

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2021] SC DUN 25

DUN-136-19

JUDGMENT OF SHERIFF L A DRUMMOND QC

in the cause

DONALD SKENE, residing at Fouracres, Fernie Castle, Ladybank, Cupar, Fife KY15 7RU

Pursuer

against

BRAVEHEART HOTELS LTD, a company incorporated under the Companies Acts (SC187085) and having its registered office at Fernie Castle, Letham, Cupar, Fife KY15 7RU

Defender

**Pursuer: O'Rourke QC, Anderson, advocate; Rollos, solicitors  
Defender: McKinlay, advocate; Mellicks, solicitors**

13 April 2021

The Sheriff, having resumed consideration of the cause finds the following facts admitted or proved:

**Findings in fact:**

[1] The pursuer owns Fouracres, Fernie Castle by virtue of a disposition granted in his favour by Mr and Mrs Alexander Watt recorded in the General Register of Sasines in the county of Fife on 10 January 1992 ("Fouracres").

[2] The defenders are the heritable proprietors of Fernie Castle registered in the Land Register of Scotland under title number FFE10307 ("the Castle"). The defenders are a limited company. Mr and Mrs Blackburn are directors of the company.

[3] Fouracres benefits from a servitude right of vehicular and pedestrian access over the roads within the Castle grounds between the main A914 public road and Fouracres as indicated by a broken green line on the defenders' Title Plan. Fouracres is the dominant tenement and the Castle is the servient tenement.

[4] The pursuer's servitude is in the following terms:

"a heritable and irredeemable servitude right of vehicular and pedestrian access to and egress from the dominant tenement over the Access Route indicated by a broken green line on the Title Plan for all purposes related to the use and enjoyment of one dwellinghouse and related offices within the dominant tenement.

(One) the heritable and irredeemable servitude right hereinbefore disposed shall be exercised in such a manner as will cause the minimum inconvenience and disturbance to the proprietors from time to time of the servient tenement and (Two) said servitude right shall at no time be used for any commercial purpose".

[5] The access route begins at a turn off from the A914 main road from where it crosses a burn before immediately splitting broadly into a D shape. The northern section passes by the front of the Castle on a straight tarmac road. The southern section forms a lower curved road which joins the northern section in the east. From the point where the two sections meet in the east, a road leads further east towards Fouracres. The Castle car park is immediately to the north of that point.

[6] The pursuer is able to access Fouracres using either the northern or southern section. When entering from the main road, the southern section runs downhill passing close to a burn and turns uphill again towards the north.

[7] The pursuer bought land and built Fouracres 31 years ago. He had previously enjoyed unrestricted access to and from Fouracres around the access route. The defenders have been trading as Fernie Castle since 1998. Mr and Mrs Blackburn ("the Blackburns") are directors of the defenders and operate the Castle as a hotel and wedding venue.

[8] In 2000, the Blackburns reversed the one way system round the access route, installed speed bumps and 5 mph signs. However those speed measures were not entirely successful.

[9] On 23 December 2018, following incidents involving hotel guests and near misses with vehicles, the Blackburns erected two sets of gates at the east and west of the northern section respectively. The west gates are visible when turning off the main road, at the start of the northern section. The east gates are located at the end of the northern section, beyond the front of the Castle, where the two sections meet.

[10] The gates are made of timber. In order for a car to pass through it is only necessary to open up one side of the gates. The bin lorry requires only one side of the gates to be open to pass through. An HGV may require both sides of the gate to be opened.

[11] The Castle is located between the two sets of gates. The defenders have erected a no entry sign beside the west gates which is visible to drivers travelling towards the Castle from the main road. The no entry sign at the west gates is more likely to divert visitors to use the southern section.

[12] The pursuer received a letter from Mr Blackburn dated 23 December 2018 informing him that gates were being installed and that he was expected to use the southern section as a two way system. There was no prior consultation with him. The letter states that one of the purposes of installing the gates was for health and safety reasons. The installation of the gates has improved safety for the defenders' guests.

[13] In order for the pursuer to access his property by vehicle via the northern section he will often require to get out of his vehicle and drive through two sets of gates to access his property. Sometimes the west gates are left open and the pursuer will not need to open

those himself. The east gates are generally kept closed when not in use. If the pursuer leaves the east gates open, the Blackburns usually shut them behind him.

[14] The west gates can be easily opened in either direction by a person of average strength and agility.

[15] The east gates are tied up with rope. They have a push sign indicating that they should be pushed in a direction towards the Castle. They are not installed correctly and drag along the ground when pulled away from the Castle. A person of average strength and agility would be able to open the east gates if pulled away from the Castle but only by exerting much more force than normal. If the east gates are pushed towards the Castle, as indicated by the push sign, a person of average strength and agility could open them easily.

[16] The pursuer has recently had a hip operation and struggles to open the east gates when pulling them away from the Castle. His late wife had suffered from arthritis and found it difficult to open the gates too. She hurt her back when she tried to open them. The pursuer does not close the gates after himself as he considers he is under no obligation to do so.

[17] The east and west gates are made of timber. They are in fairly good condition with not many cracks or distress features except for a crack in one leaf of the east gate. The crack has been caused by poor installation which has resulted in the gates being dragged along the ground when pulled open away from the Castle.

[18] In March 2020 the pursuer opened the east gates using a stick and took the gate off its hinges. He was expecting low loaders to arrive with fuel. It was at the start of the pandemic in March 2020 and he did not want to touch the gates with his hands. He took the gate off its hinges so that it could be kept open. He left a note on the gate explaining his

actions but this was never seen by the Blackburns. Taking gates off their hinges risks damaging the gates.

[19] In July 2020 the pursuer opened the gates using his off road utility vehicle. The vehicle has a bar at the front designed to open gates. It is hydrostatically powered using soft pressure to move forward. The pursuer used the vehicle to force open the gate away from the Castle and dragged it along the ground. The conduct was repeated from 9 to 24 July until the Blackburns reported it to the police. The police cautioned the pursuer. Using his vehicle to open the east gate in this manner has contributed towards damaging the gate.

[20] The southern section is 3.5 metres wide and relatively narrow. It has potholes which have been filled with thin tar which can lift out over time. It is a curved road with a bend which restricts sightlines. The verge of the road is rutted. There are posts to prevent cars from entering the burn which runs alongside the road which could be pushed over on impact with a vehicle. The road is not defined or kerbed. There are passing places and signs indicating passing places. There is a 5 mph sign. There are other areas of the verge of the road where cars can pass.

