OUTER HOUSE, COURT OF SESSION

[2023] CSOH 59

A159/21

OPINION OF LORD HARROWER

In the cause

ALASDAIR JOHN MACNAB

Pursuer

against

(FIRST) THE HIGHLAND COUNCIL; (SECOND) IAIN GILMOUR AND

DAWN MARIE GILMOUR

Defenders

Pursuer: T Young; Currie Gilmour & Co
First Defender: Burnet KC, D Blair; DWF LLP
Second Defender: Garrity; Harper Macleod LLP

31 August 2023

The issues

[1] The pursuer is Alasdair MacNab. He owns, farms and resides at Kildun Farm, situated between Maryburgh and Dingwall and generally south-east of the A862. The farm has been in the MacNab family since 1977. In the 1990s, the Highland Council, who is the first defender in these proceedings, proposed to upgrade the A862 between Maryburgh and Dingwall. In order to do so, the Council proposed to acquire various pieces of land adjacent to the A862, including part of Kildun Farm. The pursuer's parents objected, but ultimately withdrew their objection, having reached an agreement with the Council on compensation

and other matters. According to the pursuer, that agreement included the question of access to and from the field lying closest to the north-eastern boundary of their farm over adjacent land also being acquired by the Council as part of the road improvement project.

[2] The Council did not dispute that the circumstances of the transaction might conceivably give rise to an implied servitude right of access in favour of the owners of Kildun Farm. However, it maintains that any such servitude right is limited to access for agricultural purposes, while the pursuer claims it contains no such restriction. The pursuer's neighbours, Mr and Mrs Gilmour, are the second defenders. They say that the pursuer has no right of access at all where he claims to take it, since any such access would involve crossing over what they say is their land. Meanwhile, the pursuer objects to the second defenders' right to defend these proceedings, on the basis that they do not own any part of the land over which he seeks to establish access rights.

[3] The action called before me at a proof before answer. Parties entered into a joint minute, in which a number of background matters were agreed, including the fact that the Council has recently granted planning permission for a tractor retail and servicing development over the pursuer's land. While not directly relevant to any of the issues for determination, this was perhaps the elephant in the courtroom, since the nature of the pursuer's right of access, and whether indeed he has a right of access at all, is likely to have consequences for whether and how the development goes ahead.

The remedies sought

[4] The summons concluded for the following remedies of declarator.

[5] Firstly, it sought decree of declarator that the pertinent of the pursuer's property registered in the Land Register of Scotland with cadastral number ROS5963 of "access to and

egress from the farm and lands of Kildun by means of all present accesses" included the right of unrestricted pedestrian and vehicular access to the A862 over the access road owned by the Council, and coloured pink on plan 11 ("Plan 11") annexed to the summons, to and from the places marked Access E and Access F on Plan 11.

[6] Secondly, it sought declarator that there was a public right of pedestrian and vehicular passage along the access road to and from the places marked Access E and Access F on Plan 11.

[7] Thirdly, it sought declarator that (a) the Council was personally barred from denying to the pursuer, his tenants, licensees and successors the right of unrestricted pedestrian and vehicular access over the access road to and from the places marked Access E and Access F; and (b) the pursuer had an assignable contractual right to take access over the access road to and from the places marked Access E and Access F.

[8] There was an alternative conclusion for payment but this formed no part of the present proof.

[9] Plan 11 was an annotated extract from the Land Register, prepared by the pursuer's father. I have appended it to this opinion, since otherwise the remedies sought are not capable of being understood. The A862 referred to in the first conclusion is shown on Plan 11 running generally south-west to north-east, and is the new road constructed as part of the road improvement scheme. Running in the same direction, but lying just to the north-west of the new road, is the old A862. Field 3, which is that part of the farm in its present form in relation to which access is being sought, is shown lying between the new A862 and the railway line lying generally to the south-east of the farm. Kildun's other fields, together with the farm steading, lie to the south-west of Field 3, and, apart from a corner of Field 2,

are not shown on Plan 11. Plan 11 also shows that part of the old Field 3 acquired by the Council for the construction of the new A862.

[10] What the conclusions refer to as the access road is shown coloured pink on Plan 11, running between the point marked as Access F, where the access road meets the new A862, and the level crossing to the south-east of the point marked Access C. A curiosity of the summons is that, while Access C is a gate to Field 3, it is not an access in respect of which any declaratory relief is sought. Rather, the conclusions refer only to the pursuer's alleged right of access between Access F and the point marked as Access E, lying more or less opposite the property shown as "The White House". The White House and its associated land is owned by the Gilmours.

[11] While not formally agreed by way of joint minute, since Plan 11 became the principal document by reference to which all matters of topography were discussed at the proof, I will refer to it when discussing the evidence in what follows. In particular, it will need to be consulted when reference is made in the evidence to other accesses, as well as land acquired by the Council for the construction of the access road.

The evidence

[12] The pursuer's case largely turned on events that took place over a quarter of a century ago. The pursuer himself was not present at the discussions that resulted in the agreement with the Council upon which he founds. His father, who was present, is now dead, as is his mother. In July 2019 they both swore affidavits, that were received in evidence and became part of the pursuer's proof. Understandably, there were issues of reliability that affected to a greater or lesser extent all of the evidence in the case. However, I

was prepared to treat all the witnesses as generally credible, subject to the reservations I have noted in what follows.

[13] Before turning to the affidavit and parole evidence, it is convenient to set out relevant aspects of the background as agreed by parties in their joint minute.

[14] The pursuer's mother acquired Kildun Farm by virtue of a disposition by the trustees and executors of Adam Waugh in her favour dated 27 July 1977 and 24 October 1985 and recorded in the General Register of Sasines on 30 July 1986 and again on 18 March 1997. Adam Waugh's title derived from a disposition in his favour dated 14 and 24 October 1966 and recorded in the General Register of Sasines on 14 November 1966.

[15] The Council acquired ownership of land lying south-east of the old A862 by virtue of a statutory conveyance by the (now late) James William Oag in favour of the Council's predecessor, the Highland Regional Council, dated 4 September 1995 and recorded in the General Register of Sasines on 3 October 1995. The land included the site of the original White House which is shown on Plan 11.

[16] On 18 February 1997, the Council executed a compulsory purchase order ("the CPO") relative to land required for the road improvement project. Plot 1 of the CPO comprised,

> "32,266 square metres or thereby of ground comprising arable land, access road and ditches forming part of the Kildun Farm, Maryburgh and situated generally on or towards the south east of the A862 Dingwall to Maryburgh Road."

This area was part of the old Field 3, ultimately acquired by the Council for the purposes of the road improvement scheme. Plot 7 of the CPO comprised,

> "9,996 square metres or thereby of ground comprising arable land and track to railway crossing forming part of Pitglassie Farm, Dingwall and situated generally on or towards the south east of the A862 Dingwall to Maryburgh Road".

This area lay to the north-east of the land conveyed to Highland Regional Council in the 1995 disposition referred to above. Plot 15 of the CPO comprised,

> "168 square metres or thereby of ground comprising track leading to railway crossing and situated generally on or towards the south east of the A862 Dingwall to Maryburgh Road."

Plot 15 was an area of land over which the access road now runs, and from which the pursuer seeks to establish access via Access E to Field 3. Plot 5 was a servitude right of pedestrian and vehicular access in favour of the Council over part of Field 3 lying adjacent to plot 15,

> "for the purpose of re-grading the ditch situated therein together with servitude rights of pedestrian and vehicular access for the future maintenance and repair thereof".

The plan annexed to the said CPO showed the extent of each plot of ground.

[17] On 19 February 1997, the Council issued a notice that it intended to exercise its powers under the Roads (Scotland) Act 1984 and the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 in respect of the CPO. It required any objection to the CPO to be lodged by 14 March 1997. While, as already noted, the MacNabs did initially object, between 18 February 1997 and 26 April 2000 the legal representatives of the Council, on the one hand, and Mr and Mrs MacNab, on the other, conducted negotiations with a view to the Council's voluntary acquisition of certain rights over plots of Kildun Farm identified in the CPO. Ultimately, by April 2000, the Council and Mr and Mrs MacNab concluded missives for the sale to the Council *inter alia* of plot 1, referred to in the CPO, together with the grant of servitude rights in favour of the Council *inter alia* over plot 5, referred to in the CPO, all for the price of £27,500. It was a condition of the missives that Mr and Mrs MacNab would withdraw Mrs MacNab's objection to the CPO, which they duly did on 27 April 2000. By virtue of a disposition by Mrs MacNab in favour of the Council dated 26 June 2000 and

recorded in the General Register of Sasines on 2 August 2000, Mrs MacNab disponed to the Council *inter alia* that area of land described as plot 1 in the CPO plan.

