

SHERIFFDOM OF LoTHIAN AND BORDERS AT LIVINGSTON

[2024] SC LIV 14

LIV-A116-20

JUDGMENT OF SHERIFF PETER G.L HAMMOND

in the cause

STUART BRYCE

Pursuer

against

LYNN JOHNSTON or ORME

Defender

Pursuer: Crook; Jackson Boyd LLP
Defender: Nicol; Sneddon Morrison

LIVINGSTON, 7 March 2024

The Sheriff, having resumed consideration of the cause:

FINDS IN FACT:

- (1) The Pursuer is the heritable proprietor of number 6 Cannop Crescent, Stoneyburn.
- (2) The Defender is the heritable proprietor of number 8 and WLN55003.
- (3) The registered title of 6 Cannop Crescent contains the following:

Burden 1: Feu contract containing Feu Disposition by Bents Estates Limited (hereinafter called “the First Party”) to West Lothian Housing Society Limited (hereinafter called “the Second Party”) and their disponees and assignees, recorded GRS (Linlithgow) 13 Oct 1920 of 1.187 acres in the Barony of Livingston contains the following burdens:

(Fifth) The second party shall be bound to form on the ground hereby feued a lane nine feet wide for the purpose of giving access to the back of the said houses of ashes

or other material to be approved of by the Scottish Board of Health and the first party which shall be maintained in good order and repair by the second party and their foresaids at their own expense in all time coming unless the same may be taken over by the district authority.

Burden 3: Disposition by The Joint Properties Limited to David Roy and another and their executors and assignees, recorded G.R.S. (West Lothian) 28 Aug 1989, of the subjects in this Title, contains the following burdens:

The reservation of a right of access in favour of the proprietors of the neighbouring subjects known as number Five Cannop Crescent, Stoneyburn, and their successors over the service road or path so far as lying within the subjects hereby disposed as the same is tinted blue on the title plan and there is granted a reciprocal right of access in favour of the said disponees and their foresaids over the remainder of the service road or path lying outwith the said subjects and leading to the public road; DECLARING that the cost of maintaining that part of the service road or path shown tinted blue on the said plan and lying within the subjects hereby disposed shall be borne solely by the said disponees and their foresaids; DECLARING that this additional reservation shall constitute a real and preferable lien and burden on said subjects and on all buildings erected or to be erected thereon in favour of the proprietors of the subjects near or adjoining the subjects hereby disposed.

(4) The registered title of 8 Cannop Crescent contains the following:

Burden 1: Feu contract containing Feu Disposition by Bents Estates Limited (hereinafter called "the First Party") to West Lothian Housing Society Limited (hereinafter called "the Second Party") and their disponees and assignees, recorded GRS (Linlithgow) 13 Oct 1920 of 1.187 acres in the Barony of Livingston contains the following burdens:

(FIFTH) the second party shall be bound to form on the ground hereby feued a lane nine feet wide for the purpose of giving access to the back of the said houses of ashes or other materials... which shall be maintained in good order and repair by the second party and their foresaids at their own expense in all time coming unless the same be taken over by the district authority...

Burden 2: Disposition by National Coal Board to David Johnston and his executors and assignees, recorded GRS (West Lothian) 4 Sep 1985 of the subjects tinted pink in this Title, contains the following burdens:

(FIFTH) there are reserved in favour of the respective proprietors of other properties near or adjoining the said subjects and their successors servitude rights of access with all necessary equipment over such parts of the said subjects as may be necessary for cleaning, painting, maintaining, repairing, reinstating and other operations on such parts of the said other properties for which such access may reasonably be required on payment in respect of any damage caused by this exercise of said rights of access and said operations; and, subject to the rights of the tenants of the said other properties, there are granted reciprocal servitude rights of access with all necessary equipment in favour of the said disponee and his foresaids over such parts of the said other properties as may be necessary for cleaning, painting, maintaining, repairing, reinstating and other operations on such parts of the said subjects for which such access may reasonably be required on payment in respect of any damage caused by the exercise of said rights of access and said operations;...

(SEVENTH) a right of access will be reserved in favour of the proprietors of the respective subjects known as numbers 5, 6 and 7 Cannop Crescent, Bents, aforesaid, and their respective successors over the service road or path so far as lying within the

said subjects hereby disposed as same is tinted blue on the Title Plan and there are granted reciprocal rights of access in favour of the said disponee and his foresaids over the remainder of the service road or path lying outwith the said subjects and leading to the public road: Declaring that the cost of maintaining that part of the said service road or path tinted blue on the said plan and lying within the said subjects hereby disposed shall be born solely by the said disponee and his foresaids.

(5) The registered title of WLN55003 contains the following:

Burden 1: Feu contract containing Feu Disposition by Bents Estates Limited (hereinafter called "the First Party") to West Lothian Housing Society Limited (hereinafter called "the Second Party") and their disponees and assignees, recorded GRS (Linlithgow) 13 Oct 1920 of 1.187 acres in the Barony of Livingston contains the following burdens:

(FIFTH) the second party shall be bound to form on the ground hereby feued a lane nine feet wide for the purpose of giving access to the back of the said houses of ashes or other materials... which shall be maintained in good order and repair by the second party and their foresaids at their own expense in all time coming unless the same be taken over by the district authority...

Burden 2:

(SECOND) the subjects hereby disposed are so disposed subject to all wayleaves, servitudes, rights of access and others presently subsisting whether formally constituted or not.

(FIFTH) [as per other titles] there are reserved in favour of the respective proprietors of other properties near or adjoining the said subjects and their successors servitude rights of access with all necessary equipment over such parts of the said subjects as may be necessary for cleaning, painting, maintaining, repairing, reinstating and other

operations on such parts of the said other properties for which such access may reasonably be required...

(SEVENTH) a right of access win (sic) be reserved in favour of the proprietors of the subjects known as and forming 5 to 8 Cannop Crescent... by the service road at the rear and side of the dwelling houses 9 and 10 Cannop Crescent ...

(6) The registered title of 5 Cannop Crescent contains similar access rights to that of number 6 and number 8.

(7) The Service Road is shown on the Pursuer's Production 9 running from points "a" to "c".

(8) The owner of 9/10 Cannop Crescent's late husband (Tim Anderson) built a garage on the common land to the west of point "b" on the Pursuer's production number 9. "Tim's Garage" at no point blocked access along the Service Road. Tim's Garage no longer existed by the early 1990's.

(9) Mark Shepherd and Lesley Hume moved into 6 Cannop Crescent in 1996 or 1997.

(10) When they moved into number 6 there was a garage in the garden of number 6, the door of which faced onto the Service Road. It was not accessible from the public road other than via the Service Road. They regularly used the Service Road for vehicular access to the rear of number 6 from the public road. They regularly took a car and a caravan along the Service Road. They also took a boat along the Service Road. They used the Service Road regularly for vehicular access from the public road between 1997 and 2016. Mark Shepherd stored windows at the rear of number 6. The windows were transported to the rear of number 6 by Mark Shepherd in a van over the Service Road.