[21] When Mr Dryburgh, civil and chartered structural engineer, inspected the southern section in April 2019 the road was overgrown with tree foliage. However, the Blackburns have since cut back the foliage to improve sightlines. The defenders have installed additional passing places since Mr Dryburgh inspected the road. There are now 5 passing places in a stretch of road of about 250m. The southern section is used as two way access by hotel guests. Guests of all ages come and go from the Castle and there has never been a complaint about the gates. There have been very few accidents on the southern section in the last 20 years.

**Findings in fact and law:-**

1. That the defenders have not interfered with the pursuer's servitude right of access to a material extent, and that the erection of the east and west gates do not amount to an unreasonable obstruction to the exercise by the pursuer of his servitude right of access;
2. That the pursuer does not have a reasonable apprehension that the defenders will take steps to narrow or obstruct the access route;
3. That the pursuer is bound to exercise the servitude right of access in such a manner as will cause the minimum of inconvenience and disturbance to the defenders;
4. That using a utility vehicle to force open the gates and taking the gates off their hinges risks damaging the gates;
5. That the defenders have a reasonable apprehension that the pursuer will persist in opening the gates with a utility vehicle or taking it off its hinges.

**Interlocutor:**

Therefore interdicts the pursuer, his agents and or anyone acting on his behalf from damaging the wooden gates situated between Fernie Castle Hotel and the subjects at Fouracres by (i) driving at the gates in a vehicle, off road or otherwise, or (ii) otherwise damaging or interfering with their normal operation in any way including removing or attempting to remove them from their hinges;

In the principal action, sustains the defenders' fourth plea-in-law, repels the pursuer's fourth plea in law and grants decree of absolvitor in favour of the defenders; in the counterclaim, repels the fourth plea in law for the pursuer and sustains the defenders' plea-in-law; finds the pursuer liable to the defenders for the expenses of the principal action and counterclaim;

sanctions the employment of junior counsel and allows an account thereof to be remitted to the auditor of court to tax and report thereon.

## NOTE

### **Background and grant of declarator**

[1] This is a dispute over the erection of gates by the defenders on an access route at Fernie Castle in Fife. The pursuer has a servitude right of vehicular and pedestrian access over the access route. The pursuer avers that the gates are tantamount to an obstruction of the access route. He is seeking an order requiring the defenders to remove the gates and to interdict the defenders from narrowing or obstructing the access route. The defenders in turn seek to interdict the pursuer from damaging the gates by driving at the gates in a vehicle, and from damaging or interfering with their normal operation in any way. The action was initially raised by Mr and Mrs Skene. However, Mrs Skene passed away on 23 November 2019. Mrs Skene's interest now vests in Mr Skene, the pursuer.

[2] On 11 October 2019 the court on the unopposed motion of the pursuer granted declarator in relation to the pursuer's servitude right over the access route in the following terms:

“that by virtue of a disposition in their favour by Arthur Alexander Watt and Mary Judith Watt recorded in the General Register of Sasines on 10 January 1992 the pursuers have a servitude right of access for vehicular and pedestrian traffic from the main A914 public road by the driveway and other roadways serving the subjects known as Fernie Castle Castle (Title Number FFE10307) as indicated by a broken green line on the title plan to the said subjects; that the pursuers' said servitude right extends to the full extent of the route of the said driveway and roadways shown by a broken green line on the said plan and particularly extends to the northernmost portion of the said broken green line as it passes the premises of the Fernie Castle Hotel; and that the defenders removing that portion of the driveway or roadway from the pursuers' use constitutes or would constitute an unlawful interference with the pursuers' said servitude right.”

On the same date, on joint motion, the court dismissed the defenders' counterclaim. The defenders subsequently amended in a new counterclaim for interdict.

[3] This matter called before me for proof and I heard evidence on 27 November 2020 and 11 January 2021. All witnesses' evidence in chief was by way of affidavits lodged in process. All witnesses were cross examined and re-examined orally in court. The parties lodged written submissions and I heard supplementary submissions on 11 January 2021.

### *The evidence*

[4] The pursuer owns Fouracres, Fernie Castle by virtue of a disposition granted in his favour by Mr and Mrs Alexander Watt recorded in the General Register of Sasines in the county of Fife on 10 January 1992 ("Fouracres"). The defenders are the heritable proprietors of Fernie Castle registered in the Land Register of Scotland under title number FFE10307 ("the Castle"). The defenders are a limited company. Mr and Mrs Blackburn are directors of the company. Fouracres benefits from a servitude right of vehicular and pedestrian access over the roads within the Castle grounds between the main A914 public road and Fouracres as indicated by a broken green line on the defenders' Title Plan. Fouracres is the dominant tenement and the Castle is the servient tenement.

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(One) the heritable and irredeemable servitude right hereinbefore disposed shall be exercised in such a manner as will cause the minimum inconvenience and disturbance to the proprietors from time to time of the servient tenement and  
(Two) said servitude right shall at no time be used for any commercial purpose".

[6] The access route begins at a turn off from the A914 main road from where it crosses a burn before immediately splitting broadly into a D shape. The northern section passes by the front of the Castle on a straight tarmac road. The southern section forms a lower curved road which joins the northern section in the east. From the point where the two sections meet in the east, a road leads further east towards Fouracres. The Castle car park is immediately to the north of that point. The pursuer is able to access Fouracres using either the northern or southern section. When entering from the main road, the southern section runs downhill passing close to a burn and turns uphill again towards the north.

[7] The pursuer bought land and built Fouracres 31 years ago. He had previously enjoyed unrestricted access to and from Fouracres around the access route. The defenders have been trading as Fernie Castle since 1998. Mr and Mrs Blackburn (“the Blackburns”) are directors of the defenders and operate the Castle as a hotel and wedding venue.

[8] In 2000, the Blackburns reversed the one way system round the access route, and installed speed bumps and 5 mph signs. On 23 December 2018 the defenders erected two sets of gates at the east and west of the northern section respectively. The west gates are visible when turning off the main road, at the start of the northern section. The east gates are located at the end of the northern section, beyond the front of the Castle, where the two sections meet. Thus, the Castle is located between the two sets of gates. The defenders have erected a no entry sign beside the west gates which is visible when travelling towards the Castle from the main road.