[18] On 5 May 2006, the pursuer acquired title to the remaining land owned by Mrs MacNab by virtue of a disposition in his favour dated 20 December 2005 and registered in the Land Register for Scotland on 5 May 2006. The subjects acquired by the pursuer are registered under the Title Number ROS5963.

[19] A general vesting declaration in respect of *inter alia* plot 15 dated 26 July 2001 was recorded in the General Register of Sasines on 14 October 2002.

[20] The Gilmours acquired ownership of two areas of land by virtue of the disposition by Julia Sheila Oag, daughter of the late Mr Oag, in their favour dated 8 March 2001 and recorded in the General Register of Sasines on 13 March 2001. The principal area of land is that area on which the present White House is situated, together with certain surrounding land. The smaller area lay just above the north-west corner of the White House land.

[21] The Gilmours and the Council entered into a land-swap in which the Council acquired the smaller of the two areas referred to in the disposition to the Gilmours by Julia Oag (that land having been registered on 22 July 2011 in the Land Register of Scotland under title number ROS13395), while the Gilmours acquired title to a thin strip of land that "squared off" the larger area they had acquired from Julia Oag (that land now being registered on 18 May 2011 in the Land Register of Scotland under title number ROS13246). Entry and vacant possession were given as at 10 December 2001.

[22] I turn now to the affidavit evidence.

Alexander Ian MacNab

[23] The late Mr Alexander MacNab was the pursuer's father. He was born on 25 March 1928. I will refer to him simply as Mr MacNab senior, and to avoid confusion, I will continue to refer to his son as the pursuer. I was mindful of the fact that his evidence, given by affidavit, had not been the subject of cross-examination. This was particularly important when it came to the details of discussions that had taken place with representatives of the Council, and where his account may not have been entirely supported by contemporaneous documents, or by the recollections of other witnesses who had been present at these discussions. As already noted, he was responsible for preparing Plan 11, which he referred to extensively in his affidavit.

[24] Kildun Farm was a mixed arable and livestock farm, managed by Mr MacNab senior, and owned by his wife. Up until the late 1970s, the old Field 3 was accessed at the point on Plan 11 marked Access A. Due to the increasing volume of traffic, and the use of larger farm machinery, the MacNabs took alternative access down a track running between the points marked Access D and Access C. Access via Access D to Field 3 was taken on foot, and occasionally by vehicles, though it was too tight a turn to use to exit the field. Access C, formed just above the level crossing, was regularly used from the late 1970s for vehicle access to Field 3 and on occasion to the rest of the farm. The MacNabs obtained permission, as a matter of "good neighbourly relations" from both the late Mr James Oag, owner of the original White House, as well as the late Mr R A S Lawson, who owned land lying generally north-west of the railway line and which included land over which the new White House is situated. This was necessary due to the increased volume of traffic that would be passing their properties. The MacNabs continued to use Access A for tractors until the construction of the new A862.

[25] At a meeting at Kildun on 3 February 1997, according to Mr MacNab senior, he agreed with the Council that an access to the newly configured Field 3 would be provided at the point marked X on Plan 11, at its north-west corner, to replace the access at the point marked Access A that was formerly taken to the old Field 3. Access at X was to be facilitated by the construction of a traffic island, but this did not proceed because of changes in design and funding.

[26] Mr MacNab senior stated that an alternative access was proposed "at access point 'D'" on Plan 11, and that this would have been acceptable to him. But it did not proceed because Mr Dugald Lawson, son of the late Mr Lawson referred to above, had requested that the Council provide an underpass to facilitate access from his farm at Pitglassie, lying generally on the opposite side of the A862, to the track.

[27] Ultimately, access to Field 3 was provided at Pitglassie junction on the A862, from the point marked Access F on Plan 11, and along a new road leading to Access C. The new road was tarred, up to a point just below the White House, roughly in line with the fence marked on Plan 11, before giving way to a metalled track that led to the level crossing. As noted above, the pursuer does not assert a right of access to Field 3 via Access C, but only via Access E. In his affidavit, Mr MacNab senior described Access E as "a vehicular access with a culvert which was installed by [the Council] as part of the accommodation works for the road improvements to replace Access D".

Anne Jessie MacNab

[28] The late Mrs Anne MacNab was born on 16 August 1928. She was the late Mr MacNab's wife. She owned Kildun Farm from 1977 until 2005, when she disponed it to the pursuer. Mrs MacNab confirmed that her husband acted on her behalf during all

negotiations and agreements with the Council. She deponed that no compensation was ever received for the loss of her right of access directly from the A862 to Field 3, because the MacNabs were to be provided with an equivalent unrestricted right of access at Pitglassie junction via Access F.

[29] I turn now to the parole evidence.

Alasdair MacNab (the pursuer)

[30] The pursuer was 66 years old. He was a farmer and veterinary surgeon, though he had stopped practising as a full-time vet in 2015. Having acquired title to Kildun from his mother in 2006, as previously noted, he began living at Kildun cottage in 2008. (He had annotated a slightly different version of Plan 11, showing certain additional features, but it was not materially different from the version annexed to the summons and which is appended below.) Prior to the road improvement project, Access A was the only access to Field 3 from the old A862. Access B showed a point of access between Field 2 and Field 3. While Kildun Farm was a large dairy farm, Field 3 tended to be used for arable farming. If Field 3 were in crop, access to Field 3 could not be taken via Access B from Fields 1 and 2 lying to the south-west as it would risk contamination.

[31] Access D had been constructed for the late Mr Oag, and allowed him to take access from the main road to a paddock in the north-east corner of Field 3. Access E was intended as a replacement for Access D, constructed at the time the access road was built.

[32] During the 1990s, the pursuer was working in Inverness, and saw his parents every day to discuss with them the details of the proposed CPO. He recalled the planning application by which the Council gave notice of their intention to develop the road improvement scheme. Item 3.1 of the minutes of the meeting of the Council's Roads and

Transport Committee on 30 August 1993 referred to "extensive discussions" having taken place with landowners

> "to determine their mode of operation, their concerns in connection with their property and also their access requirements in connection with the route to ensure that no critical items were left without consideration".

This accorded generally with his recollection of discussions regarding Field 3 needing separate access to meet the operational requirements of the farm. Having considered the alternatives, the committee's recommendation was to adopt a route following "an alignment to the lower side of the existing road through land which is part of Kildun farm".

[33] By letter dated 20 October 1993, the MacNabs objected to the new road, arguing for a widening of the existing road. Several meetings took place between Mr Samuel MacNaughton, of the Council, and the MacNabs. Eventually an agreement was reached at a meeting that took place at Kildun Farm on 3 February 1997. In advance of the meeting, Mr MacNab senior had prepared for his own use a list of "requirements to secure withdrawal of objections to road through Kildun". The pursuer was not at the meeting, but he discussed all the proposals with his father. He described the list as his father's "wish list" to "keep the farm functional and leave his options open". Item 7 read, "Access to the field at the White House strong & wide enough for all types of farm traffic". Item 13 read, "Planning permission for houses in 9 acre field at the White House". The "field at the White House" was Field 3.

[34] Following the meeting, by letter dated 11 February 1997, Mr MacNaughton sent the MacNabs' land agents a note of "agreed matters associated with the land acquisition", inviting them to agree "the details of these notes". Item 11 stated,

> "Access to the third field will be required from the new road and it was agreed that an agricultural access involving a double gate capable of taking a combine will be required at a location near the burn".

The location of the access being referred to in this note was at the north-west corner of Field 3 and was shown on the map by the letter "X". Item 17 stated,

> "Any proposals for housing and/or farmshop will require a planning decision in principle prior to assessing any roads needs associated with such development".