(11) Mark Shepherd and Lesley Hume removed the garage to the rear of number 6 in 1997 or 1998 and replaced it with a building to keep birds in. An area was slabbed over and a caravan was parked on the slabbed area for a number of years.

(12) There was not always a fence to the rear of number 6.

(13) The Defender and her husband approached Mark Shepherd, Lesley Hume and Mark O'Malley for money to contribute to improving the Service Road. Lesley Hume gave Mark Shepherd money to hand over to the Defender and her late husband. Mark O'Malley contributed £200.

(14) The Defender and her late husband patched potholes on the Service Road and common land with hardcore and carried out clearance on the common ground. The Service Road had been usable for vehicular and pedestrian traffic prior to and during their clearing efforts.

(15) The space between the front of number 6 and number 7 and the angle at which the ground rises would prevent access for a car from the front of number 6 accessing a garage to the rear of number 6.

(16) Number 5 has a garage that faces onto the Service Road. The main door of the garage currently has wooden cladding over it. Mr Brown, Mr O'Malley's predecessor at number 5, had a car in the garage which faced onto the Service Road.

(17) Mark O'Malley also built a garage that was accessible from Cannop Crescent. He no longer uses the garage that faces onto the Service Road as a garage but as a games room. It was converted in 2016.

(18) Mark O'Malley moved into number 5 in or around 2003. From 2003 until 2016 Mr O'Malley regularly made vehicular use of the Service Road both for domestic and

business purposes. Mr O'Malley stopped using the lane because of confrontations with the Defender and her late husband.

(19) Mr O'Malley has a servitude right of vehicular of access over the Service Road which he exercised regularly between 2012 and 2016.

(20) Mark O'Malley applied for a business licence to run a second hand car business from the rear of number 5. After objections from the Defender and Mrs Anderson he withdrew his application. In the objection letter signed by the Defender and her late husband dated 19 May 2014, they acknowledge vehicular use of the service road "for a number of years" prior to that date and complain about the adverse affect on their amenity.

(21) When Mr and Mrs Beech moved into number 6 in 2016 they decided to build a new garage. The existing buildings to the rear of the garden at number 6 were demolished and removed via the Service Road.

(22) When Mr and Mrs Beech moved into number 6 in 2016, Mrs Beech made regular use of the Service Road for both vehicular and pedestrian access. No-one prevented her from doing so.

(23) Prior to bringing a digger onto the garden of number 6 via the Service Road Christina Beech informed Mrs Anderson as a matter of courtesy.

(24) Work on building the new garage to the rear of number 6 commenced in late 2018.

(25) The Defender and her late husband were aware of the Pursuer's proposal to erect a new garage, and that it would have to face onto the service road. They were told by Mr and Mrs Beech in the course of a conversation.

(26) The Defender and her late husband observed the removal of the old building from the rear of number 6 along the Service Road without negative comment or interference.

They observed materials being taken along the Service Road to construct the new garage at

number 6 without negative comment or interference. They were aware that the construction of the garage was progressing.

(27) In late 2018, towards the end of construction of the new garage at number 6 the Defender and her late husband padlocked a gate across point "a" on the Pursuer's production number 9. This prevented access or egress to the new garage over the Service Road. The period of construction had been more than three months. The Defender and her late husband also parked a car on the Service Road near point "a" preventing use being made of the Service Road. In around 2020 the Defender and her late husband constructed a fence further obstructing the Pursuer's right of access.

(28) Since late 2018, the Pursuer has been prevented by the obstacles put in place by the Defender and her late husband from exercising his servitude right of access over the service road.

FINDS IN FACT AND LAW

1. There exists a right of access in favour of the Pursuer as heritable proprietor of number 6 Cannop Crescent over the Service Road described in the registered title of number 6 at Burden 3, in the registered title of number 8 at Burden 3 (SEVENTH) and in the registered title of WLN55003 at Burden 3 (SEVENTH).
2. The extent of the right of access is a servitude right of vehicular access.
3. The right has been exercised and acknowledged at various times in the twenty years prior to the raising of the action. It has not subsisted for a continuous period of twenty years unexercised or unenforced and without any relevant claim to it having been made.

4. The servitude right of vehicular access has not been extinguished by the operation of the twenty years long negative prescription. The Pursuer is entitled to decree of declarator accordingly.

5. The actions of the Defender in obstructing the right of access by (i) locking the gate indicated at or near point "a" on the Pursuer's production number 9, (ii) erecting the fence indicated on the Pursuer's productions number 8 and 9, and (iii) parking a vehicle at the entrance to the access road represent an unlawful interference with the Pursuer's right of access. The Pursuer is accordingly entitled to decree ordaining the Defender to remove all obstructions; failing which warrant authorising him to remove the obstructions at the Defender's expense.

6. The Pursuer is entitled to decree of interdict.

THEREFORE sustains the Pursuer's pleas-in-law numbers 3, 4, 5 and 6 in the principal action and also the Pursuer's pleas-in-law numbers 1 and 2 in the counterclaim; *Quoad ultra repels* the parties' pleas-in-law; grants **DECREE OF DECLARATOR** that the Pursuer, as heritable proprietor of the dwellinghouse known as 6 Cannop Crescent, Stoneyburn, Bathgate EH47 8EF registered in the Land Register of Scotland with title number WLN18461, has a heritable and irredeemable servitude right of way for pedestrian and vehicular traffic over (i) the ground marked blue on the Title Plan of 8 Cannop Crescent, Stoneyburn, Bathgate EH47 8EF registered in the Land Register of Scotland with Title Number WLN37934; and (ii) the service road located on the ground constituted by Registered Title WLN55003 in the Land Register of Scotland; **INTERDICTS** the Defender or anyone acting on her behalf from obstructing pedestrian and vehicular right of access over the service road leading from the public road to the rear of the Pursuer's property, said service road being

constituted by the area tinted blue on the Title Plan of Registered Title WLN37934 and by the service road located on the ground constituting Registered Title WLN55003, by maintaining locked gates, parking a car at the entrance or erecting a fence on the service road or in any other manner which obstructs the Pursuer's right of access over the said service road; **ORDAINS** the Defender to remove the locked gates, and car located on Registered Title WLN55003 and to remove the fence positioned on the area tinted blue on the Title Plan of Registered Title WLN37934; **FAILING** the Defender removing as aforesaid within 28 days of the date of decree **GRANTS WARRANT** to the Pursuer to have the said removal effected, and to grant decree against the Defender for payment to the Pursuer of the cost of said removal; **RESERVES** meantime all questions of expenses, and appoints parties to be heard thereon within the Sheriff Courthouse at Livingston, or by Webex video link as may be directed by the court, on a date to be hereafter fixed.

NOTE

Introduction and background

[1] This case went to proof before me over a number of days. Evidence was given for the Pursuer by the Pursuer himself, Lesley Hume, Mark O'Malley, Christina Beech, Barry Beech and Gayle Marshall. The Defender gave evidence on her own behalf, and also led evidence from Irene Armstrong, Mark Shepherd, Sheila Johnston, Kelly Fitzpatrick, Lorna Kerwin and David Johnstone. In addition, the court went on a locus inspection to view the access road and the layout of adjacent houses, garden grounds, outbuildings and boundary features which were referred to in the evidence.