[9] There were three main areas of dispute on the evidence. I summarise the evidence in relation to each as follows:

## THE OPERATION OF THE GATES

[10] The pursuer received a letter from Mr Blackburn dated 23 December 2018 informing him that gates were being installed on the access route and that he was expected to use the southern section as a two way system. There was no prior consultation with him. Although the letter states that one of the purposes of installing the gates was for health and safety reasons, there had, as far as the pursuer was concerned, never been a health and safety issue. The gates greatly interfere with the exercise by him of his servitude right of access. It is a nuisance for him to have to get out of his car and drive through two sets of gates to access his property. Whilst he acknowledged that the west gates are not much of a problem to open, the east gates are difficult to open because they are not installed correctly and drag along the ground. The gates are tied up with rope which also makes them difficult to open. The pursuer has recently had a hip operation and struggles to open the east gates. His wife had suffered from arthritis and found it difficult to open the gates too. She hurt her back when she tried to open them. Even a person of average strength would find it difficult to open the gates. The pursuer does not close the gates after himself as he considers he is under no obligation to do so. The Blackburns come out and shut the gates after he has used them. On occasion after his hip replacement he would travel around the grounds in his mobility chair. The Blackburns would shut the gates behind him when they could clearly see that he had difficulty walking.

[11] The pursuer acknowledged that on the east gates there is a sign saying "push" which would indicate the gate is to be pushed in a direction towards the Castle. But Mr Skene opened the gates away from the Castle as he thought he wasn't fit enough to open it the other way. He accepted that it wasn't necessary to open both sides of the gates for vehicular access, although an HGV would have to open both sides. He explained that before the gates

were installed, if there was a function on at the Castle, he used the southern section as a matter of courtesy.

[12] Mr Neil Skene, the pursuer's son, has been in the construction industry for 25 years. He described the gates as being of poor, non-agricultural quality and not suiting the setting of a national listed building. He thought that both sets of gates were equally difficult to open. Both drag along the ground and have done so since they were first erected. He did not agree that a person of average strength could open the gates without difficulty. They are not properly secured in the ground and do not meet in the middle. The west gates are often open but the vast majority of the time they are closed.

[13] Ms Heminsley has lived with her husband, Mr Campbell, at the coachhouse in the grounds of the Castle for 26 years. The one way system operated by the previous owners had worked well, running clockwise, entering along the northern section and exiting via the southern section. When there was a wedding on at the Castle, they would use the southern section as a two way system out of courtesy. In December 2018, they became aware that the Blackburns intended to alter the one way system by installing gates in the northern section and making the southern section a two way system. There was no consultation with them. Ms Heminsley considered the gates a nuisance as she had to get out of her car to open them. The gates are heavy and drag on the ground. She usually pulls back the right hand gate towards her due to health conditions with her back and arthritic ankles. Although she agreed the sign directs that the gate should be pushed, she finds it hard to do that. The west gates were quite often left open.

[14] Mr Roy Campbell agreed that the gates were poorly constructed and drag on the ground. He opens the gates in either direction. He thought they were more or less the same to open. He agreed that a person with average strength would have no difficulty opening

them. The gates do drag on the ground but it is not a major issue. He lifts the gate to manoeuvre it, to take the pressure off the part dragging on the ground. He agreed the west gates were more often open than not. He stated that there have been occasions when Mrs Blackburn had behaved inappropriately, challenging road users, filming them using the road, glaring at them and refusing to slow down when in her vehicle.

[15] Ms Kate Richardson previously lived at the stables but she had never tried to open the gates and used the southern section to avoid using them. She only ever used them if they were already open or if she saw a vehicle coming the other way on the southern section. She thought the gates looked difficult to open and had seen the pursuer drag the gate across the tarmac.

[16] Mr William Allison, fencing contractor, has 20 years' experience fitting gates in domestic, industrial and agricultural settings. In July 2020 he was instructed by the pursuer to assess the functionality and condition of the east gates. He reported that the gates are made of timber, in fairly good condition with not many cracks or distressed features except for a crack in one leaf. He considered that the crack was most likely to have been caused by the gates being poorly installed. The gate posts were not straight. They had not been secured deep enough in the ground. The gate crooks that are critical to the swinging action of the gate were uneven. One of the crooks was driven into the hanging post more than the other which causes the gate to drop as it opens. As a result, the gate had to be lifted clear or dragged along the tarmac. He estimated that between 300-400% more force was required than to open an average gate. Dragging the gates over tarmac will result in stress fractures, cracking to the gate frame and further wear on the slamming stile with slackening of the gate posts. This will only make it more difficult to open and close. Mr Allison confirmed he had not attempted to open the gate by pushing it in the other direction towards the Castle.

When shown the video lodged in process of the gate easily opening when pushed towards the Castle, he remarked that it hadn't opened like that when he looked at it. They were hung to swing the other way, away from the Castle. The ground sloped up towards the Castle so that if the gate didn't open away from the Castle it was unlikely to open when swung towards it.

[17] Mr Blackburn explained that he and his wife were concerned that Castle guests, especially children and the elderly, could have an accident when exiting the Castle onto the driveway to take access to and from the front lawn. Guests frequently congregate on the lawn across the driveway from the main entrance to the Castle. The distance between the front door of the Castle and the drive is very short, about 20 feet. The immediate proximity of the access driveway when stepping out of the front door to the Castle is a material health and safety concern. A vehicle passing even at relatively slow speed could cause a serious accident. The defenders previously attempted to address these health and safety concerns by installing 5 mph signs and speed bumps. However, there were two incidents during the summer of 2018 involving near misses with vehicles when guests' children were running around in and out of the Castle and cars were entering or exiting along the northern section. He erected the gates in December 2018 so that the guests would enter and exit via the southern section and park in the car park, avoiding a volume of traffic on the northern section during events. Mr Blackburn had delivered a card and Christmas present to the pursuer explaining what he proposed to do. Mr Blackburn's letter dated 23 December confirms that health and safety concerns formed part of the reasoning behind the installation of the gates.

[18] Mr Blackburn described the east gates as being easy to open. If pushed in the direction indicated on the sign, they will swing completely open. This was shown on the

video lodged in process. A person of average strength has no problem opening the gates. Since the gates were installed in December 2018 no works or repairs had been carried out. The right hand side gate is large enough for any car to pass through. A larger vehicle can use the southern section. The bin men use the northern section and open only one side of the gates to do so. The purpose of having the gates was for safety of guests particularly children.

