed at some point between April 1995 and April 1996 (*numbers 6/17 – 21 of process*)
  - iii. new fencing was erected around compartment 7 (*ibid*);
  - iv. replanting was completed by March 1997 (*number 6/22 of process*)
- e. in around 2002, relations between the Pursuers and EF deteriorated, in part after the Pursuers successfully raised Court of Session proceedings to reduce a grant of planning permission EF had obtained to develop steadings near to the Pursuers' home.
- f. in 2006, during statutory consultation for the purposes of the 2003 Act, EF suggested that the Path be included in Angus Council's draft Core Path Plan (*number 6/15 of process*).

- g. the Pursuers have erected an electrically operated gate over PROWX where it adjoins the entrance to their home and a sign stating "PRIVATE No Through Road". Though a button needs pressed to open the gate, no signs point to its existence. Users of PROWX are left with the impression that it is neither a Public Right of Way nor a Core Path (*numbers 6/36 and 40 of process and site visit*).
- h. on 17 July 2008, the Pursuers objected to a proposal by Angus Council to designate PROWX as a Core Path. The Pursuers sought to exclude from designation the part of PROWX used to access their home (*number 6/34 of process*).
- i. in October 2008 Scottish Water excavated 10,000 tons of accumulated sludge cake from the Quarry, which was then infilled with topsoil and grassed over. During the work, a temporary compound was formed on what is now the site of the House to house temporary site offices and parking space for heavy machinery, cars and fuel bowsers (*number 5/3/10 of process*).
- j. in December 2009, the Defenders applied to Angus Council for planning permission to build the House. The Pursuers objected to the application, which was initially refused by the Council under delegated powers (*numbers 5/3/1-10 of process*).
- k. on 17 March 2010, following a hearing, Angus Council rejected the Pursuers' objection to PROWX's designation as a Core Path (*number 5/3/33 of process*).
- l. in October 2010, after an appeal, Angus Council granted the Defenders planning permission to build the House (*number 5/3/7 of process*).
- m. in September 2012, the land on which the House was to be built was disposed by EF to the Defenders (*number 6/2/13 of process*).
- n. the House was built between February 2014 and December 2015.

- o. soon after, the Defenders applied to Angus Council to realign the Core Path away from the House, to the east of the Quarry. After consultation with the Angus Local Access Forum and site visits the Council received a representation from an unnamed third party about the application which raised the issue of whether the Path was a Public Right of Way (*number 6/15 of process*).
- p. the Forum and the Council both supported the Defenders' application, which was granted on 16 August 2016 (*numbers 6/4 and 6/14 of process*).
- q. the Defenders then erected a gate across the former Core Path to the south of the House.
- r. on 30 January 2017, Angus Council sent an e-mail to the Defenders which mentioned that the third party could raise the Public Right of Way issue in court (*number 6/3 of process*).
- s. these proceedings were warranted on 30 May 2017.

[63] From this, it appears the Pursuers' claim may be a sequel to others they have made, the majority of which have involved EF and his family; to date these have included (i) reducing a grant of planning permission obtained by EF to develop derelict steadings (ii) objecting to two Core Path proposals (iii) objecting to the Defenders' application for planning permission to build the House and, most likely (iv) making third party representations to Angus Council about the Defenders' application to realign the Core Path.

[64] That context also bears upon other evidence in the case which does not place the First Pursuer in a positive light. YZ and GH, both apparently independent witnesses, express unfavourable opinions of him in their Affidavits and give much the same reasons for holding them. Both the Defenders' Affidavits contain detailed evidence of strange, intemperate and, on one occasion, violent behaviour on the part of the First Pursuer. In her

evidence, the Second Defender clearly remained upset by this. In his oral evidence, the First Pursuer did not take the opportunity to refute what those Affidavits say. No other local resident gave evidence in support of the Pursuers.

[65] In addition, regardless of EF's evidence, the context casts doubt on the credibility of the Pursuers' evidence of continuous use of the Path since 1996. In combination, the RTS correspondence and the Affidavits of QR and ST confirm between 1996 to 1998 (i) the Paddock was ploughed up (ii) planting out then took place until March 1997 (iii) rabbit control, particularly shooting, took place until 1998 and (iv) a fence existed around compartment 7, in other words most of the southern portion of the Woods.

[66] To walk or ride on the Path from the South Gate at that time, as the Pursuers assert they did, would have entailed traversing a ploughed field (and subsequently a nursery of young trees) and climbing over at least one fence, all the while risking being accidentally shot by QR. Such a scenario is improbable.