[35] Ultimately, the proposed access at point "X" was superseded, the Council having run into funding difficulties. Eventually, at some point between 1997 and 2000, the proposed access was moved to Access F. The pursuer was working away from home during this period.

[36] By letter dated 25 July 2000, the MacNabs' solicitor wrote to them enclosing a cheque for £27,673.81, being the purchase price of £27,500 plus interest, received from the Council for the acquisition of that part of Kildun Farm required for the road improvement scheme. If no access for Field 3 had been agreed, the MacNabs would have insisted on their objection or sought a greater sum in compensation. It was a condition of the missives that,

> "The Council in carrying out the A862 Dingwall-Maryburgh Road Improvement Scheme will incorporate the following items into the scheme:- (a) the layout and bellmouths associated with the Seller's access onto the A862 will be such as to allow for articulated vehicles to negotiate the access smoothly".

[37] Construction of the new A862 began in August 2000 and was completed by 2002 or 2003. On or about 5 May 2002, the pursuer's father sent two handwritten letters to a Mr Steele, one of the Council's engineers. One of these letters, headed "Drainage", complained about flooding to the paddock, and asked that,

> "Access be provided to the area for Mrs Gilmour and her horses from her own ground as was the case when Mr Oag rented the same field prior to the construction of the road".

A second, headed, "Access to field at White House", stated,

> "The field at the White House which used to have access at the line of trees below Humberston now has access beside the White House. I should be glad to have your assurance that the 25-30 trailers & tractors that will be used to remove silage from this field will be able to do so safely and easily and without damaging any sides of the access road from the new road to the railway gate".

I understood this to be a reference to access being taken at Access C, as described in Mr MacNab senior's affidavit. (A third letter dated 4 May 2002, headed, "Access road to Kildun" did not appear relevant, as it was concerned primarily with flooding from the new A862 and the old road down the "farm road".) The Council's principal engineer, Mr Potter, replied by letter dated 9 May 2002, in which he stated that, as far as he knew, the fencing and gates to the paddock rented by Mrs Gilmour had been completed in accordance with their agreement. Further, the access to the field at the White House "[had] been designed as a farm access road and [would] provide you with the equivalent standard of access you previously enjoyed".

[38] Between 2003 and 2016, if Field 3 were in grass, the MacNabs would use the access road 12 to 15 times a year to put fertiliser down. If there were animals there, it would be used daily, to check on them. The access road was also used by a variety of others, including the Gilmours, Mr Lawson of Pitglassie Farm, Network Rail, Scottish Water, SSE, the Cromarty Firth Fishery Board, fishermen accessing the bothies on the foreshore, and members of the public generally. There had been no issues during this period regarding use of the access road, with the exception of one incident when the Gilmours objected to a baler who had had to pull up on the access road because it was too wet to enter the field. The pursuer had never seen or been aware of the Gilmours maintaining the Kildun side of the access road, including the verges.

[39] In about 2016/2017, access at Access E was blocked by the erection of a new wooden fence in front of the original steel gate. There was a ditch running between the gate and the access road. Boulders had been placed on the verge of the access road, opposite the gate. A sign had been erected, stating, "Private Road. No Parking". From that moment on, the pursuer had had to use Access B to gain access to Field 3. The risk of contamination meant that he could not put Field 3 into crop. The whole area around Access E had become overgrown, showing a lack of maintenance. There had been a large pipe placed in the ditch to form a base over which Access E could be constructed. The Council had had to remove the pipe because it had become blocked with gravel.

[40] On 23 December 2016, the Council's planning review body gave conditional approval to an application by HRN Tractors Ltd for planning permission for the erection of a building for agricultural repairs, servicing and sales with associated access, parking, external display area and landscaping. The Gilmours had objected to the planning application.

[41] The pursuer regularly rented out grass fields, including Field 3, for sheep-grazing during winter. In January 2017, he and one of his tenants, Mr Glennie, could not enter Field 3 at Access C because the access had been blocked by large boulders.

[42] In 2006, Mrs MacNab, having previously sold Kildun Farm to the pursuer, assigned to him all rights in connection with the farm, including "all rights conferred upon [her] by Highland Council in favour of Field 3".

Alastair William Glennie

[43] Mr Glennie was a farmer and crofter, aged 72. He used to winter his sheep in "the wee field at the end of Kildun Farm" (ie Field 3) from October to February. After the access

had been blocked, he had to take his sheep through "the long field" near the Kildun steading (ie Fields 1 and 2, which had become amalgamated). If there were ewes in the long field, they would have to be penned before he could drive his lambs through to the wee field.

John Urquhart

[44] Mr Urquhart, aged 72, was a retired crofter, and was secretary and treasurer to the Dingwall & District Angling Club. He gave evidence in relation to the historic use by members of the association of the pre-existing track over part of which the access road had been constructed. It would be used by anglers three or four times per week, during summer, and by wild fowlers in winter. It was used by farmers to access their fields, by water bailiffs from the district fishery board, by the railway board, and by walkers. Prior to the 1980s, members of the club would take their vehicles directly across the railway line, but since then it had become necessary to make a telephone call at the level crossing and ask for permission. Members would park in a space on the east side of the track just before it reached the level crossing, which was wide enough for about three cars, parked nose to tail. In about 2001, Mrs Gilmour wished to fence off her field as she had a horse, which would have removed the car parking area. Mr Lawson (he did not say whether it was Mr Lawson senior or his son) intervened, pointing out the need for tractor and combine access down the track. That seemed to resolve the matter.

Alexander Munro

[45] Mr Munro was a farm contractor who had done work for the MacNabs for 30 years. The work involved all activities, except combining, for example, fertilising, silage, wrapping

and carting bales. Prior to the construction of the new A862, he took access to Field 3 from Access A, though he conceded that others may have taken larger vehicles through Access C. After the new road was built, he took access from Accesses E and C. He had had no interaction with the Gilmours, other than on one occasion in 2016, when he had had to leave his van on the access road because the fields were wet. Mr Gilmour has asked him to move the van. He never used Access B. He never witnessed any maintenance being done to the access road, its verges, or in relation to the ditch.

Edward Rush

[46] Mr Rush was 57, and an operations manager with the Cromarty Firth Fishery Board. He would use the access road six to eight times a year by car and on foot. He saw walkers using it frequently. On one occasion in July 2016, he had reversed his car down to the railway line and parked in the vicinity of Access C in order to phone for permission to cross the railway. While he was still in his car, Mr Gilmour opened the door of his vehicle, stepped inside and told him to move. Mr Rush replied that he could not move while Mr Gilmour was still in his car.

Samuel MacNaughton

[47] Mr MacNaughton, aged 74, was a retired chartered civil engineer, who had worked as a transport planner for the Council and its predecessors since 1970. As head of consultancy, he would be responsible for between seven and ten large projects at any one time. He would become involved in discussions with landowners only in relation to "critical" issues. He had been involved in the A862 road improvement project. He remembered Mr MacNab senior being keen on holding on to as much land as possible. He

could not now remember the details of the discussions he had had with him regarding access. So far as Access A was concerned, he pointedly stated that he could not remember having had any discussion about it "at all".

[48] It was common for landowners to ask about development. He would always refer them to planning. In compulsory purchase negotiations, the Council "could only match what exist[ed] on the ground, and try and replace what [was] lost in terms of infrastructure". For example, if a landowner was going to lose a boundary fence or a shed, the Council might replace it with a new one. If planning permission had already been obtained, it might be appropriate to grant a certificate of appropriate alternative development, and that might be relevant to any discussion regarding compensation. If access were lost, they would "try to replicate it". If a servitude were lost, they would try to replace it with a servitude when it "went to legal". The Council would have been researching the number of users of the pre-existing track. If they had rights over the old track, then the Council would try to give them rights over the new access road. When Mr MacNaughton was there, the main user of the track was Mr Oag and his customers. Mr MacNab senior used it, as did Mr Lawson, users of the salmon bothy and Network Rail.