[19] Mrs Blackburn agreed with her husband that the pursuer was entitled to use both the northern and southern section of the access route and was unrestricted in his access. However, since installing the gates there have been difficulties with the pursuer, his family, visitors and employees who have disregarded the anti-clockwise system. They have accessed and exited through the northern section rather than entering via the bottom section. This compounded the safety issues because there are passing places on the southern section and none on the northern section. The gates are capable of being easily opened. They are there for the safety of guests and are not an unreasonable impediment to access. The quality of the gates was very good. Guests a lot older than the pursuer come and go from the Castle and there has never been a complaint.

#### THE SOUTHERN SECTION

[20] The pursuer's evidence was that the southern section used as a two way access was dangerous. It is full of potholes and the side of the road can be difficult to see as it is covered with leaves. Although the defenders had attempted to repair the road, it is not properly constructed with stones filling in passing places. The defenders do not clean out the potholes properly and the tar they use is too thin and lifts out. Over the years the pursuer has repaired the road and spent £20,000 to £30,000 doing so as a gesture of good

will. The defenders have installed about 5 passing places but these are poorly constructed and small. They are very overgrown and easy to miss. HGVs have difficulty with the passing places. There are other areas where it is possible to pass but only in dry conditions. It is very dangerous to reverse near the burn.

[21] Mr Neil Skene agreed that two way traffic on the southern section is grossly unsafe. He explained that the verge on the southern section of the road is rutted and there is nothing to stop vehicles ending up in the burn. Although there are posts knocked in to the verge, to stop anything entering the burn, these can easily be pushed over. There are passing places but the roadway is not defined or kerbed. Trees overhang the roadway. The section is unlit, poorly surfaced, has obscured signage, road surface, soft verges and no protection from drowning in the burn.

[22] Ms Heminsley and Ms Richardson also agreed the southern section is in poor repair with many potholes. The extra Castle traffic on the road makes the conditions worse. The passing places are made from inadequate material and cars can sink into the ground. They are not being maintained and are overgrown, making them hard to see. When trucks or larger vehicles use it, it makes matters worse. The posts that have been erected will not prevent a vehicle from falling into the burn. On one occasion another driver came round a corner too fast and Ms Richardson was forced to reverse off the road.

[23] Mr Scott Dryburgh, chartered civil and chartered structural engineer, was instructed by the pursuer to carry out an inspection of the southern section in April 2019. His report is lodged in process. He inspected the site on 8 and 25 April 2019. He concluded that a two way traffic system is wholly unsafe and dangerous. The road is extremely narrow which is why passing places are needed. Emergency services vehicles will struggle to use it. He concluded that the southern section of the road was not fit for that purpose. The road

was tarred but at 3.5 metres wide it was too narrow. There were insufficient passing places. In addition, the left hand corner is too tight for bigger vehicles. The passing places were only effective for shorter vehicles to get off the road. Because it is a curved road the sightlines are not good. Cars would need to see what was coming to use the passing places or would have to reverse into them. He accepted in cross examination that his opinions might be altered if additional passing places had been installed, particularly since an ability to pull into a passing place depends on sightlines and there being a passing place. The surface is temporary, made up of loose stones which would have a limited design life. He agreed also that an average car is about 2 metres wide and that there is plenty of room for cars travelling in one direction. He thought there might be difficulty for a fire engine to manage the tight bend.

[24] Mr Blackburn explained that the defenders had upgraded the southern section, removing rhododendron bushes to improve sightlines and installing fencing in the area round the Castle to protect the guests and installing additional passing places since Mr Dryburgh inspected in April 2019. There are 5 passing places on flat ground for cars to pass as well as other areas on the road verge. Mrs Blackburn explained that in twenty years the only accident had been one involving her husband who was driving too fast and had ended up in the burn. She felt it was much safer for guests now. Many types of vehicles, buses and double deckers have all been able to enter and exit using the southern section.

#### ALLEGED DAMAGE TO THE GATES BY THE PURSUER

[25] Mr Blackburn gave evidence that in March 2020, the pursuer, as is shown in the videos, opened the east gates using a stick and took the gate off its hinges, before returning in the direction of his home. Usually every morning, the pursuer opens the gates without

travelling through. He thought this was done to cause a nuisance. Although the pursuer had claimed this was done in anticipation of receiving deliveries to his property, the delivery drivers often took the southern section as there are no entry signs for the northern section. The pursuer is also shown in videos from July 2020 using his mobility vehicle to forcibly open the east gates and immediately return to his own property. Mr Blackburn was concerned that the pursuer's action had caused damage. On looking at the gates, he could see cracking and scuff marks. The gate had been pushed by the utility vehicle the wrong way and had been dragged along tarmac. Mr Blackburn at first hoped the pursuer's method of opening the gate with a vehicle would stop but the conduct was repeated from 9 to 24 July until the Blackburns reported it to the police.

[26] The pursuer acknowledged that a video lodged in process shows him opening the east gates using a stick and taking the gate off its hinges. He explained that this occurred at the start of the pandemic in March 2020 and he didn't want to touch the gates with his hands. He was expecting low loaders to arrive with fuel that day. He took the gate off its hinges so that it could be kept open. He wrote a note on the gate to explain why he had opened the gates that way (although Mr Blackburn in his evidence stated he did not see any note).

[27] The pursuer also accepted that in July 2020 he had opened the east gates using his off road utility vehicle because he was having difficulties opening them. He did not cause any damage. There was a small crack in the gate but that had arisen because of the way the gate had to be dragged over the ground to open it. The utility vehicle could not damage the gate unless he drove into it with intent to damage it. He has not since used his vehicle or walking stick to open the gate and has no intention of doing so again. In some of the videos he accepted that he can be seen opening the gates with the vehicle before turning around to

go back in the direction he came from. His explanation was that he was opening the gates for an HGV coming in. The vehicle has a bar at the front and is designed for that purpose. It is hydrostatically powered using very soft pressure to move forward. He confirmed the police had cautioned him over the use of the gates. But he did not accept he had damaged the gates by using the vehicle.

### *The Pursuer's Submissions*

[28] The pursuer invited me in the principal action: (i) to sustain the pursuer's fourth plea-in-law; (ii) to repel the defenders' pleas-in-law, (iii) to grant an order *ad factum praestandum* as second craved; and (iv) to grant interdict as third craved. In the counterclaim the pursuer invited me to sustain the pursuer's first, second and fourth pleas-in-law, to repel the defender's plea-in-law and to refuse interdict as first craved.