[2] The dispute between the parties relates to an access road running in roughly an elongated "L" shape behind the houses in Cannop Crescent. The Pursuer's interest in the

access road is to gain vehicular access to the garage he has built at the rear of his property at 6 Cannop Crescent. Because of the slope of the land and the position of other structures on the site, he cannot obtain access to the garage via his garden from the front (Cannop Crescent) side. The Defender is the heritable proprietor of 8 Cannop Crescent. Her interest in the access road is to preserve her amenity from traffic, and also because she has her own plans for development upon, or in the immediate vicinity of, this area, and which would be physically constrained if a vehicular right of access had to be maintained for the Pursuer.

[3] In around December 2018, the Defender and her late husband took steps to block off the access road to vehicular traffic from the adjacent main road by placing locked gates and parking a car at the entry point, and a fence at the other end. Since that time the gate has remained padlocked, resulting in denial of access to the Pursuer, or anyone else.

[4] There was no dispute that, consistently across a number of title deeds/title sheets, there is expressed a servitude right of access over the access road in favour of the Pursuer as heritable proprietor of the dwellinghouse at 6 Cannop Crescent in Stoneyburn. However, the Defender maintains that (a) The servitude right of access does not extend to vehicular access, and (b) if there was a servitude right of vehicular access, that has been extinguished by the operation of negative prescription in that the right has subsisted for a continuous period of 20 years without being exercised, enforced or having been the subject of a relevant claim. The Pursuer's fall-back position, if I ruled against him on the prescription argument, was that the Defender was in any event personally barred from denying the Pursuer's vehicular right of access. This is argued on the basis that the Defender was well aware of the Pursuer's intention to build a garage accessed only by the service road, and took no steps to prevent the Pursuer removing a previous building and transporting in materials for the new garage.

[5] The Defender sought to introduce an argument, for which there is no Record but which was discussed in the course of submission, that any access during the 20 year period was being exercised by permission of Mrs Moira Anderson (the proprietor of numbers 9 and 10), and so was not being exercised in terms of the servitude right contained in the titles. Also, as the Pursuer's counsel observed, the Defender may have hinted at an abandonment argument at one stage in his submissions, but there are no pleadings or pleas-in-law directed at that point, and it was not developed.

[6] The evidence was for the most part anecdotal. Witnesses spoke about their knowledge of the use or non-use of the service road based on their historic knowledge of having lived at, or been a regular visitor to, one or other of the houses in Cannop Crescent backing on to the disputed road. Cannop Crescent has clearly been a popular location in which to live. Some of the houses had remained in the same families' ownership for many years and passed to succeeding generations. Memories were long, if not always accurate. Recollections varied. Some witnesses were more help than others, and some witnesses were perhaps understandably vague when asked to recall dates and details about the part this service road played in the lives of the residents down the years. Some witnesses were stridently adamant that their evidence was correct, and would not back down or make concessions even when confronted by documentary evidence contradicting their position.

[7] Counsel for both parties criticised the credibility and reliability of the other's witnesses. There may well have been an edge of partisanship in the evidence of some of the unshakeable witnesses based on old neighbourly friendships or grudges, but issues of credibility did not account for all the discrepancies. Some witnesses appeared genuinely surprised when confronted with photographic evidence contradicting their position, which could be dated fairly accurately by reference to other evidence.

[8] For these reasons, where there was a conflict in the evidence and photographs available, I preferred versions supported by dated photographs to unsupported anecdotal testimony of witnesses speaking from their recollection.

The evidence

Pursuer's witnesses

[9] The Pursuer, Stuart Bryce, is the heritable proprietor of 6 Cannop Crescent. He purchased the property in February 2016. The Pursuer explained the layout of the access roadway by reference to the adjoining properties. He explained that there had been no gate in situ at the entrance to the service road when he bought the house. There is now a locked gate erected by the Defender which obstructs his right of access, and a car parked at the gate. When he moved in, there was nothing to stop access, and he would drive or walk this service road. It was possible that there was a gate in existence there earlier, but if that was so he did not notice it because it was not closed or locked and did not interfere with his access. There were buildings belonging to numbers 5 and 6 facing onto the service road. He took the old structures down between 2016 and 2018, and used the lane to take away the old materials and bring onsite materials for the construction of a new garage. The new garage was built over a period of a few months in 2018. It faces onto the service road. The Defender was aware of the Pursuer's intention from his planning application in 2018. It would have been obvious to the Defender that access to this garage would have to be taken from the service road. Access from Cannop Crescent to the side of the Pursuer's house was impossible due to the slop of his garden and the lack of clearance between the Pursuer's house and the boundary. The Pursuer was asked a series of questions in cross examination about the historical use and state of the lane, but he was unable to answer for the period of

time before he acquired number 6 as he had no knowledge of the position. The Pursuer denied suggestions put to him that he was only exercising access via the lane when building the garage by permission of Mrs Anderson the owner of number 9. He explained that he did not need any such permission as he was exercising a right. He had done some tidying up of the lane by way of housekeeping, but denied attempting to widen the access or causing damage.

[10] Lesley Hume or Shepherd was, along with her then husband, Mark Shepherd, the proprietor of 6 Cannop Crescent from 1997 until they sold it to the Pursuer in 2016. From the time she moved into the house, there was a garage with a door opening onto the lane which led from the main road. They used the lane all the time. Her husband was a joiner and window fitter, and parked his van there. He also used the lane to take windows round to the back of their house. The Shepherds took the garage down at one stage and parked a caravan there. She was able to speak to views shown in photographs showing aspects of the use of the lane. These clearly showed the access road being used by vehicles. She noted the truck belonging to Mark O'Malley (number 5) parked in the lane. She pointed out her husband's window frames lying against the garage, which opened onto the lane. She pointed out her daughter in another photograph, in the back garden, which also clearly showed a caravan parked at the top end of the garden by the access lane. Her daughter was 3 or 4 at the time, which dated the photo to 2003 or 2004. Other photographs showed there was no fence. Another photo showed Mr O'Malley's van parked beside his garage which clearly opened on to the lane. At one point around 2010, the Defender and her late husband had suggested that all of the owners with an interest in use of the lane make a contribution to get it "fixed". She did not remember any gate at the entrance to the lane, and certainly not one which was ever closed, and she used that for access all the time. There was

no garage or other building encroaching on the lane. The access lane was not blocked by rubble or other rubbish. There had been a container between number 5 and number 6, but this was not parked on the access road. It was on the other side of it and did not obstruct use of the access. Mrs Anderson at number 9 did not have any issue with anyone using the access road. Her only concern was in case it was caused damage. She told Mrs Anderson out of courtesy when a JCB was brought in, and Mrs Anderson's only comment was "Watch the wall". The Shepherds had been entitled to use the lane as of right because of the titles and their use was not dependent on the kindness of Mrs Anderson.