[49] Mr MacNaughton was taken to a letter dated 22 September 2017, written by a Mr Stewart Fraser from the Corporate Governance section of the Council in response to an email from the pursuer. By this stage, although Mr MacNaughton had retired from the Council, the author of the letter stated that he had been able to discuss matters with him when preparing his response. In the course of his evidence, Mr MacNaughton was initially reluctant to be drawn on the detailed contents of the letter. However, when taken to the following passages, he ultimately confirmed that they represented his understanding of matters.

[50] The first passage was this.

> "It is understood that access [sic] track at the former White House which led to the railway crossing and the firth ran adjacent to the former White House, was fairly steep (perhaps 1:7 or 1:8) and was used by pedestrians, fishermen, pony riders and for [sic] farmers for farm vehicles but was not suitable for general vehicular use with the exit onto A862 having poor visibility to the north towards Dingwall. The section of new access that was installed at Pitglassie was a replacement for the top section of the former access track to the firth and joined the original access track at the entrance/exit to the underpass. It was intended that this replacement section would have the same status as the original access track; in promoting a CPO the Council would only be able to justify acquisition of ground to provide a replacement access taking account of the uses of the adjacent ground at that time".

[51] The second was this.

> "In relation to Kildun, use of the track had been for access to field 3 by farm vehicles for agricultural purposes so that the replacement of the top section of the new access was in turn provided for use by the farm vehicles for agricultural purposes. This was confirmed in the letter of 9/05/2002 from Geoff Potter".

This was a reference to the letter to Mr MacNab senior, already referred to in the pursuer's evidence, in which the Council confirmed that,

> "[The access to the field at the White House] has been designed as a farm access road and will provide you with the equivalent standard of access you previously enjoyed".

In evidence, Mr MacNaughton added that the access road was designed with a "thin surfacing; it was designed for light traffic". So far as the tarmacking of the access road was concerned, he said it was never the Council's intention to continue to tarmac it down to Access C.

[52] The third passage was this.

> "Although from the correspondence I understand the titles for Kildun did not contain express rights of access over the original access track, you have confirmed that access had been taken over this route for farm purposes so the extent of any rights acquired by use would be defined by the type of use which had been made of the access track. I'm advised that it was agreed with Mr Macnab [sic] Senior that a curve would be provided between the new access section and the point where it joined with the original access track to accommodate farm vehicles as Mr MacNaughton was advised that the access was taken to field 3 via the field gate

> adjacent to the railway crossing so that access could continue to be taken at the point it had previously been taken".

[53] Having confirmed in relation to each of these passages that they represented his understanding, Mr MacNaughton effectively adopted them as part of his evidence. This was hardly surprising, since, as previously noted, the letter appeared to have been drafted on the basis of discussions that its author had had with Mr MacNaughton.

Geoffrey Potter

[54] Mr Potter, aged 72, was a retired civil engineer who had been employed by the Council from 1978 until 2010. He designed and managed road schemes from their inception, through the contracting stage and on to construction. He was referred to his letter dated 9 May 2002 to Mr MacNab senior, in which he confirmed that,

> "[The access to the field at the White House] has been designed as a farm access road and will provide you with the equivalent standard of access you previously enjoyed".

By "equivalent", he meant equivalent to the old White House access road from Access D. Mr Oag was the main user of this road. Fishermen, farmers, the owner of Pitglassie, Mr MacNab senior, the railway company and members of the public all used it. In his letter, he was speaking from the point of view of a roads engineer, not that of a lawyer.

[55] Regarding Access E, Mr Potter was not sure if access had been taken there prior to the construction of the access road. By July 2003, the access road was finished. The Council agreed with Mr MacNab senior that they would do extra work to benefit Mrs Gilmour, who was renting the paddock. This involved constructing a "bridge, gate and pipe" to facilitate access at Access E for her horse to the paddock. The proposal was to lay the pipe in the

watercourse or ditch, then surround it in gravel so that it could be crossed on foot or by horse.

[56] The top part of the pre-existing track had been surfaced only roughly, and the tarmac extended only partly down the slope before giving way to gravel. Mr Oag had had a lawnmower repair business. Lawnmowers would be brought down the track on trailers pulled by farm vehicles. But neither the former track nor the new access road were suitable for general vehicular use. Neither had been adopted. The access road was not constructed to an adoptable standard, being neither thick enough nor wide enough. It had been designed for use by a limited number of agricultural vehicles.

[57] Mr Potter was involved in surveying the old Field 3 and the old A862. He had no recollection of any Access A. He didn't recall any discussion of providing access at the point marked "X" on the plan. He didn't recall that it was no longer possible to have a "ghost island" on the new road at that point, causing the location of the access to be changed. There was "never an access at point X in [his] mind". There was always to be an access to Field 3, but not directly from the new A862.

Dugald Alexander Lawson (giving evidence remotely by Webex)

[58] Mr Lawson, aged 71, was a farmer at Pitglassie Farm. His father bought the farm in 1952. His father owned the field to the north of Field 3 between the old A862 and the railway line. There was a glebe to the south of Field 3 that they would rent from the Church of Scotland, and to the north-east of that, four other fields. In 1971, Mr Lawson senior conveyed the old White House to Mr Oag. In 1992, he, Mr Dugald Lawson, sold further land to Mr Oag. By that stage the old White House was due to be demolished, but Mr Oag wished to remain in the area and build a new house. Prior to the new access road being

built, the track from Access D to Access C would be used by himself and salmon fishers working at the bothy. It was a pretty rough tractor track. Members of the public would use the track; it formed part of the Round Dingwall Walk. He used to drive his cattle across the road at Pitglassie junction (Access F), when it used to be a two lane road, but under the road improvement scheme it became a three lane road and he persuaded the Council to build the underpass in order that he could take his cattle across more easily.

[59] He used the new access road a lot. He had crops in the bottom fields. It was also used by the owners of the White House, and the pursuer. The fishery board continued to use it, as did pedestrians. He had no recollection of a gate being installed at Access E. He was not aware of anyone taking access at Access E to Field 3. He conceded that the pursuer and his contractors might have used the access road to take vehicular access to Field 3, but doubted it as he had a clear sight-line from his farm over to the access road and Field 3. There was also a steep bank on the field side of Access E. He was unsure when it had been blocked up; he had nothing to do with that. Members of the angling club might have walked down there, but they could never have taken a car, and he would not have allowed them to do so. His father might have permitted anglers to take a car down to the level crossing, but he never did. He had no recollection of himself intervening in any dispute over car parking between the angling club and Mrs Gilmour. He conceded that Mr Rush would have taken vehicular access down the track, but he was not aware of anyone else taking vehicles between Access E and Access C. He was aware that Field 3 had been used for hay or silage. He could not understand why the pursuer would wish to take access to Field 3 via Access F and Access E. He had a perfectly good access at Access B. Access C would in any event be preferable to Access E as it had a double gate. He had no objection to the pursuer taking access through Access E so long as it was for agricultural purposes only.

He had reached an agreement with the Council that Access F would not be used for any future development.

Iain Gilmour

[60] Mr Gilmour, aged 61, was a driving instructor and had been living at the White House since he and his wife bought it in 2001. He claimed, somewhat implausibly, that he only became aware of the CPO four or five years ago when investigating the planning application for the tractor and maintenance yard in Field 3. The access road had been completed within a year of the Gilmours' moving in to the White House. The land around it was a paddock for the horse. Mr Gilmour did not drive down the track, though there were people who came to collect the manure who did. Parked cars tended to damage the track. He put up the "Private road. No parking" sign in 2017. He never sought to prevent anyone otherwise using the track. In 2005/2006, in return for a one-off payment, the Gilmours granted permission to Network Rail to install a telephone. The line ran from the level crossing, up the verge on the White House side of the access road, crossed the access road, and continued along the verge on the other side.

[61] Once in 2005, Mr Lawson asked if Mr Gilmour would mind if he repaired a few pot holes in the bottom part of the track near Access C. Other than that, he had no recollection of any maintenance being carried out to the access road. The Council did not maintain the access road. No one did. Every few years, or whenever it needed it, the Gilmours hired contractors to clear the ditches all the way down to the railway. They have been cleared five or six times, at a cost of £500/600 each time. The Council did come in 2022, at the request of the pursuer, but that was the first time they had done that. When, in 2016, the ditch

overflowed at Access E into the MacNabs' field, he arranged for contractors to remove the pipe from the ditch.