[29] The pursuer submitted that the gates constitute an unreasonable obstruction on the pursuer's right of access and the court should order their removal in terms of crave 2. A servient proprietor must not do anything which would prevent the full exercise of the right by the pursuer as the dominant proprietor (*Servitudes and Rights of Way* by Cusine and Paisley at paragraphs 12.87-12.121). The pursuer is entitled to exercise the servitude free from unreasonable obstruction. What constitutes an unreasonable obstruction is a matter of degree which can be assessed against the circumstances of the case including the nature of the land in question and the existing legitimate uses of the road (paragraph 12.94). Gates will constitute an unreasonable obstruction where there is evidence that they will cause a material inconvenience to the dominant proprietor (paragraph 12.96).

[30] In his written submissions the pursuer suggested that the Equality Act 2010 may have some relevance in determining whether a gate causes an unreasonable obstruction and

that the test may be different from that set out in *Drury v McGarvie* 1993 SC 95. Ultimately, in oral argument, he accepted that no case had been pled in respect of the 2010 Act and that the test was as set out in *Drury v McGarvie*, namely whether a person of average strength and agility would be able to open the gate without material inconvenience.

[31] However, the pursuer distinguished *Drury v McGarvie* case from the present circumstances as it was concerned with agricultural gates constructed for the purpose of keeping livestock whilst no such purpose was being pursued by the defenders who had erected gates in an urban or residential setting, albeit one in the countryside. The extent of the inconvenience which must be tolerated by the dominant proprietor is proportional to the necessity of installing the gates by the servient proprietor. The defenders' suggestion that the gates are used as traffic calming measures is designed to obscure their true motives. The gates do not regulate speed over any distance. A driver can open gates and drive off again at speed, as demonstrated by the defenders' video showing someone driving past the Castle between the gates at speed. In any event, the gates are an excessive measure for that purpose. The removal of traffic increases the amenity of the Castle and is of obvious benefit to the defenders. Absence of lawful necessity ought to be balanced against the level of inconvenience to the pursuer and others using the access route. The pursuer's witnesses made it clear the difficulty they had in opening the gates and the inconvenience caused. It includes the increase in danger in using the southern section of the access route.

[32] The defenders' resistance to the proceedings, the conduct of Mrs Blackburn, and the Blackburns' desire to deter or prevent the use of the northern section of the access route gives rise to a reasonable apprehension that the defenders will take alternative steps to narrow or obstruct the access route. The court is therefore invited to grant interdict as third craved.

[33] In respect of the counterclaim, the pursuer submitted that it is obviously unfounded in fact and law. Interdict is sought against “the [pursuer], his tenants, agents and or anyone acting on his behalf”. The tenants do not act on the pursuer’s behalf and are not defenders in the counterclaim, therefore interdict is not competent against the tenants. Interdict is sought against these persons “while exercising the servitude”. The defenders’ case appears to allege vandalism by the pursuer and has nothing to do with the exercise of a servitude right of access under the servitude or otherwise. The counterclaim bears no relation to the servitude, therefore it is not competent and is irrelevant. There is in any event no basis for the claim for interdict. No evidence of actual damage to the gates was put to the pursuer. The reasons for cracking of the gate are explained by Mr Allison. The videos do not show any damage being caused to the gates. The videos show the gates being carefully opened by the pursuer in a vehicle designed for that purpose. There is no evidence that any damage was caused by opening the gate with a wooden baton. The pursuer’s explanation for why he opened the gate in that manner is credible and reliable in light of the unfolding pandemic.

[34] In respect of expenses the pursuer invited me to find the defenders liable to the pursuer in the expenses, and to sanction the employment of senior and junior counsel. The case is a difficult neighbour dispute in a niche area of law, involving expert and video evidence as well as giving rise to disputed facts.

### *The defenders’ submissions*

[35] The defenders invited the court to sustain the defenders’ fourth plea-in-law in the principal action and grant decree of absolvitor in favour of the defenders; to sustain the defenders’ plea-in-law in the counterclaim and grant interdict as craved (subject to certain

amendments); to find the pursuer liable to the defenders for the expenses of the principal action and counterclaim; and sanction the employment of junior, but not senior, counsel.

[36] The defenders emphasised that the nature and existence of the pursuer's servitude right of access is not in dispute and declarator had been granted unopposed. The issue is whether the pursuer is entitled to an order that the gates installed by the defenders should be removed. The legal test is whether the gates amount to an unreasonable obstruction on the pursuer's access rights. There is no general legal rule as to whether servient tenements are entitled to install gates. Each case involving the installation of gates turns on its own facts and circumstances (Cusine and Paisley, *Servitudes and Rights of Way*, at paragraph 12.96). In a rural setting, a recognised justification for installing gates is to prevent animals from straying onto neighbouring land (*Drury v McGarvie*). The law will recognise other justifications for gates depending upon the circumstances (Cusine and Paisley, paragraph 12.97). Safety of the public can be a legitimate reason. The circumstances which can justify the installation of gates are not closed. The level of inconvenience, and whether a gate represents an obstruction, is to be assessed by reference to the impact on a person of average strength and agility (*Drury v McGarvie* at p.101 D-F).

[37] Any gate will cause at least some inconvenience to those taking vehicular access. That is self-evident from the fact that a driver requires to exit their vehicle to open the gates. Yet the installation of gates can be justified on safety or other grounds. It is necessary to show material inconvenience before a gate constitutes an unreasonable obstruction. The test is highly fact sensitive. The nature of the properties is to be taken into account. For example, the installation of gates on an urban road would be assessed differently to gates on a rural road.

[38] The right to install a gate, assuming that it does not constitute an unreasonable obstruction, is an incident of the ownership rights of the servient tenement. Accordingly, the fact that a gate has not been installed previously does not assist a party seeking to challenge its installation, even if access has been taken for over twenty years without a gate. (Cusine and Paisley, *Servitudes and Rights of Way*, at paragraph 12.102). Even where opening a gate involves some physical inconvenience, that is not sufficient to support the conclusion that the gate is an unreasonable obstruction (Lord President Hope in *Drury v McGarvie* (at p.101 D-F). The pursuer would only be entitled to obtain the remedy of removal of the gates if they were in a position to prove that the gates were of such a nature which amounted to an obstruction which could only be dealt with by taking them down (per Lord President Hope at p101 F-G).