[11] Mark O'Malley has lived at 5 Cannop Crescent since 2003. He has a garage at the rear which has always been there, and which has a door to the access lane, although he no longer uses it as a garage. In about 2017 he decided to build a new garage at the front of his property and converted it into a games room. He stopped using the lane because it was causing aggravation between the neighbours; and in particular confrontation with the Defender and her late husband. He has clearly understood from his title that he has a right of vehicular access along the lane. This has now been prevented by the gate erected by the Defender and her late husband. He identified from photographs the area at the rear of number 5 showing his truck parked at the rear of his property in the area previously occupied by his red van. He used to buy and sell cars at auction, and parked his truck there every day and night for 4 or 5 years. The lane was used all the time over the years. He confirmed the use of the lane by the Shepherds. There was also a boat parked there from around 2012 to 2016. A caravan came and went over the years. All of this access was gained to the back of the houses via the access road or lane. Mr O'Malley pointed out that the Defender and her late husband themselves had in fact acknowledged the vehicular use being made of the lane in their letter dated 19 May 2014 objecting to his planning application

to obtain a second hand dealer's licence at the address. Along with other neighbours, he was asked by the Defender and her late husband to contribute £200 to the maintenance of the access lane, which he did. There was no debris blocking the access road at any time. Any debris which was removed came from the "No Mans Land" adjacent to it.

[12] Christina Beech lives at 6 Cannop Crescent. She and her husband are tenants of the Pursuer at that address. They moved in in the Summer of 2016. At that time there was a garage with double doors, a shed and an aviary. A few weeks after they moved in, these buildings were removed by Mr Beech using the access lane to the rear. There was a discussion with Mrs Anderson before removal. As a courtesy, they mentioned bringing a digger round to clear an area at the back. Mrs Anderson was quite happy with that. Her only concern was damage to her fence/wall. Mrs Anderson mentioned that Mr and Mrs Beech had a right of access via car along the lane, but they already understood this was their right and were not seeking permission. She told Mrs Anderson about their plan for a new garage and it would have been apparent to her that access would be via the lane. There was also a conversation with the Defender and her late husband about the orientation of the garage. She had never envisaged that the garage would face towards the house, and had never represented anything different to them. Vehicles could not access the garage at the rear from the front of the house because of the restricted space. She and her husband had not been able to use the garage because the access road has been blocked by a padlocked gate and a parked car. The gate had not been locked until the new garage was built.

[13] Gayle Marshall explained that the late Mrs Moira Anderson ("Aunt Moira") who lived at 9 Cannop Crescent was in fact her grandmother's sister. She was a regular visitor to the house over the years but has never lived there. She pointed out where Aunt Moira's husband, her Uncle Tim, had a garage at point b on the plan, which was at the right angle

turn. This was erected in the 1980's but did not obstruct vehicular traffic. This garage was taken down years ago. The lane was in regular use all the time she could remember – since some 40 years or so ago – and all the neighbours, including the Pursuer's predecessors in title at number 6, used the lane for pedestrian and vehicular access to the gardens at the rear of their houses. Some of the houses had garages there, facing onto the lane. The lane was in constant use. Mrs Anderson had encouraged people to get out into the lane to trim the hedge and keep the surface in good repair to make access easier for everyone. The lane was used regularly by cars and at times by a car transporter. A boat was taken round and parked there also. The use of the lane carried on until a gate at the entrance was padlocked by the Defender and her late husband, but she could not recall when that happened.

Mrs Anderson had been concerned about a car transporter using the lane, in case it caused damage, but otherwise the witness had never heard her expressing concern about the neighbours using the lane for access. She had no bitterness or grudge towards the Defender or her late husband.

[14] Barry Beech is the husband of the witness Christina Beech. He was employed by the Pursuer as a plant operator/labourer. He and his wife have been tenants of the Pursuer at 6 Cannop Crescent since summer 2016. When they moved on there were two sheds and a garage at the rear of the garden. These buildings were demolished and a new garage was erected. Materials were taken away and brought in by the lane. Vehicular access to the rear of the property could only be via the access road at the back because the garden ground at number 6 was too steep, and the clearance from the house not enough, to allow a car to be taken in from the street at the front by that route. The Defender would have seen materials being brought in for the new garage. She knew that the garage would have to face onto the lane. Before any building work started, he made a point of telling the Defender and her late

husband what the plan was for the garage. He made it clear that the garage was going to face the lane. The Defender's late husband became aggressive and said he wanted to build a gym. The witness told the Defender's late husband he could build whatever he wanted as long as the witness could get his car in and out. The Defender and her husband "watched me build the garage". They didn't try to prevent him bringing in materials. They waited until the garage was nearly complete and then blocked off access parked a car in the lane to obstruct passage.

Defender's witnesses

[15] The Defender, Mrs Lynne Orme, lives at 8 Cannop Crescent. She first moved there with her parents and brother and sister in 1974. There had at one time been access round the lane in a big semi-circle back to the main street, Cannop Crescent; at a point between number 1 and Bents Cottage. There was nothing to stop anyone doing that at that time. However the route came to be closed off by bushes and fences to stop people getting access through. People used to throw ashes and other stuff over their fences onto the lane. There was also an old wooden shed at the angle of the lane which restricted passage to pedestrians. It was too narrow for a vehicle to pass. The shed fell down in around 1992. After that, the lane was not used at all and was just a place to dump rubbish. This carried on for years until 2005, when she and her late husband decided to clear all the rubbish off the access route. It was a lot of work; about 300 tons of rubbish were taken away, without the help of anyone else, over about 14 years. Mrs Anderson only allowed the Defender to bring up a trailer because she approved of what the Defender and her late husband were doing to tidy up the lane. Mrs Anderson would not let vehicles come up the lane unless she permitted them; and she only permitted the Defender to do so. Perhaps others would get

permission on a one - off basis if she so allowed. The Defender did recall Mrs Anderson permitted Mr Shepherd to go up with his boat and a caravan on a temporary basis. There had always been an old gate at the entrance to the lane but it was not kept closed or padlocked. A new gate was installed by the Defender and Mrs Anderson. That remained unlocked until December 2018 when problems arose with the Pursuer's workmen building the new garage who were being abusive to her. At that time, the Defender padlocked the gate with the approval of Mrs Anderson. The owners of 5, 6 and 8 were not allowed by Mrs Anderson to park on or access their houses along the lane. In cross-examination the Defender initially only conceded that the other proprietors' rights were for maintenance and repair purposes. When the terms of the title deeds were put to her, she conceded that the other proprietors did indeed have rights of access without a requirement that it be for maintenance, but only for pedestrian - not vehicular - access. The Defender accepted what was shown in the photos by way of vehicles parked in places which could only be accessed by the lane but was not readily prepared to concede the dates when the photos were taken. Eventually the Defender did accept that the evidence showed the van parked there in about 2003, and that this contradicted her position on Record, which was that there would have been no access after 1992. She also accepted that the garage of number 5 faced out onto the lane, but maintained that number 6 did not. The Defender did not accept that the area adjacent to the lane was being used to keep a flatbed lorry and old window frames despite the photos showing that. She had been unaware that the Pursuer's new garage would face onto the lane.