[62] Field 3 contained sheep in winter and cows during the spring and summer. The only arable crop he could remember was once in 2006/7 when the pursuer was trying to grow barley. He only rarely saw machinery in Field 3, perhaps three times a year, not more than ten. Mr Lawson took agricultural vehicles down the access road.

[63] He accepted, albeit after some pressing by counsel for the petitioner, that the public were entitled to take some form of access down the access road. He had mentioned the existence of a "public access route" when objecting in 2015 to the application for planning permission. He was aware that pedestrians used it, as did Mr Lawson's vehicles, Network Rail, the SSE (probably), and the Cromarty Firth Fishery Board. He acknowledged that he had blocked up Accesses C and E. He did that in 2016/2017. He put the sign up later. He claimed that his solicitor had advised him to do so. He denied that the MacNabs had been using these accesses for over 15 years from the time he bought the White House until he blocked the accesses. He conceded, under reference to photographs of the access road taken in 2021, that the verge was overgrown on the Field 3 side, but said that he had stopped maintaining it because of this legal action.

[64] Mr Gilmour had been aware of his wife using the paddock in Field 3 once, for about two months, in 2003/4. She stopped renting the paddock after that, and had since used an area of paddock connected to the White House and still owned by Mr Oag's daughter. So far as he was concerned, "nothing happened" at Access E for the next ten years. In relation to the confrontation with the water bailiff, Mr Rush, he had simply asked him to remove his vehicle from the verge.

Dawn Marie Gilmour

[65] Mrs Gilmour was aged 60 and worked part-time for the Crown Office and Procurator Fiscal Service, and also as a stock controller for Tesco. She and Mr Gilmour had lived at the White House since 2001. Again, somewhat implausibly, she claimed not to have been aware of the CPO until 2016/2017, after the Gilmours had taken legal advice following the grant of planning permission to HRN Tractors. She maintained this position, even though the plan attached to the disposition to them showed a "proposed public road" and a "proposed access". Asked whether she was not interested in how it was proposed she would gain access to her new house, she replied that she left it up to her solicitor; the CPO process was never mentioned.

[66] She claimed the Gilmours have had to clear the ditch five or six times at a cost of approximately £500 a time. The Gilmours strimmed the verge and planted bulbs. They cleared the undergrowth from the verge yearly. In 2016 the ditch became blocked near Access E. The contractor advised that the pipe was the main cause, and asked if they wished it to be removed. The ditch was cleared in 2022 by one of the Council's contractors. She had asked them not to do anything until she had spoken to her solicitor. She agreed to allow them to continue their work. No other maintenance had been carried out by the Council.

[67] She had no recollection of the incidents spoken to by Mr Rush, Mr Urquhart, and Mr Munro. She recalled seeing a land rover and a trailer parked near the level crossing, which may have been Mr Glennie's. This would have been in around January 2017, after Access C had been blocked off. The pursuer and his wife were there, trying to put sheep into Field 3. She recalled one incident in the last 10 years when the pursuer had sent a digger down to Access C that was wider than the track and broke up the verge. She had never otherwise tried to stop anyone using the track to get to the firth. She tried to

discourage parking because the verges were too soft. The Gilmours had granted a "wayleave" to Network Rail to allow a telephone cable to be installed down the verge. They signed a document, but hadn't kept it. She previously kept two horses, and now just the one horse, in the paddock surrounding the house, and in a paddock to the north-east of the White House. She had used the paddock in Field 3 the first year after they moved in. The fence enclosing the paddock from the rest of Field 3 ran all the way to the railway track, blocking Access C. She was shown a map of the area used by the Council's engineer, Mr Steele, in July 2003 to illustrate certain works that the Council had proposed to carry out. She conceded that the paddock was shown there as stopping short of Access C. She conceded that there might have been a large double gate at Access C when she moved in to the White House, but didn't wish to be drawn on whether it might have been there to allow access to be taken to and from Field 3 and the track. She couldn't explain why, if she thought that the Gilmours owned the access track, she would have allowed the Council to construct the access at Access E to allow her horse to enter the paddock. It had a post-and-rail fence running across the ditch on each side of the pipe. She never took her horse box over it. She had used the paddock twice, for periods of one month at a time. Access E was not wide enough to take a tractor and trailer. She had never seen the pursuer using it.

[68] She recalled seeing sheep in Field 3 in the winter, and cows in summer. The only time she had seen the MacNabs or their contractors using the access road was the day he had tried to put sheep into the field after it had been blocked off. Mr Lawson and his contractors took a tractor down the access road, but they would not park on it. She had a good view of Field 3 from the White House. She would see the pursuer on his "quad bike", checking fences and the like. The pursuer accessed Field 3 from Access B. Other users, such

as walkers, cyclists, Mr Lawson, the fishery board, Network Rail, SSE, used the track more or less frequently, but never to access Field 3.

Caroline Cook

[69] The pursuer led Ms Caroline Cook, aged 55, a chartered surveyor, and an expert in digital mapping. She had been instructed to prepare a report on the ownership of the access road. She had examined the deed plans associated with a number of the relevant dispositions and mapped them onto the Ordinance Survey Mastermap, with a view to determining the boundaries of the land owned by the pursuer, the Council and the Gilmours.

[70] She concluded that the western boundary of plot 15 in the CPO was adjacent to Field 3. There was no gap between the pursuer's property and plot 15. Plot 5 on the CPO was that area of Field 3 over which the Council proposed to acquire a servitude right of access. There was no gap between plots 5 and 15, confirming that plot 15 was bounded by the pursuer's land. Her mapping of the title plans suggested that the whole of the Access Road as far the southern end of plot 15 was owned by the Council.

Submissions

The pursuer's submissions

[71] Counsel for the pursuer moved the court to grant each of the three declarators noted above. He adopted his written submissions, in which he summarised his argument as follows.

[72] First, the CPO and general vesting declaration (and the various related statutory and voluntary conveyances) amounted in effect to a single transaction. One clear intention in

that overall transaction was to provide Kildun Farm with an equivalent right of access to Field 3 to the one previously enjoyed at Access A. Such a separate access to Field 3 was reasonably necessary for operating Kildun Farm. As such, it gave rise to a servitude by implication over the adjoining land forming part of the access road acquired by the Council. That servitude was recognised in terms of Section A of the pursuer's registered title. There was no evidential basis on which it ought to be restricted to access for agricultural purposes only.

[73] Secondly, the access road was a private road. It was acquired and constructed by the Council under statutory authority. It was intended to be dedicated to public passage of both pedestrians and vehicles. As such, there was a public right of passage over it that entitled the pursuer to access Field 3 at Access E.

[74] Thirdly, in February 1997, the Council agreed with Mr MacNab senior (as agent for Mrs MacNab) that Field 3 would be entitled to have a separate access from the new A862 equivalent to Access A. Although the precise location of the access changed as the design changed over time, the consensus between the parties that a separate access would be provided never changed. That agreement was reached at meetings and in correspondence intended to have serious commercial consequences, and was intended to be binding.

[75] The Gilmours, ultimately, should not have appeared. The effect of a valid general vesting declaration was to vest the relevant land in the local authority from the date it was recorded or registered (Town and Country Planning (Scotland) Act 1997, Schedule 15, para 37). On 14 October 2002, the Council recorded a valid general vesting declaration in respect of *inter alia* plot 15. There was no gap between plot 15 and Field 3. Therefore, the pursuer was not seeking to establish access rights over land owned by the Gilmours. The

Gilmours' evidence of "possession" of any part of plot 15 fell far short of the nature or quality of possession sufficient for positive prescription.

The Council's submissions

[76] The Council was prepared to accept that "the removal of part of the pre-existing track and its replacement" by the access road might be capable of amounting to the sort of exceptional circumstances in which a servitude would arise by implication (written submissions, para 34). It accepted that it built the access road "on the understanding that the MacNabs had a right of access over the pre-existing track, including for vehicular access for the purposes of agricultural activities in Field 3 up to Access C" (written submissions, para 29). They provided the access road to allow the continued exercise of those rights, but not for the exercise of increased rights in terms of a different type or volume of vehicular traffic. The access road had been designed to at least the same standard as the top part of the pre-existing track, and was in fact constructed to a better standard, but not to an adoptable standard.