[39] The defenders were motivated to install the gates due to health and safety concerns. Following the incidents in summer 2018, children attending functions at the Castle narrowly avoided being hit by passing vehicles when emerging from the Castle entrance in the direction of the lawn. That prompted the Blackburns to install the two sets of gates in December 2018. Mr Blackburn's letter dated 23 December confirms that health and safety concerns formed part of the reasoning behind the installation of the gates. Even if the defenders held additional motives of the nature contended for by the pursuer that would not entitle the pursuer to an order for removal of the gates. The health and safety concerns are genuine and justify the installation and continued presence of the gates.

[40] The pursuer in oral evidence only complained about the east gates. He accepted that the west gates could be operated without difficulty. All witnesses accepted that the west gates were left open at least some of the time. The Blackburns acknowledge that the east gate can drag along the tarmac but only when opened in the wrong direction and away from

the hotel. Ever since the gates were installed there has been a “push” sign indicating the direction in which it should be opened. The sign was removed by persons unknown before a more secure sign was fixed on 1 January 2019 and it remains in place today. The Blackburns’ evidence is consistent with the video showing the east gate being pushed open towards the Castle with minimal effort using one hand. All of the pursuer’s witnesses who spoke to difficulties opening the east gates confirmed that they opened the gate away from the Castle, despite the push sign. Ms Heminsley and Mr Campbell did not describe any material difficulty using the gates.

[41] Even if the court was to accept that the gates could scrape along the ground (when the gates are opened in the correct direction) that would not be sufficient to support the conclusion that they were an unreasonable obstruction such that it was appropriate to grant a court order for their removal. Taken at its highest, the pursuer’s case would support a conclusion that some adjustment or repair was required to the gates and would fail for the same reasons outlined by Lord President Hope in *Drury v McGarvie*.

[42] The defenders’ position is that the gates would not constitute an unreasonable obstruction even if there was no alternative access route over the southern section. But the fact that the pursuer has the option of entering and exiting the Castle grounds without going through the gates, further supports the conclusion that, in the whole circumstances, the gates are not an unreasonable obstruction on the pursuer’s access rights.

[43] Castle guests use the southern section in both directions without difficulty.

Mr Dryburgh accepted he had not attended the site since April 2019 and that his opinions may be altered if additional passing places had been installed. Additional passing places have been installed since then: there are now 5 passing places from the main road to the east gates which is adequate for a short 250m stretch of road. In addition there is a grass verge

which can be used to allow vehicles to pass. Mr Dryburgh confirmed that the passing places were long enough for regular vehicles to enter and thus allow another vehicle travelling in the other direction to pass. He accepted that the installation of additional passing places may well address his concerns regarding drivers' ability to pull into a parking space when noticing a car coming in the other direction without requiring to reverse. Mr Dryburgh's criticism of the material used on the southern section was not relevant to this action: his view was the poor quality material would have to be replaced in a very few years. The southern section is suitable for two way access. The pursuer has an alternative route and does not require to open the gates.

[44] In relation to the counterclaim, the defenders submitted that the pursuer had admitted that on 24 March 2020 he attempted to take the gates off their hinges using a wooden baton and without the defenders' permission. The pursuer stated that he had left a note on the gate to explain that he had acted out of concern for Covid 19 but no note has been lodged and the Blackburns didn't see any such note. His actions show that he is fixated on having the gates removed. The pursuer also admitted that, in a series of incidents throughout July 2020, he drove a utility vehicle at the gates in order to open them (see videos productions 3.1(i)(a) to (g)). One of the posts on the east gates is damaged. Whilst there is no direct evidence that was caused by the pursuer's vehicle, the defenders submitted that is a reasonable inference. Even at low speed, a motorised vehicle is likely to apply significantly more force to the gates than a person using them normally. Even if the court is not persuaded to hold that the pursuer has damaged the gates, his conduct plainly carried that risk (as he knew or ought to have known). The pursuer was charged by Police Scotland in relation to these incidents. Given the pursuer's erratic behaviour, the Blackburns have no confidence in his assurances that he does not intend to repeat this conduct.

[45] The defenders submitted that interdict in the terms sought is justified by the pursuer's admitted actions. A grant of interdict in the terms sought would not impose any unreasonable or unwarranted restrictions on the pursuer's access rights. Indeed, it would be entirely consistent with his obligation to exercise his servitude rights in a manner which causes minimum inconvenience and disturbance to the defender.

### *Decision*

[46] I found all the witnesses who I heard give evidence to be doing their best to tell the truth and to be credible and reliable. Before I consider the law, I resolve the disputed areas of fact as follows.

### OPERATION OF THE GATES

[47] The evidence varied as to how difficult the gates were to open with witnesses giving different accounts. Most of the witnesses agreed that the west gates were left open quite often. Almost all of the witnesses, including the pursuer, who is a frequent user of the west gates, acknowledged that there was no real difficulty opening them. I therefore find that the west gates can be opened by a person of average strength and agility without any difficulty.

[48] However, the majority of the pursuer's witnesses stated that the east gates drag on the ground if pulled away from the Castle. I accept that evidence that if the east gates are pulled in a direction away from the Castle they require the operator to lift them up or to exert force in order to open them up. That was supported by the expert evidence of Mr Allison, who explained that the gates had been poorly installed. As a consequence the gates had dropped and when pulled away from the Castle dragged on the tarmac. I accept also that much more force than would normally be required to open a gate is needed in

order to lift the gate free of the ground or drag it over the tarmac when pulled in that direction.

[49] On the other hand, the balance of evidence, in my view supported a finding that when pushed towards the Castle, in the direction indicated on the push sign, the east gates opened relatively easily. I could see that for myself in the video clip provided by the defenders. I accept Mr Blackburn's evidence that no work has been done to the gate since they were installed to change how easily they open. Although Mr Allison stated that he thought the gates had been hung to open away from the Castle, neither he nor any of the pursuer's other witnesses attempted to push the east gate towards the Castle in the direction indicated on the sign. I find the video evidence to conclusively show that the gates can be easily pushed towards the Castle by a person of average strength and agility.

[50] I also accept the evidence of the Blackburns that their motivation for installing the gates was at least in part a health and safety one as explained in their letter of 23 December 2018. They had tried previously to address that issue by installing a 5 mph sign and speed bumps. However there had only been limited success and following two incidents in 2018 they decided to install the two sets of gates for the safety of their guests when exiting the Castle out over the driveway. The pursuer suggested that the Blackburns had other motives. However, their explanation at the proof was entirely consistent with the explanation Mr Blackburn gave in the letter of 23 December. It is entirely plausible that hotel owners would wish to fulfil their duties of care towards their guests in such a manner. The pursuer, supported by Mr Dryburgh, disputed that the gates would have the requisite effect as cars could nonetheless speed up between the gates. Cars may well do that, but it seems to me that where a relatively short distance of road is interrupted by the presence of two sets of gates that will have some impact on reducing the amount of speed that a vehicle

can build up over distance. I reject Mr Dryburgh's evidence on that aspect which was not, in any event, his area of expertise.