[16] Sheila Johnstone is the Defender's sister. She lived with the rest of the family at 8 Cannop crescent from 1974 to 1990, and has been a regular visitor since then. The lane was just a dumping ground for everyone's rubbish. It could not be used for any other purpose.

It was impassable with obstructions. The Defender and her late husband spent years clearing it up. Fences separated the gardens from the lane and lorries could not be driven up it because it had just become a grass track.

[17] Mark Shepherd is the Pursuer's predecessor as proprietor of 6 Cannop Crescent. He moved in in 1998 and lived there for approximately 18 years until he sold the property to the Pursuer in 2015. I did not find him to be a straightforward witness at all. He was sullen and looked displeased at being asked to take his hands out of his pockets when taking the oath. He admitted that he had refused to appear as a witness in this case when asked to do so by the Pursuer, but now appeared as a witness for the Defender whom he referred to along with her late husband throughout as "John and Linda". His body language was guarded and defensive. He would not state his address in open court. Mr Shepherd's evidence was that when he moved in he needed access to his garden by a JCB to put in drainage and Mrs Anderson had denied him access; telling him she had sole rights to the lane and that he would have to obtain access from the front side of his house through the garden. He had spoken to a number of neighbours who had all confirmed to him that there had never been access along the lane and that he would be unable to get access. He had budgies in a shed at the top of the garden. He then bought a concrete shed for the back garden. There never was a garage at number 6 and never any access onto the lane. On a few very specific occasions he had brought a car, a caravan and a boat round to the back of his house via the lane but that was only by permission of Mrs Anderson. He had no use for the lane other than that. Over the years people dumped rubbish in the lane. Eventually the Defender and her late husband started clearing it of debris. In cross-examination he accepted that he did not know whether he had had access rights or not, because he had not checked what his own titles contained. He just proceeded on the basis of what Mrs Anderson said. He denied that he

regularly used the lane, and accused other witnesses, none more so than his ex-wife, the witness Lesley Hume – against who he clearly evinced particular dislike - of lying. When confronted with the photo of his daughter in the back garden dated to around 2003, clearly showing the caravan in the background, he said it was normally parked out at the front until it was broken into. I was not impressed with this witness and was not prepared to place reliance on his testimony on the disputed issues.

[18] David Johnstone is the brother of the Defender. He lived at 8 Cannop Crescent from around 1970 to 1988 and still visits his sister there. He was somewhat vague but remembered trying to take a caravan up the lane at a later date and being told by Mrs Anderson that under no circumstances was he allowed to do so. Mrs Anderson told him the lane was for walking on; not for vehicular access. He remembered that there was rubbish lying on the lane.

[19] Irene Armstrong is the sister of the late Mrs Moira Anderson. She was born at either number 9 or number 10 Cannop Crescent (now joined together as one property) and has known the locus for some 70 years. She saw her sister regularly over the years and was a regular visitor. Her evidence was that in all the years she was at her sisters', she never saw a car go up or down the lane. Her sister told her she had put up a gate and padlocked it to stop people taking vehicles up. Her evidence contradicted that of the Pursuer's witness Gayle Marshall. That witness is her niece's daughter, and there has been a falling out so that she no longer speaks to that other side of the family. She expressed a view that Gayle Marshall was not trustworthy because "the only thing that interests her and her mother is money". I felt her evidence was coloured by antipathy towards other family members.

[20] Ivy (Lorna) Kerwin lived at "The Beeches" in Cannop Crescent for many years. She was friendly with Mrs Anderson. She had picked up from Mrs Anderson some of the tensions over the use of the lane. She was vague about dates. She did recall Mrs Anderson being angry because she had allowed a builder (Reilly) to park his car somewhere in or on the lane area, but he had sited a container there and had started operating a sunbed rental business from it. She was angry because he had abused her kindness. Mrs Anderson told her she would not allow anyone else to use "her lane". This was in the course of a single conversation. The witness had not ever gone up the lane herself, and did not even know there was a lane there until this discussion. She had no idea where the container had been sited or how it got there, but it may have been by a crane. If number 5, number 6 and the Johnstones had rights of access but Reilly did not, she would understand why Mrs Anderson would be cross. She accepted that she was attempting to recall this conversation from a long time ago

[21] Kelly Fitzpatrick is the niece of the Defender. She spent a lot of time at 8 Cannop Crescent when she was growing up. In the mid-1990's it was her "second home" at times. She had always been told from an early age not to go over the fence onto the area beyond because it was not safe. There was a lot of rubble and an old container there. She denied that the area behind the house was a service road because of the condition it was in. Mrs Anderson was very strict and set in her ways when it came to the lane. Nobody was allowed to use it. The Defender and her late husband had put "blood sweat and tears" into transforming this area from a junkyard into something of an amenity. They had to clear a jungle and a lot of rubble. They got no help from the neighbours. Her view was that the Defender was now entitled to claim this area as her own on the basis that, "she deserves every bit of it as she put the sweat into it". When it was put to her in cross-examination that

there were photos of vehicles from 2003 or later in positions where they clearly must have got there via the lane, the witness had no answer other than it was not possible.

Pursuer's submissions

[22] On behalf of the Pursuer, counsel reminded me that the Defender does not dispute on Record that the right of access described in the titles is a servitude right of access. Her defence is that it is not vehicular; or, if it was vehicular, it has prescribed. The onus of establishing that a right has prescribed lies on the party so asserting (*Walker and Walker: The Law of Evidence in Scotland*, 5th Ed 2020, paragraph 2.3.1); in other words, the Defender. The Defender had failed on the evidence to establish that the servitude right of access had subsisted for a continuous period of 20 years without being exercised.

[23] On the issue of construing the meaning of "access", counsel referred me to "*Servitudes and Rights of Way*" by Cusine and Paisley, 1998. The learned authors consider at paragraph 3.03 whether a servitude right of access extends to vehicular access. The whole terms of the deed require to be considered (*North British Ry v Park Yard Co* (1898) 25 R (HL) 47; *Boyd v Hamilton* 1907 SC 912). Also, the surrounding circumstances require to be considered. The learned authors express the view that where a deed provides for "access" this falls to be construed narrowly in accordance with the principle that a servitude right of access has to be exercised *civiliter*. Cusine and Paisley note that the reference to the access being over a "roadway" or a "driveway" may be a factor pointing to vehicular access being intended, but the mere fact that the access is wide enough to take a vehicle will not of itself be determinative, although it might not take much more. However, Cusine and Paisley made the point that the use of the unqualified term "access" "suggests that the draftsmen

thought the meaning was clear, perhaps by reference to the circumstances at the time, which may now be impossible to prove....”

[24] It was submitted that when the deeds in 1982 and 1989 were drafted, the draftsman would have been aware of the 1920 burden which required the dispone:

“...to form on the ground hereby feued a lane nine feet wide for the purpose of giving access to the back of the said houses of ashes or other material to be approved of by the Scottish Board of Health and the first party which shall be maintained in good order and repair by the second party and their foresaids at their own expense in all time coming until the same may be taken over by the district authority.”