[77] The access road having been designed to replace the top part of the pre-existing track, ie from Access D to Access E, it was intended to include a public right of passage for pedestrians and cyclists, such as had been enjoyed over that part of the pre-existing track. It was necessary to avoid confusion between such limited rights as the public might have enjoyed and whatever vehicular access had been taken by private owners in pursuance of their property interests.

[78] There was no evidence of the Council and Mr MacNab senior entering into any contract to provide the owners of Kildun Farm with access to Field 3. Any such contract would certainly not have been for "unrestricted" vehicular access. The only contract entered

into was in terms of the formal missives concluded in 2000. No mention was made there of express servitude rights to Field 3. Mr MacNab senior's 1997 "wish list" had been prepared and discussed over three years before the MacNabs eventually agreed to withdraw their objection in April 2000. Further negotiations took place in the interim with Mr MacNab senior wishing to retain his objection as leverage. Any understanding reached in 1997 would have been subject to formal legal agreement. Mr MacNaughton was an engineer, not a lawyer. The negotiations were not about access rights but the design of the road. The Council had reasonably proceeded on the basis that the MacNabs had been taking access to Field 3 at Access C via the pre-existing track for agricultural purposes.

[79] So far as ownership of the access road was concerned, the Council's position was that it owned the solum of the access road between Access F and Access E and a little way further down the access road towards the level crossing as far as the end of plot 15, a point which could be seen on the ground as the end of the tarred section of road. The Council agreed with the pursuer that the Gilmours had not evidenced possession sufficient to found positive prescription.

The Gilmours' submissions

[80] The Gilmours' motion was that I should refuse to grant the first two declarators.

[81] There were well-known criteria that required to be fulfilled before an implied servitude would be recognised, not least the requirement that the benefitted and burdened properties should have been possessed together and then severed, and that the servitude must have been absolutely necessary for the comfortable enjoyment of the benefitted property (Scottish Land Law, Gordon & Wortley, 3rd ed, Vol II, para 25-041, which, however,

qualifies the requirement of absolute necessity to one of being "absolutely necessary, or at least reasonably necessary"). None of the criteria were satisfied in this case.

[82] The pre-existing track had always been and remained a private access track. The new access road from Access F to where it joined the pre-existing track was a private access track. The verges of a private track were not presumed to be part of the track. There was no evidence that the verges ought to be treated as part of the track. There was no evidence of the general public having ever used the tracks with vehicles, and certainly not between Access F and Access E, or across the verge at Access E. Nor was there any evidence of any public right of passage over the accesses.

[83] Counsel for the Gilmours indicated that he would make no submissions in respect of the pursuer's pleas in law supporting the third conclusion (written submissions, para 2). However, because the pursuer's third conclusion sought a declarator of a contractual right to take access over the Gilmours' property, counsel did make submissions in support of the Gilmours' ownership of the land/verge at Access E (written submissions, paras 30, 31). Part of that submission involved an assertion that the Council, never having possessed plot 15, had never "perfected" its title to that area of land for the purposes of the Prescription and Limitation Act 1973. As such it could not compete with the Gilmours' title based as it was on at least ten years of possession following the recording of their 2001 disposition in the Register of Sasines. I understood counsel, following a discussion, to have departed from that submission at the bar, at least insofar as it was premised on a need for the Council to have perfected its title to plot 15. However, I understood him to have maintained his position that the Gilmours had reacquired title to the relevant area on the basis of their recorded title combined with ten years' possession.

Decision

Preliminary issue - the Gilmours' interest

[84] The pursuer invited me to deal with the question of the Gilmours' right to defend these proceedings as a preliminary issue, since if they did not own any of the land over which he claims a right of servitude, then they could have no interest in opposing the action.

[85] As I have noted, it did not appear ultimately to be in dispute that the Council acquired title to the land included in the general vesting declaration on 26 August 2001, when it was recorded in the Register of Sasines. Nor did I understand it to be disputed that the land thereby vested in the Council included plot 15. The Gilmours' principal argument seemed to be that plot 15 did not include the verges, and that there was therefore a gap between plot 15 and the land included within the pursuer's title. I reject that argument. In the CPO plan there were no gaps between, on the one hand, plots 15 and 17 (the latter being that part of the pre-existing track extending from the end of plot 15 up to the junction with the old A862) and plot 1, being the MacNabs' Field 3. That is confirmed by the fact that plot 15 was immediately bounded to the south-west by plot 5, being a servitude right of access in favour of the Council over part of Field 3. The absence of any gaps or overlaps was also confirmed by Ms Cook in her evidence based on the mapping of the various plans onto the Ordinance Survey Mastermap.

[86] I also reject the Gilmours' argument based on prescriptive re-acquisition. Neither the pursuer nor the Council disputed that ownership could be "reacquired" in this way, at least in principle (Gretton & Reid, Conveyancing, 5th ed, para 8-33). However, they described it as highly unusual in practice, and requiring clear evidence of possession. Such possession must be overt. Occasional or intermittent acts of cutting the grass, sweeping, weeding and clearing verges would be insufficient (*Hamilton* v *Dumfries and Galloway Council* [2007]

CSOH 96, para 34; *Stevenson-Hamilton's Executors* v *McStay (No 2)* 2001 SLT 694, para 14). The photographs referred to in evidence demonstrated that little, if any, maintenance had been carried out on the side of the access road nearest Field 3, other than within that area of land that was indisputably within the Gilmours' ownership. The clearing of ditches, as well as being very occasional, extended down the whole length of the pre-existing track, the greater part of which was in the Gilmours' ownership.

[87] Mrs Gilmour had made no objection to the Council's entitlement to carry out accommodation works designed to facilitate access to Field 3 at Access E. Her claim not to have been aware of them, even though they had been designed for her benefit, was not credible. It was also telling that the Gilmours only sought to block access to Field 3 and erect a sign in 2016/2017, after HRN Tractors Ltd had applied for planning permission.

[88] I accept the Council's submission that it possessed the whole of that part of the access road within its ownership not only by making it available for its intended purpose to those with rights of access over it, but also through the continual exercise of such rights by those to whom the access road was made available. There was no evidence that the Council had refused to clear the ditch when asked to do so or to repair any defect in any part of the access road within their ownership. The repairs to pot-holes referred to in evidence all occurred on that part of the access road within the GIlmours' ownership.

[89] In my judgment the Council clearly owns the solum of the access road between Access F and Access E, including its verges, and proceeding down the access road towards the level crossing to the end of plot 15 on the CPO plan. It follows that the Gilmours have no title and interest to oppose the first and third conclusions for declarator sought by the pursuer, and to that extent, therefore, I am in agreement with the submissions made by Mr Young for the pursuer. However, the pursuer's second conclusion for declarator was

premised on the existence of a public right of passage over the Council's land, and since the pursuer's exercise of any such right must be consistent with the rights exercised by others, including the Gilmours, it would be going too far to suggest that the Gilmours had no right to be heard in relation to this aspect of the dispute.

Implied servitude

[90] The pursuer and the Council have joined issue over the nature and extent of any implied servitude, rather than on whether the circumstances of this case were such as to give rise to an implied servitude of any description (see the Council's written submissions, para 34). However, the facts and circumstances upon which the Council conceded that an implied servitude might arise are not identical to those relied upon by the pursuer. In its carefully worded written submissions, the Council stated that it is prepared to accept that "the removal of part of the pre-existing track and its replacement by [what it referred to as] the New Access" might amount to the exceptional circumstances giving rise to an implied servitude (*Ibid*). For the pursuer, however, it was the loss of Access A that was critical. This has implications for the nature of the servitude contended for, since Access A provided the pursuer with access to and from the old A862 directly from his own land, and in that sense might be said to be "unrestricted". By contrast, the pre-existing track was not owned by the MacNabs, and any rights they may have had to take access over it were necessarily not those of an owner.