[67] I also formed an unfavourable opinion of the First Pursuer in evidence. By his own admission he has a tendency to speak at length, which made it difficult at times to determine the points he sought to make. He displayed many of the classic traits of those caught up in protracted litigation, particularly neighbour disputes – his answers revealed a man obsessed with trying to disprove what the opposition sought to prove, someone who had obviously spent many hours desperately trying to find evidence which might cast doubt on the incontrovertible. Even if compelled in cross examination to give an affirmative answer, he invariably sought to qualify it in some respect. He also appeared to seek pitfalls in every question, however simple, which Mr MacDougall put to him. At no stage did he give the impression that he was willing and/or able to tell things as they truly were. His evidence

was, for these reasons, anything but objective. I did not gain the impression he sought to achieve anything other than the furtherance of his own interests.

[68] As there were many instances of these issues during his evidence, I shall only mention three. He gave evidence that the Path could be seen on an aerial map which he had unearthed online (*number 5/3/32 of process*) – unfortunately for him, it patently cannot be seen. When, in cross examination Mr MacDougall used the colloquial local name for PROWX, he instantly replied “I have a problem calling it that” and asked it be termed “Public Right of Way X” instead. When Mr MacDougall refused to do so, Mr Armstrong was clearly thrown and appeared unhappy that Mr MacDougall did not comply with his request. Finally, he denied that the case was an example of a man trying to impose conditions on someone else’s land. The irony of his denial – from someone who has erected an entry controlled gate and a “Private” sign across a Public Right of Way and Core Path – was apparently lost on him.

[69] My doubts about his credibility and reliability hardened on hearing the evidence of EF. In brief, EF’s evidence was as good as the First Pursuer’s was bad. In contrast to the First Pursuer, EF’s answers were measured and balanced. Where necessary, EF was prepared to accept fault; if a point was against him, he freely admitted it – examples were his ready acceptance that all had not been as it was meant to be with his planning application for the steadings, his admission that in 1996 he had given the First Pursuer permission to use the Woods (which the First Pursuer denied in evidence, presumably in fear that his claim might founder on tolerance), his acceptance that the Path could (at least in theory) have been used for over twenty years and his tacit acceptance that he had closed the Woods artificially in late 2016.

[70] EF's evidence of events in the Woods over half a century was also corroborated by others and, where possible, that corroboration was independent. In comparison, the First Pursuer's evidence largely stands alone. Given the history between their families, it would have been understandable had EF seen the witness box as an opportunity to speak his mind about the First Pursuer. His unwillingness to do so on oath added to the impressive nature of his evidence generally, which I have accepted in full.

[71] I have also considered the other evidence, to cross-check my assessments of the First Pursuer and EF. I am prepared to accept most of the Second Pursuer's evidence. However, for the above reasons, I cannot accept her statement that she agreed with her husband's evidence. I also do not accept she has walked the Path as frequently as she said since 1996, though she may have done in recent years. My conclusions on these issues are set out below. While I am prepared to accept the evidence of AB, who gave me no reason to doubt her credibility or reliability, she spoke only to occasionally walking on the Path with one or both of the Pursuers. While I also accept CD's evidence – similarly, she gave me no reason to think it ought not to be accepted – it was also uncontroversial insofar as she spoke of only using the Path occasionally and since 2007. There is no other evidence which favours the First Pursuer over EF. In these circumstances, there is no basis for altering my initial assessment.

### **Accepted Evidence**

[72] What, then has been proved? In brief, I accept EF's evidence, corroborated as appropriate by the RTS Limited correspondence, QR, GH, YZ, ST and WX that in the late 1980's, the Woods were largely impassable through a combination of overgrowth and

fencing. Between 1994 and 1997, work was carried out. EF cleared space between rows of trees in the Woods. Once Forestry Commission approval was obtained, large parts of them were felled and restocked by RTS; the Paddock was ploughed in furrows and planted out; a new South Gate and new fencing were also installed. Over the same period and beyond, rabbit and deer control work was regularly undertaken, principally by QR. Consequently, though the Path existed by 1996, it only did so to facilitate that work. After it was completed, EF again cleared out space in the Woods in 2001 – 02, when new growth began to inhibit access.

[73] On this basis, the Path was not recognisable as a formal track in 1996. At that time, though access to the Woods from PROWX was possible through the new South Gate and the fence to the north of the Paddock had been removed, it was restricted by the Paddock having been ploughed in furrows and by planting work being carried out there. Though access could be taken from the North Gate to the Quarry, the Path could not easily be accessed beyond it due to a deer fence and the Woods being overgrown. No “well-worn” path of the type described by the First Pursuer existed at that time.