[25] That being so, the draftsman could reasonably be assumed to have understood that a lane nine feet wide and formed of ashes was for access beyond pedestrian access. Why would people need pedestrian access to the rear of their houses when they clearly had more convenient pedestrian access from the front? The reference to maintenance until such time that the “lane” would be “taken over by the district authority” fortifies the position that this was a vehicular access.

[26] The draftsman could also reasonably be assumed to have known at the time of drafting that the Service Road was used for vehicular access to the rear of the properties on Cannop Crescent. There is a garage (at number 5) that still faces onto the Service Road and has no access from the front of Cannop Crescent. There was a garage facing onto the Service Road (at number 6) that had no access from the front of Cannop Crescent. The Defender’s predecessor in title to WLN55003 had a garage built on the common ground an accessed via the lane.

[27] There was no merit in the Defender’s suggestion that the service lane created by 1920 Feu disposition extended beyond number 5 and no longer exists. That position was untenable. Whether the Service Road as a Service Road extended beyond number 5 is simply unknown. No witness was able to speak authoritatively to that proposition. In any

event, even if the road did previously extend beyond number 5 at one time, the rights of those from number 5 to number 10 continued to subsist and to be exercised, as is evidenced by the garages at number 5 and number 6 facing onto the Service Road and the Defender's own evidence that it was used until 1992.

[28] The 1989 burden refers to the access as over a "service road or path". It is submitted that the word road would not have been used had vehicular access not been intended. It was clear in this case that there is a great deal more than the terminology or just the width of the Service Road that indicated the servitude was a vehicular one.

[29] The Defender gave evidence that the Service Road was used for vehicles before 1992. She made reference to Tim Anderson making use of it and to number 5 having a car in a garage at the far end that could only access the public road via the Service Road.

[30] The weight of documentary, photographic and oral evidence before the court demonstrated that the Service Road was being used for vehicular access to number 6 and number 5 from at least 1997 until the Defender blocked access in 2018.

[31] The previous heritable proprietor of WLN55003 (Mrs Anderson) provided written evidence in 2014 to the effect that (i) vehicular access was taken over the Service Road; and (ii) that "the residents have access for family cars" (Pursuer's production number 6). This, in the context of the registered servitude in each of the Defender's and Pursuer's titles, should be conclusive in this case. It was submitted that it was impossible to deny that the Pursuer has a servitude right of vehicular access.

[32] In response to the Defender's argument that any right of access enjoyed by the Pursuer in terms of his title has prescribed, counsel took me through the chronology of events established in the evidence. The evidence pointed to the Pursuer's right being created on 28 August 1989. The Defender admits to the Service Road having been used for

vehicular traffic until 1992. For section 8 of the 1973 Act to have any potential effect the Defender would have to prove that the servitude right of vehicular access had been unexercised and without any relevant claim being made in relation to it for 20 years. That would mean that she would have to prove that it had been unexercised between 1992 and 2012.

[33] The evidence showed that the Service Road was used regularly between 1997 and 2019 by number 6; both by the Shepherds and by the Pursuer and his tenants. There is photographic evidence of vehicular use dating to 2002 and 2003 (Pursuer's productions number 3, 4 and 5). The Defender admits that number 6 made use of the Service Road to transport inter alia a car, a caravan and a boat during the prescriptive period.

[34] Turning to the Defender's argument that any use of the access road was with permission of Mrs Anderson (who was at the time the heritable proprietor of WLN55003) and therefore not an exercise of the servitude right, this was entirely irrelevant. The Defender was confusing the law relating to extinction of a servitude by negative prescription on the one hand with the law on a servitude being created by positive prescription on the other. Permission or tolerance was not a relevant consideration in an argument that a right created by a deed has prescribed as a result of negative prescription. Section 8 of the 1973 Act is entirely silent on the matter of permission or tolerance. Where a valid servitude right of access is in place and the dominant tenement makes use of that access it is, by definition, making use of its right. The question of permission does not come into it. If it were to be a valid consideration, then it would make a nonsense of the law of servitudes as it would require the dominant tenement always to assert its right (by more than action) otherwise risk losing it. That would create constant uncertainty. The proposition was not supported by any authority.

[35] If the Defender's intention was to introduce an argument of abandonment by the back door, this should not be entertained. There was no Record and no fair notice. In any event, the court should accept the evidence of the Pursuer's witnesses. The requirements necessary to meet some sort of abandonment of the rights of number 6 were not met (Cusine and Paisley at paragraph 17.15).

[36] For abandonment to have taken place the Pursuer or his heritable predecessors would have to both (i) have ceased to make use of the Service Road (which they did not do) and; (ii) demonstrated an intention to relinquish the servitude. The evidence of Mark Shepherd was that if he had known about the servitude he would have made use of it and would not have asked permission. The Defender's position is that Mrs Anderson represented to Mark Shepherd (and the world at large) that he had no servitude right of access and that he asked for permission to use the Service Road. If that is true then there can have been no intention for him to relinquish something he did not know he had, and Mrs Anderson's heritable successor could not rely on the effect of a misrepresentation of the facts by Mrs Anderson.

[37] For all these reasons, the Defender had failed to establish that the Pursuer's servitude right of access had been lost by negative prescription, abandonment or the exercise of any collateral permission independent of that right.

[38] If the court was not with the Pursuer on his prescription argument, the Pursuer's fall-back position was that the Defender was personally barred from denying the Pursuer's right of access.

[39] It was submitted that the evidence showed that the Defender and her late husband were aware of the Pursuer and his tenants and employees removing old buildings from the rear of number 6 via the Service Road in vehicles. Neither the Defender nor her late

husband prevented them from doing so. The evidence showed that the Defender and her late husband were aware of the Pursuer and his tenants and employees taking materials from the public road to the rear of number 6 for the purpose of constructing a new garage. The Defender had admitted as much. The Defender and her late husband did not materially interfere with the Pursuer's access rights over the Service Road between 2016 and 2019. It was submitted that the Defender and her late husband knew that the garage that was being constructed at number 6 faced out onto the Service Road, and that access to it would only be via the Service Road. That was borne out by two pieces of evidence: (i) the conversation admitted to by the Defender between her late husband and Barry Beech at which the Defender's late husband expressed concern as to whether the garage was going to encroach over the common ground (because the Defender and her late husband intended to build on part of that ground); and (ii) the Defender's admitted close knowledge of Cannop Crescent, from which it can be inferred that she would have known that a car would not have been able to access the new garage from the front of Cannop Crescent and would only be able to do so via the Service Road.

[40] The Defender by her inaction as regards the Pursuer's vehicular use of the Service Road over a period of 3 years (between 2016 and 2019) justified the Pursuer in believing that he had a servitude right of vehicular access. On the basis of that belief, he constructed a new garage that is only accessible over the Service Road. The Pursuer would be prejudiced were the Defender now to be allowed to argue that there the Pursuer has no such right. The Pursuer was therefore personally barred from denying the Pursuer's right of vehicular access.

Defender's submissions

[41] The Defender's primary argument is that any servitude right of access enjoyable by the Pursuer has prescribed under the 20 year long negative prescription.

[42] The Prescription & Limitation (Scotland) Act 1973 section 8 (1) provides that if, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of 20 years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished. This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6 or 7 of this Act as being a right correlative to an obligation to which either of those sections applies.