[91] The pursuer relied heavily on the meeting that took place between his father and Mr MacNaughton in February 1997. The pursuer himself of course was not in attendance at that meeting, although he was able to refer to the affidavit, in which Mr MacNab senior asserted that, "As far as [he] was concerned", it was intended that he was to get a right

equivalent to what he had lost at Access A (affidavit, para 8). But Mr MacNab senior's "wish list", drawn up in preparation for the meeting stated only that access to Field 3 was to be "strong & wide enough for all types of farm traffic". Moreover, Mr MacNaughton's letter dated 11 February 1997, confirming what had been agreed, stated only that,

> "Access to the third field will be required from the new road and it was agreed that an agricultural access involving a double gate capable of taking a combine will be required at a location near the burn".

There was nothing in either of these documents to indicate specifically which access the new access was intended to replace, although its description as an "agricultural access" does not support the claim that it was intended to be unrestricted.

[92] Mr MacNaughton's note of what had been agreed at the February 1997 meeting also stated that, "Any proposals for housing and/or farmshop will require a planning decision in principle prior to assessing any roads needs associated with such development". Counsel for the pursuer submitted that if access had been intended for agricultural purposes only then there would have been no point in keeping alive the possibility of an application for planning permission for housing. However, this interpretation places far too much weight on what, in 1997, was still the early stages of negotiations that took a further three years to complete. Clearly, the MacNabs' existing use of Field 3 as farmland had already demonstrated a need for an agricultural access. But the roads needs associated with a housing development, with or without a farm shop, would clearly depend on its size, and the expected volume of traffic. As Mr Potter made clear, this would have implications for the design and construction of the road, how many courses it should have, its width, whether it should have drainage, a pavement, street lighting, and so on. It is fanciful to suggest that Mr MacNaughton, in agreeing to provide an agricultural access "involving a double gate capable of taking a combine", had already committed the Council to building an

access road that would be capable of accommodating a housing development of wholly unspecified dimensions. Rather, he was simply making it clear that, before the Council could even begin to carry out an assessment of whatever additional roads needs might be associated with any kind of development, he would expect the MacNabs to have first obtained planning permission in principle.

[93] Whatever may have been the position in 1997, by 2000 – a period during which the pursuer had been working away from home and in relation to which he was unable to assist the court – the Council's focus was on replacing the top part of the pre-existing track. This was for the benefit not just of the MacNabs but a number of different users, the principal one being Mr Oag and his customers, but also Mr Lawson, users of the salmon bothy and Network Rail. As Mr MacNaughton put it, by this stage, the Council's legal department would have been researching the number of users of the old track, and if they had rights over it, the Council would try to give them rights over the new access road. Fundamentally, whatever rights the MacNabs had over the new access would have to be consistent with the rights of others. I would therefore disagree with the pursuer, when he said that,

> "There was no suggestion in any of the evidence that the right of access he had down the [pre-existing track] was in some sense more restricted to the one he had at Access A" (written submissions, para 59).

I would also disagree with him when he suggested that I must disregard any assurances the Council might have had to give to others, such as Mr Lawson (written submissions, para 96). The fact that, when providing a new access to replace the access track, the Council had to accommodate a number of different, potentially competing, users is relevant to any understanding of what, in all likelihood, it would have been prepared to agree with Mr MacNab senior.

[94] There was no suggestion in the evidence that the new road was designed in such a way as to allow the unrestricted access of anybody. Both Mr MacNaughton and Mr Potter confirmed that the road was given a thin surfacing, suitable only for light traffic. Moreover, it would appear from Mr MacNaughton's evidence that the curve in the access road where it meets the old track was designed specifically to allow Mr MacNab senior to take access to Field 3 at the point it had previously been taken, that is, from Access D to Access C. It was the pre-existing track that Mr Potter was referring to in his letter of 9 May 2002, when he said that,

> "[The access to the field at the White House] had been designed as a farm access road and will provide you with the equivalent standard of access you previously enjoyed".

While neither witness could recall any discussion over Access A, they were both quite firmly of the view that the loss of an unrestricted right of access at that location did not form any part of their consideration of the MacNabs' needs. In reality, the scope of the servitude which the pursuer now seeks would impose a burden on the Council's land far in excess of anything that might reasonably have been in the contemplation of parties (*Andrew Louttit & others (Louttit's Trustees)* v *Highland Railway Company* (1892) 19 R 791, *Keith* v *Texaco* 1977 SLT (Lands Tribunal) 16, *Garson* v *McLeish* 2010 SLT (Sh Ct) 131).

[95] An important part of the pursuer's case was that they would have sought more in compensation for losing an unrestricted right of access than they in fact received. However, there was no evidence of what discussions took place between Mr MacNab senior and the District Valuer or of what considerations were taken into account before the purchase price had been agreed. According to Mr MacNaughton, it would have been necessary to obtain planning permission or a certificate of appropriate alternative development in order to justify an enhanced level of compensation.

[96] In these circumstances, I have concluded that, if there was any agreement about access at all, it was not an agreement to provide the unrestricted pedestrian and vehicular access for which the pursuer contends. A similar conclusion follows if one approaches the matter, not on the basis of what the parties should be taken to have agreed, but on the basis of what is reasonably necessary for the enjoyment of the land. I have no difficulty with accepting that the pursuer's preferred configuration of his mixed arable/dairy farm may reasonably require separate access to Field 3. However, this would not make access to Field 3 at Access E a reasonable requirement for all farmers, let alone all owners, in perpetuity. Further, if I am being asked to recognise a right of unrestricted access, including access for non-agricultural use, then the specifically agricultural justification for separate access to Field 3 would appear to have disappeared altogether.

[97] There is, therefore, no basis for an implied right of access as extensive in scope as is sought by the pursuer in its first conclusion. The terms of that conclusion refer to the description of the pursuer's property in the Land Register as being Kildun Farm, "together also with access to and egress from the farm and lands of Kildun by means of all present accesses including that between the points lettered E and F on the said map". The "said map" is of course the cadastral map for Kildun Farm, but it is unclear what was meant by "the points lettered E and F" since the annotations to Plan 11 do not appear on the cadastral map. Be that is it may, the pursuer submitted that the effect of the Keeper's so-called "Midas Touch" would be to create a servitude of access by the fact of registration itself (Land Registration Act 1979, s3(1)(b), Cusine & Paisley, Servitudes and Rights of Way, para 11-07; the pursuer's title having been registered in 2005, before the coming into force of the Land Registration etc (Scotland) Act 2012).

[98] Counsel conceded that the court is entitled to have regard to extrinsic evidence to construe "the description of the servitude" so conferred (written submissions, para 79). He referred to the evidence of the pursuer and of Mr Munro to the effect that, in 2005 when the pursuer's title was registered, Access E was a "present access" on to Kildun Farm. There was of course a conflict in the evidence regarding the extent to which the pursuer, or his tenants, took access through Access E before it was blocked by the Gilmours. The Field 3 side of the access appeared rather steep in the pictures, and may have involved crossing a watercourse. But even accepting the pursuer's evidence, and that of Mr Munro, it did not amount to evidence of unrestricted access as distinct from access solely for agricultural purposes. The Land Register should not be interpreted as enlarging the scope of any rights of access that he already had, and I have already held that any servitude right of access down the access road is not so extensive as to amount to unrestricted right of pedestrian and vehicular access.

[99] It is on this narrow ground that I would decline to grant decree of declarator in terms of the first conclusion. However, I was not in any event persuaded that the circumstances of the present case were apt to found an implied servitude in principle.

[100] Firstly, counsel for the pursuer cited the Inner House's opinion in *ASA International Limited* v *Kashmiri Properties (Ireland) Limited* 2017 SC 107, which emphasised that, "Each case must be assessed individually on its own particular facts" (para 22). *ASA International Limited* itself cited *McLaren* v *City of Glasgow Union Railway* (1878) 5 R 1042, in which Lord Justice-Clerk Moncrieff said that "every sale of land implies that all incidental rights are included in the conveyance, which are essential to the reasonable enjoyment of the sale" (at p1047). The very enunciation of that principle, the Lord Justice-Clerk continued, implied a generality that must vary its application according to the circumstances in which it is

applied. "It resolves, necessarily, in all cases, into a question of presumed intention, which of course may be inferred or excluded by the nature of the transaction out of which it arises" (1047).