[74] Though access over the Path was possible thereafter, especially from 2006 when EF suggested it be designated a Core Path, there were probably restrictions and/or brief interruptions (i) in 2008 while the Quarry was excavated and infilled (ii) after the North Gate became stuck at some point after 2008 until the First Defender repaired it in 2010 (iii) when the Defenders placed a gate across it after the Core Path route was realigned and (iv) between October 2016 and January 2017 when the South Gate was closed.

## **Discussion**

[75] There is no dispute that the Pursuers have accessed the Woods. There is no dispute that there is now a Path which is publicly accessible from either terminus and that there has been some use of it. However, what the Pursuers offer to prove is that they and their employees use it regularly and frequently for walking and riding, have done so without interruption since 1996 and that a path existed for many years before that, a path which has been and continues to be used by members of the general public.

[76] I accept the Pursuers have occasionally used the Path for walking and riding. However, I do not find it proved that such use has been either regular or frequent or that it has taken place without interruption since 1996. No evidence was led of any path having existed before 1996. Due to, variously, the state of the Paddock, the state of the Woods, fencing and vermin control, the Path was not capable of such use until at least 1997 or 1998. Even then it was only capable of use for a year or so before the Woods again became overgrown and remained so until EF completed clearing them again in 2002. I do not accept the First Pursuer has ridden ponies on the Path as frequently as he stated. Such use would have been immediately noticeable to any other person in or around the Woods; while I accept the times he said he used the Path would have limited the opportunity for others to see him, it is highly improbable that no-one did. Though the Second Pursuer may have regularly walked the Path in recent years she, like her husband, would have been unable to until at least 2002. Put shortly, the Pursuers have failed to prove their case.

[77] Separately, much of the evidence led by the Pursuers was irrelevant in law. For the Path to be a public right of way as defined by section 3 of the 1973 Act, it must first have

been possessed, in the sense of having been used, by the public. In that regard, as Rankine confirms:-

“The use of a road by...the occupier of the adjacent lands...and his dependants, or by persons visiting or trading with these cannot avail the public... Possession by neighbouring landowners or occupiers and their servants will, if nothing to the contrary appear, be ascribed to the humbler right of servitude...”

[78] In *Scotland*, also a case between neighbouring proprietors, the Sheriff interpreted that passage as meaning that evidence of use of a claimed public right of way by neighbouring proprietors, their visitors or those with whom they trade must be disregarded. I agree.

Evidence of that nature, as stated both by Rankine and by Lord Watson in *Mann*, could only ever be capable of asserting a right of servitude; if that was not so, any proprietor could attempt to assert the existence of a public right of way over neighbouring land if it had been used for over twenty years.

[79] Insofar as PROWX lies between them, the Woods and the Pursuers’ home are not truly contiguous. However, there was no suggestion that EF and the Pursuers were anything other than neighbouring proprietors and any attempt to argue to the contrary would have been wholly artificial. I regard the Pursuers as neighbouring proprietors of EF as owner of the southern portion of the Woods.

[80] The difficulty this causes the Pursuers is that they led no evidence of use by anyone other than themselves, a visitor (AB) or their servant (CD). While they mentioned seeing others occasionally on the Path, there was no evidence those persons used the Path end to end nor of when they were seen. Consequently, to borrow Cusine and Paisley’s analysis (*at* 20.25), as the Pursuers have failed to prove public use, there is no requirement for the Defenders to rebut the Pursuers’ case.

[81] On the other issues raised, the Defenders submitted on the authority of *Rhins* that there was no evidence of use of the Path from end to end; on that, had I accepted the Pursuers' evidence, I do not agree. Though there was certainly evidence of the Pursuers using the Path as a return journey, there was other evidence led to the contrary – in particular of the Pursuers separately using it as part of a loop route around the village back to their home. Of course, for the above reasons, I did not accept it and it is in any event ultimately irrelevant.

[82] The remaining issues, the duration of use and standard of possession, may be addressed together. In *Dollar Land*, under reference to Lord Watson in *Mann*, Lord Hope held that if there is evidence which is capable of supporting the existence of a public right of way, to prevent such a right arising a landowner must ensure users are made aware they do so with his consent, not as of right. In this case, that would have entailed EF making users of the Woods aware of such consent.

[83] On the evidence led, the Pursuers came to access the Woods by invitation of EF at the dinner in 1996. However, EF did not extend that invitation to the general public; it was particular to the Pursuers and did not refer to the Path at all, not least as it did not exist as such and, in any event, was not then wholly accessible. In these circumstances, there can be no question of EF having tolerated even the Pursuers' use of it.

## **Decision**

[84] In these circumstances, the case falls to be dismissed and the Pursuers found liable to the Defenders in expenses. I have, as agreed, sanctioned the cause as suitable for the employment of Junior Counsel.