[43] In any event, according to the Defender, any right of access which may have existed extended only to pedestrian, as opposed to vehicular access.

[44] The Defender argues that such access as there was had been taken as a result of Mrs Anderson giving her permission, as opposed to the exercise of the servitude right. The Pursuer's submission in response that this is irrelevant where there was an existing servitude right of vehicular access created by deed was misconceived. The issue of permission was fundamental. If a party seeks permission to use an access and permission is granted, and then that party proceeds to make use of the access, then it is axiomatic that the party is exercising that permission and is not exercising any other right. The "right has subsisted....unexercised" for the purposes of engaging the operation of s. 8 (1). In the Defender's submission, the evidence demonstrated the seeking and on occasions the granting or withholding of permission during the period between 1992 and 2019.

[45] In dealing with the Pursuer's fall-back argument that the Defender was personally barred from denying the access right, counsel also argued that this should be rejected. The leading authority on the law of personal bar was the case of *Gatty v MacLaine* 1921 SC (HL) 1, where Lord Chancellor Birkenhead explained the concept in his speech at page 7 as follows:

“Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.”

[46] If the court accepted the evidence of the Defender that she was led to believe that the new garage would face the front and not out the back, then the Pursuer could not demonstrate the necessary representation, reliance or prejudice necessary for a case of personal bar.

[47] The primary case for the Defender was that reflected by the pleas-in-law for Defender in the counterclaim. These are to the effect that the servitude right of access claimed by the Pursuer had subsisted for a continuous period of 20 years without being exercised, and had therefore been extinguished by the operation of prescription in terms of section 8(1) of the Act (plea-in-law 1). Accordingly decree of declarator should be pronounced as first craved in the counterclaim. It followed that any attempt by the Pursuer to exercise or otherwise assert the continuing the continuing existence of the now extinguished servitude right of access over the property of the Defenders is a wrongful infringement of the Defenders' heritable property rights. Accordingly interdict should be granted (plea-in-law 2).

[48] Counsel posed the question whether the access lane was a through route or a dead end. In his submission, the original service lane referred to in the 1920 Feu Disposition by Bents Estates Ltd extended beyond number 5 past the rear of number 4 and the remaining

houses in sequence as a through route. It fell into disuse except as a footpath. It was now a dead end. It is impassible to vehicular or any other traffic. Prior to 1985 the house plots at number 4 and others were extended to incorporate the area of what had been said service lane and beyond it. The service lane has not existed and no rights of access have been exercised for a prescriptive period of more than 20 years and since long before 1985. The access route was and is impassible to vehicular or any other traffic, and the right of access was therefore unexercisable.

[49] Whether the servitude was pedestrian only or extended to vehicular access was a question of construction of the deed. A burden of this kind had to be construed so to permit exercise in a way least burdensome to the servient proprietor. The grant of servitude contained in the Pursuer's title deeds therefore fell to be interpreted in the narrow sense as a pedestrian access, and did not extend to vehicular access.

[50] What the Pursuer claimed was an access route was more of an obstacle course. According to the Defender, the evidence demonstrated that all manner of obstructions were abandoned or jettisoned onto the lane. They had no interest in maintaining an access route and took no steps to do so. The evidence pointed to people intent on creating an obstacle course not a free access road.

[51] The late Mrs Anderson held sway over at least some of the other owners in relation to use of the lane. 6.1 Some appear to have accepted that Mrs Anderson's permission was required for vehicular use of the lane notwithstanding what was stated in their title deeds. On the Defender's view of the evidence, Mark Shepherd and Christina Beech had sought Mrs Anderson's permission for vehicular use of the lane.

[52] Counsel submitted that the evidence demonstrated that the owners at Cannop Crescent regarded the lane not as a service lane, but more like a private garden path which

one would only enter if expressly given permission or invited; or where that was implied for legitimate business such as postal delivery.

[53] The issue of permission was fundamental. If a party seeks permission to use an access and permission is granted, and then that party proceeds to make use of the access, then it is axiomatic that the party is exercising access in accordance with that permission rather than exercising any other right such as a right granted in the titles. If access was being exercised by grant of permission and not by exercise of the right granted in the title, then the right granted by the titles, ie the servitude of access, has subsisted unexercised for the purposes of engaging s. 8 (1). Such use is of no effect in law to interrupt prescription or to fortify the right claimed by the Pursuer.

[54] Mark Shepherd and Christina Beech had sought the permission of Mrs Anderson for vehicular use of the lane during the period from about 1996 to 2019. This was inconsistent with the exercise of the servitude right, and demonstrated the granting or withholding of permission by Mrs Anderson from time to time. There was support for this in Pursuer's Production 6 at page 6.1 where the position stated by Mrs Anderson is that "I grant access" - or in this instance withhold it - in relation to Mr O'Malley the owner of number 5.

[55] The Pursuer's claim involved increasing the burden of the servitude in a manner that is not legitimate. Regular use of the access for driving out of and returning to park in the new garage at number 6 is a different thing from episodic use of the service lane for occasional picking up and dropping off at the rear of number 6

[56] The evidence demonstrates that the rear boundary of number 6 (along with those of number 5 and number 7) was fenced off and inaccessible from the lane. The court should accept the evidence of Mark Shepherd that he had to remove the fence to allow the instances of access when permission was granted by Mrs Anderson. Also his evidence and that of the

Defender and Sheila Johnston about Mark Shepherd needing to climb over the fence to get into the lane when the Defender and Mr Orme were working there should be accepted.

[57] As a matter of law it was only the exercise of the specific right of access to number 6 that is asserted by the Pursuer in this action that can be relevant to the determination of this case. The activities of other owners in relation to their own particular rights and the specific routes involved are irrelevant. The evidence demonstrates only episodic vehicular use of the lane by the owners of number 6 in the period from about 1996 to 2019; and that was based on the exercise of permission sought from Mrs Anderson from time to time.

[58] As a matter of law, the activities of other owners are only relevant to their own particular rights and the specific routes involved. The activities of others are irrelevant to, and cannot form a basis for supporting, the continued existence of a servitude right relating to the Pursuer's property. Accordingly any activity of the owner of number 5 (Mr O'Malley) has no effect on the running of prescription running in relation to any servitude rights pertaining to number 6.

[59] It was however instructive that Mr O'Malley abandoned any attempt to assert a right of vehicular access over the lane and took his vehicles to another site.

[60] In relation to the Defender's personal bar argument, the court should accept the evidence of the Defender that she was led to believe that the new garage would face the front and not out the back onto the lane. If the court accepted that evidence, the Pursuer would have no case based on personal bar because the necessary ingredients of representation, reliance or prejudice would be lacking.