#### SOUTHERN SECTION

[51] Most of the pursuer's witnesses described the southern section as being unsafe to operate in two directions, for a number of reasons including potholes, poor sightlines, narrowness, running alongside a burn and inadequate passing places. Mr Dryburgh's evidence about the condition of the southern section must be seen in light of the fact that the Blackburns have carried out more work to the southern section since he inspected the section in April 2019. They have added additional passing places and cut back on the greenery to improve sightlines. Mr Dryburgh accepted in oral evidence that installing additional passing places would alter his opinions. I accept the evidence from the pursuer's witnesses that there are some potential hazards in the route, including potholes that have been filled temporarily and will require refilling and that it is a narrow single track road, following a burn, with posts that may be capable of being pushed over on impact. However, I find that the condition of the southern section is not such that would make it unsafe to operate as a two way road. The condition of it has improved since Mr Dryburgh inspected it. There are plenty passing places and signs to indicate where they are with improved sightlines. Castle guests use it without complaint. There have been no accidents in it over the years other than one where Mr Blackburn himself had been travelling too fast. There is a slow 5 mph sign directing users to travel slowly. I find that the southern section is of a construction that cars can use in both directions without posing any unacceptable risks of danger.

## ALLEGED DAMAGE TO THE GATES

[52] The crack in the east gate seems to have been caused by the east gates continuously being dragged along the ground, which in itself has arisen as a result of poor installation, all as explained by Mr Allison. When the pursuer was opening the east gates with his utility vehicle, I do not consider that he was, as was suggested, nudging the gates open. From the video footage it appeared to me that he was using the vehicle to force open the gates, certainly exerting more force than one would normally when opening a gate by hand. Whilst I am not persuaded on the evidence that his use of the utility vehicle caused the crack, it has, in my opinion, formed part of the continued dragging of the gate on the ground which has been the cause of damage over time. I recognise that it is a hydrostatically powered vehicle which has a bar on the front designed to open gates. But these gates are not within an agricultural setting intended to be operated by agricultural vehicles. They are gates on an access route in front of an operating hotel. Using a utility vehicle bar to push them open may well give rise to greater than normal forces and poses an inherent risk of damage, or of contributing towards any damage, otherwise caused by continually dragging the gates over the tarmac.

## THE LAW

[53] The parties were agreed that the law is that a dominant proprietor in a servitude of way is entitled to use it free from "unreasonable obstruction". Obstructions may be erected if they are an "immaterial interference with the rights of the dominant tenement". The case of stiles on a footway is an example of an obstruction which has been held not to interfere materially with the right of the dominant tenement to access. However whether or not an

obstruction is a material interference is essentially a matter of degree, dependent on the circumstances (Cusine and Paisley, *Servitudes and Rights of Way* at paragraph 12.94).

[54] A gate across an access road obviously causes some inconvenience to those exercising the servitude such as drivers of vehicles because it requires them to dismount from their vehicles and open the gate before they pass through. Nevertheless the courts have consistently upheld the general right of the owner to erect gates provided they do not interfere, in a fair and reasonable sense of that expression, with the public right of passage (*Drury v McGarvie* at page 99D-E). Only evidence to the effect that the installation of the gate will create a material inconvenience to the dominant proprietor will prevent its installation. What constitutes a material inconvenience will vary from case to case and is a question of fact. No general rule can be laid down that gates are either permissible or impermissible in all cases (Cusine and Paisley, *Servitudes and Rights of Way*, paragraph 12.96).

[55] The court held in *Drury v McGarvie* that a gate is an obstruction if a person of average strength and agility, "the ordinary able bodied adult" would be able to open it without material inconvenience. The onus is on the dominant proprietor to prove that the gates are an obstruction if he seeks to have them removed (p99B). That case has many similarities on the facts to the present one. The pursuers argued that gates were an obstruction because they were heavy, improperly hinged and had to be unlooped from posts, lifted for some height and dragged along the access road (p100-101). Since the pursuers were both elderly and suffered physical disabilities they argued that they had been rendered virtually housebound by the erection of the gates on their right of access. The court concluded that the question of the pursuers' disabilities were irrelevant to the question of whether the gates were an obstruction, explaining that was because a servitude right is

praedial in nature and is a real and not personal right. It would be contrary to its essential character that the burden on the servient tenement should alter from time to time according to the personal circumstances of the owner of the dominant tenement (p102D). Accordingly, having considered the authorities, the court concluded that the extent of the dominant proprietor's right of access falls to be determined by reference to a person of "average strength and agility". That is consistent with the principle that the servitude is presumed to be as little burdensome to the servient tenement as is consistent with its fair exercise. Since the burden on the servient proprietor is a continuing one, the burden must be measured by reference to a reasonable but fixed and constant standard, and not to the individual characteristics of the dominant proprietor for the time being. Accordingly the test is whether "a person of average strength and agility" would be able to open the gate without material inconvenience (page 103B – D).

#### APPLICATION TO THE CIRCUMSTANCES

[56] Does the erection of the gates in this case constitute an unreasonable obstruction on the pursuer's right of access? Do they cause a material inconvenience to the pursuer exercising his servitude right? Would a person of average strength and agility be able to open the gates without material inconvenience? In answering these questions, it is of relevance to consider the purpose for which gates have been erected. I find that they were erected in 2018 for reasons of public safety, notably the protection of hotel guests. I agree with the pursuer that the facts of the present case are different from *Drury v McGarvie* where the gates were erected to keep in livestock. Here the setting is not an agricultural one, but an access route leading to residential properties and a commercial hotel and wedding venue, albeit in the countryside. It is accepted in the authorities that health and safety may be a

legitimate purpose in an industrial setting to erect gates (Cusine and Paisley, *Servitudes and Rights of Way*, at paragraph 12.96). A hotel and wedding venue setting is not an industrial setting but nor is it solely residential with people coming and going as hotel guests and attending events. In my opinion, it might reasonably be expected that a hotel owner would erect gates for the protection of their guests where guests exit and enter the hotel within 20 feet of the access route. In my view the erection of the gates is justified for that purpose. Two sets of gates does not seem to me to be an excessive number along the distance of the access route and the context of that setting.