Decision

[61] The Defender's principal argument is that the servitude right of access contained in the Pursuer's title has subsisted for a continuous period of 20 years unexercised and so has been lost by prescription under section 8 of the 1973 Act. The Pursuer's and Defender's witnesses gave anecdotal evidence about what was happening on the ground over the years. The Pursuer's witnesses spoke to regular use of the lane by various proprietors for passage of vehicles up the lane or service road to the gardens or garages at the rear of the houses on Cannop Crescent until the Defender and her late husband padlocked and blocked the entrance to the lane in late 2018. They gave examples of such use well within the 20 year prescriptive period. In stark contrast, the Defender's witnesses described the lane as an impassable to vehicles, unusable and unused dumping ground for people's rubbish and rubble. They denied that vehicular traffic used the access road.

[62] For the reasons referred to by the Pursuer, I preferred the evidence of the Pursuer's witnesses to that of the Defender's witnesses. There was clear photographic evidence of vehicles, caravans and stored materials on the lane or in places adjacent to it and which could only be accessed via the lane. Moreover witnesses were able to date the photographs (eg by the age of a child shown in a photograph of the garden of number 6) to place them within the prescriptive period and so interrupting the continuous period required for prescription to operate. The onus is on the Defender to satisfy the court that the servitude right in the Pursuer's title has prescribed. She has failed to discharge that onus and the Pursuer is accordingly entitled to succeed on that ground. The servitude right still subsists and has not prescribed.

[63] In relation to the quality of the access right, the Defender avers that it related only to pedestrian access and did not extend to vehicles. As *Cusine and Paisley* note in the passage

referred to in submissions, construction of the servitude depends on the terms of the deed. Where the right is expressed in unqualified terms simply as “access” without specifying further, then in the absence of any other aids to construction the burden falls to be construed narrowly on the view that servitude rights are to be exercised *civiliter*; in other words in the least burdensome manner. In the present context that would mean pedestrian access only. However, in this case, I agree with Pursuer’s counsel that there is other extraneous evidence to assist construction of the right, and the court is clearly entitled to have regard to that to put the wording of the deed into context as envisaged by Cusine and Paisley. The reference to the 1920 burden in the titles granted in 1982 and 1989 strongly suggests, in my opinion, that the lane was for vehicular traffic because that deed requires the lane to be nine feet wide and constructed of ashes or similar material. That would not be necessary for pedestrian access, which in any event would be available, and no doubt more convenient, from the front of the houses on Cannop Crescent. I agree that the reference to maintenance of the lane until such time as it would be taken over by the local authority supports that view. The use of the term “service road or path” in the 1989 burden is also in my view strongly supportive of an intention that there should be vehicular access.

[64] It is clear from the evidence also that vehicular access was in fact the access which was being taken following on the grant of the servitude right. This is evidenced by the photographic and documentary evidence and the testimony of the Pursuer’s witnesses as referred to in the submissions. The letter from the late Mrs Anderson to the local authority dated 9 May 2014 provides further support. She specifically refers in her letter to vehicular access being taken over the service road, and mentions that “the residents have access for family cars”

[65] Taking all this together, I am satisfied that Pursuer has made out a case pointing to the use of the service road/lane for vehicular access to number 5 and number 6 from at least 1997 until the Defender blocked off access in late 2018.

[66] Given my decision on the principal argument, the argument on personal bar is redundant. However, I believed the Pursuer and Barry Beech that the Defender and her late husband ought to have known from their knowledge of the location and topography, and did in fact know, from conversations between the parties that the garage at the rear of number 6 was progressing and that it would have to face on to the lane. That being so, the Defender and her late husband did nothing to prevent the removal of old structures and bringing on site building materials for the new garage via the lane until the garage was nearly completed. At that point they decided to padlock the gate and deny access to the Pursuer and other neighbours. Therefore, had it been necessary to apply the doctrine of personal bar, I am satisfied that the Pursuer is correct in submitting that the test in *Gatty v MacLaine* would have been met, and that the Defender has by her words or conduct justified the Pursuer to believe that the erection of the garage was not objected to, and thereby allowed the Pursuer to alter his position to his prejudice. Had it been necessary to do so, I would have sustained the Pursuer's plea-in-law number 2.

[67] Finally, I turn to the Defender's argument that any access being taken along the lane was by grace and favour of Mrs Anderson and so could not be said to be by exercise of the servitude right of access contained in the Pursuer's title. The proposition was that the grant of personal informal permission was a wholly different kind of entitlement separate from the right in the titles, so that such access would not interrupt the 20 years negative prescription.

[68] I prefer the Pursuer's submissions to those of the Defender. The formal constitution of interests in land, such as servitudes, by grant in writing in the titles is a fundamental cornerstone of our system of land law designed to provide a degree of certainty that people can rely on in understanding what their rights and obligations are and defending them against others. As a consequence, the circumstances in which these rights can be overridden are understandably limited. The 1973 Act provides one such limitation, in this case section 8, whereby in certain well defined circumstances a right such as the one in question here can be extinguished through prescription if it has subsisted for a continuous period of 20 years unexercised or unenforced and without any relevant claim having been made in relation to it.

[69] In my view the Defender's argument is misconceived, unsupported by any authority and irrelevant. In a system of land rights based on written grants of title, a very specific, clear and limited provision by Statute whereby those rights can be extinguished is logical and understandable. However, a potential for such rights to be extinguished by an unregulated informal grant of a personal permission or licence to do something which the rights holder is already entitled to do, is not.

[70] I am of the opinion that the late Mrs Anderson took upon herself more than she was entitled to. To some of the residents of Cannop Crescent, she seems to have been regarded as having something almost akin to the status of a wise tribal village elder whose word was accepted. From the correspondence lodged and witness' evidence, she had expressed views about who would be allowed to do what upon the service road. There is no basis in the titles for the restrictive interpretation of access rights which was mooted by Mrs Anderson to some of the neighbours and expanded on in letters of objection to the local authority. It is remarkable that at least some owners did not bother to check their own titles or query the

position with their own solicitor but relied on Mrs Anderson's views. The access rights were specified in the titles of the proprietors and were enjoyable by them to that extent irrespective of any limitations expressed by Mrs Anderson.

[71] If a proprietor or group of proprietors are entitled to exercise a right of access granted by their titles, and in fact they do so, the fact that they were ignorant of that right and out of courtesy or misapprehension asked for and obtained permission to do what they were already entitled to do from someone who had no right to grant or withhold such permission, that could not result in the loss of their rights under their titles. It cannot be right in such circumstances that this would amount to an exercise of an entirely different right supplanting and displacing the one they were entitled to exercise. For these reasons, I am unable to accept the Defender's argument that any exercise of rights of access was referable to permission from Mrs Anderson, to the exclusion of the rights granted in the titles, and that it did not therefore interrupt the negative prescription.

[72] It follows that the Pursuer is entitled to succeed in the principal action and the counterclaim. He is entitled to decree of declarator and interdict as craved, together with the order sought ordaining the Defender to remove the obstructions and warrant to effect removal in the event that she fails to do so. I have determined that a period of 28 days from the date of decree would be sufficient time for the removal of these obstructions. I will refuse the craves in the counterclaim.

[73] Both parties invited me to reserve the question of expenses meantime. A hearing will be assigned thereon at a later date to be afterwards fixed. If in the meantime the parties are able to agree expenses they should let the Sheriff Clerk know so that the hearing can be discharged and the matter dealt with administratively.