[57] There is of course inconvenience for anyone who uses the northern section by vehicle. They will have to dismount to open the gates and drive through. The west gates will not cause any such inconvenience on the occasions they are left open. When closed, I have found above that a person of average strength and agility would be able to open the west gates with no difficulty. The east gates will have to be untied before opening. I have also found that a person of average strength and agility would be able to open the east gates if pushed towards the Castle (as indicated by the sign) without any difficulty. A person of average strength and agility could open the east gates if pulled away from the Castle but only by exerting much more force than if opened in the other direction. Any inconvenience caused by having to exert that extra effort could easily be avoided by following the directions on the sign and by pushing the gates towards the Castle. The gates do not prevent vehicles from having access along the route. A vehicle as big as a bin lorry can pass though one side only and even a larger vehicle such as a wide HGV can gain access if both sides of the gates are opened. Any inconvenience from opening gates is avoided altogether if the southern section is taken. The southern section is a narrow single track road but as explained above, with the aid of passing places, can be used for travel in both directions

without posing unacceptable safety risks. In all of these circumstances, I do not consider either set of gates by themselves or together constitute an unreasonable obstruction or constitute material inconvenience to the exercise by the pursuer of his servitude right of access.

[58] In any event, if such a conclusion cannot, contrary to my view, be justified, the pursuer's remedy is not, in my opinion, to obtain an order for removal of the gates in their entirety. In *Drury v McGarvie* Lord President Hope at p101F held that the pursuers would only be entitled to the remedy of removal of the gates where the pursuers could prove that the gates amounted to an obstruction that could only be dealt with by taking them down. Where the gates required some adjustment or repair to minimise the inconvenience, the pursuers' averments had fallen far short of satisfying that test. In the present case, the pursuer has not proved that only removal of the gates would remove the obstruction. On the face of it, it would appear that the difficulties with opening the east gates in one direction arise as a result of the way they have been hung. The pursuer has not shown that repairing the gates would not resolve that difficulty. The pursuer has a right to alter or adapt the gates to his convenience and a right to enter onto the servient land to carry out the works required to maintain his servitude right, albeit it would have to be carried out at his expense (*Drury v McGarvie* at p103F).

[59] I reject the pursuer's submission that the defenders' resistance to the proceedings, the conduct of Mrs Blackburn, and the Blackburns' desire to deter or prevent the use of the northern section of the access route gives rise to a reasonable apprehension that the defenders will take alternative steps to narrow or obstruct the access route. The defenders did not oppose declarator that the pursuer has a right of access across the whole of the access route. The Blackburns confirmed in their evidence that they do not intend to deny

the pursuer use of the northern section. The erection of the gates is justified for health and safety reasons. The Blackburns have carried out improvements to the southern section. I accept there was some evidence about the unwelcoming conduct of Mrs Blackburn towards other road users but that does not of itself cause me to conclude that the Blackburns will take steps to obstruct or narrow the access route. I therefore refuse to grant interdict as third craved.

[60] In relation to the counterclaim, I note that the court previously ruled that the counterclaim was competent when the defenders sought to introduce it by way of amendment and I do not therefore consider that further here. I am not persuaded on the evidence that the crack on the gate was solely due to the way the pursuer opened the gate in July with his utility vehicle. It seems to me to be more likely to have been caused by the continuous dragging of the gate along the tarmac over a longer period of time by the pursuer and others opening the gate away from the Castle. However, I find that by opening the gate with his utility vehicle away from the Castle, and dragging it across the tarmac, the pursuer has contributed towards the damage to the gate. I reject the pursuer's submission that the pursuer is shown in the video footage as carefully opening the gates or nudging them open with his vehicle. The video image shows the vehicle opening the gates with relative force, relative that is to what might be used by a person opening them by hand. I accept the vehicle is hydrostatically powered and there is a bar at the front, designed for opening agricultural gates. But these gates are not agricultural gates and on the pursuer's witnesses' evidence are not of a robust quality. Opening the gates in this manner risks damaging the gates and I find that it has contributed to the existing damage on the gate.

[61] The video also shows the pursuer taking the gates off their hinges with a stick in March 2020. In my opinion, there was no need to lift the gates off their hinges to allow

traffic to pass even in the light of an unfolding pandemic. The pursuer could have easily opened the gate and left a note without taking it off its hinges. Removing gates from their hinges also carries some risk of damaging the gates.

[62] Although the pursuer states that he will not repeat this conduct, the use of the utility vehicle was repeated during July last year. His behaviour is indicative of his continued desire to keep them open. In my view, given his repeated previous behaviour and insistence on removal of the gates, the defenders have a reasonable apprehension that the pursuer will behave in this manner again and that this may result in or contribute towards damaging the gates. I therefore grant the interdict in favour of the defenders as craved prohibiting the pursuer from damaging or removing the gates. The defenders accepted in submissions that the words "his tenants" should be deleted from the terms of any interdict. The tenants do not act on the pursuer's behalf and are not called as defenders to the counterclaim. The defenders also accepted that the words from "while exercising the servitude" to "driveway serving Fernie Castle Hotel" be deleted from the interdict, accepting the pursuer's point at paragraph 12(2) of submissions that the interdict is to prevent alleged acts of vandalism. I grant interdict as craved subject to those deletions.

#### EXPENSES

[63] Since the pursuer has been unsuccessful in obtaining declarator in terms of craves 2 and 3, and the defenders have been successful in obtaining interdict in terms of the counterclaim, I award the expenses of the proof in favour of the defenders as being successful in relation to both the principal action and counterclaim.

[64] Section 108 (3) of the Courts Reform (Scotland) Act 2014 sets out the relevant factors for the court to consider when deciding whether to grant sanction for counsel. These are:

the difficulty or complexity, or likely difficulty or complexity, of the proceedings, the importance or value of any claim in the proceedings, and the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel. I do not regard these proceedings as being legally complex or difficult: only one case and one text book were relied upon by the parties in submissions. However, I recognise the claim was of importance to both parties, involving a neighbour dispute over access rights: the pursuer having employed counsel, it was desirable that the defenders followed suit so that the pursuer did not obtain an advantage. The defenders instructed junior counsel and were successful in both the principal action and counterclaim. Accordingly I consider it reasonable to sanction junior counsel only.