[101] But just as each case involves an application of principle to facts, so it is important not to lose sight of the principle that is being applied. In this case, it is difficult to see how the sale of parts of Kildun Farm to the Council necessarily carried with it, as an incidental to that sale, any right of access over neighbouring land. Counsel for the pursuer urged me to look at the "various transactions involved in the conveyance as a whole" (written submissions, para 51(2)), relying on *Bowers* v *Kennedy* 2000 SC 555. I took him to mean that I should consider the sale of Kildun to the Council together with the acquisition of land by compulsory purchase, including plot 15, by the Council. However, *Bowers* should be read as a case of more or less simultaneous grants by a common author. If the Knackery alone had been sold, and the farm retained, there would have been no difficulty in implying the necessary access to the public road from which the Knackery would otherwise have been cut off. The Knackery should not lose its access, the court held, simply because the farm had been conveyed to a third party some eight days previously (*Bowers*, paras 19, 20).

[102] But then counsel for the pursuer urged me not to treat common authorship as a necessary precondition for the implication of a grant or a reservation, but only as a particular "fact pattern", albeit perhaps the most common one (written submissions, para 50). However, that is not the way it appears to have been treated in the leading textbooks. The need for a common author is regarded by the learned author of the relevant chapter in Scottish Land Law, not simply as a fact pattern, but as a condition that follows from the fact that the servitude is regarded as constituted by a grant, albeit an implied one. The general principle being that the proprietor of land is entitled to do anything not

forbidden by law or agreement, "it is necessary to find a common author, in order to find a person who is capable of impliedly limiting a grant not on the face of it limited" (*Scottish Land Law*, Gordon & Wortley, 3rd ed, Vol II, para 25-42).

[103] Counsel referred me to paragraph 8-22 in Cusine and Paisley for the proposition that there may be "unusual cases" where "one of the parties to the disposition have special or additional rights over adjacent land over which an implied servitude may be found to have been granted in the right circumstances" (written submissions, para 50(1)). However, that paragraph contains the heading, "Unity of ownership required", and observes that if the dominant and servient tenements cannot be shown to have been owned by the same party, "the claim of implied grant will fail". What the learned authors go on to acknowledge as an "exceptional case" is where the person disponing of a plot of land owns the superiority of adjacent land over which has been reserved to him the right to grant a servitude. What the learned authors are discussing here is lack of title or capacity, and the purpose of the example is to show that the absence of any right to the *dominium utile* in land will not necessarily prevent the implication of a servitude right of access. However, the point to note from the example for present purposes is that both the plot of land being disponed as well as the *dominium directum* in the adjacent land are being held by the same person, and at least to that extent, it provides an illustration of, rather than a departure from, the common author principle. Counsel cited no case of implied grant which did not involve a common author or rely on the principle of common authorship.

[104] Secondly, while there may be scope to imply a servitude right of access where that may be considered "incidental" to the sale of land, to adopt the language of the Lord Justice-Clerk in *McLaren*, I am not persuaded that this is the case here. This was apparently not one of those cases where the need for the servitude only emerged after the sale. The pursuer's

own case was that, so far from being incidental, the need for unrestricted access had been anticipated and agreed at the 1997 meeting. The pursuer accepted, of course, that he could not found on any oral discussions in order to establish the creation of a real right in land. But why did the missives of sale not expressly provide for an obligation on the Council to grant a servitude right of access over adjacent land, whether it be of the sort now contended for or of any description? I agree with the Council when they said that, whatever understanding may have been reached in 1997, this was the sort of transaction which would always be subject to formal legal agreement, with the involvement of solicitors on both sides (written submissions, para 16). As Mr MacNaughton put it, whatever he agreed would have to "go to legal". He was an engineer, not a lawyer, and it may be doubted whether he had the authority to bind the Council. But even if he did, in the circumstances of this case, it would not be for the court to step in and imply the existence of a servitude which parties did not expressly create themselves. Had it been necessary for me to decide the point, therefore, I would not have concluded that the circumstances of this case called for the implication of a servitude right of access more limited in scope than that sought by the pursuer.

[105] It might be thought that these reservations go further than those of the Council, who accepted that an implied grant might in principle be capable of being constituted "by removal of part of the pre-existing track and its replacement by the [access road]" (written submissions, para 34). But this concession was based on the assumption that the acquired servitude rights would be "defined by" those it replaced (written submissions, para 34). The Council had built the access road "on the understanding that the MacNabs had a right of access over the pre-existing track" (para 29). Now, on one view, the Council's position might itself be seen as an application of common authorship, with the Council having become owner by virtue of the CPO of both the relevant part of the pre-existing track as well

as the new access road. This wasn't explored further in argument, but whatever may have been the basis for the Council's position, it certainly didn't involve any concession that the MacNabs ever enjoyed a pre-existing servitude right of access down the pre-existing track. And since the pursuer has not established, because his case was not founded, on any pre-existing servitude, I am not sure, upon analysis, that the Council can properly be said in this action to have made any concession to the pursuer at all.

Public right of passage

[106] Section 151 of the Roads (Scotland) Act 1984 ("the 1984 Act") defines "road" as meaning,

> "any way (other than a waterway) over which there is a public right of passage (by whatever means and whether subject to a toll or not) and includes the road's verge, …; and any reference to a road includes a part thereof".

It defines "private road" as meaning "any road other than a public road", and "public road" as meaning "a road which a road authority have a duty to maintain".

[107] On record, all parties had been agreed, at least until the first morning of the proof, that the access road had never been adopted by the roads authority, and was a private road in terms of the 1984 Act. However, at the outset of the proof, counsel for the Gilmours sought to amend by deleting references in Answers 6 and 8 to the access road as being a "private road". He referred to it is as no more than a "private access". Counsel for the pursuer opposed receipt of the amendment on the basis that it came too late, and that he would be prejudiced if it were allowed, since he might have wished to lead evidence regarding the construction of the road in order to meet the Gilmours' new position. At the invitation of counsel, I reserved the matter until the conclusion of the proof.

[108] In his submissions, counsel for the Gilmours accepted that, "The tracks have been used predominantly by walkers and cyclists, and by individuals and organisations accessing private property interests" (written submissions, para 24). However, he also submitted that, "There is simply no evidence of *the accesses* being anything other than private tracks" (written submissions, para 27, emphasis supplied). Ultimately, his position seemed to be that there was a distinction between evidence of use of the track by pedestrians, which he accepted, and evidence of use of Accesses C and E to and from the track, which he did not accept.

[109] In my judgment, it was clear on the evidence that the access road was designed to replace the top part of the pre-existing track. There was an abundance of evidence establishing a public right of passage for walkers and cyclists over both the pre-existing track and the access road. Since I accept that the access road is a way over which there is a public right of passage, it follows that it is a road for the purposes of the 1984 Act. Further, the "road" in terms of s151 of the 1984 Act includes the "road's verge", and therefore the right of passage extends over the whole of the road including the verge (*Hamilton* v *Nairn* 2010 SLT 399). Moreover, the "road" in terms of s151 also includes any part of the road, and so the right of passage need not be exercised end to end, as it were, but may be exercised over part of it (*Hamilton* v *Nairn, ibid*; *McRobert* v *Reid* 1914 SC 633). I accept therefore that the public right of passage may be exercised by pedestrians and cyclists to and from the access road to Field 3 via Access E.

[110] However, s151 of the 1984 Act provides that the public right of passage may be "by whatever means", and s151(2) distinguishes among a number of specific categories of "road", including footpaths and cycle tracks, according to the means by which the public right of passage may be exercised (*Hamilton* v *Dumfries and Galloway Council (No 2)* 2009

SC 277, para 26). From the fact that there is a public right of passage by one specific means, it does not follow, therefore, that there is a public right of passage by some other means, or by all means. Nor does it follow, from the fact that land has been acquired by a local authority in connection with the construction of a road, that it has been dedicated to unrestricted public passage (*Elmford Limited* v *Glasgow City Council (No 2)* 2001 SC 267).

[111] The peculiarity of the new access road is that it appears to have been designed to allow vehicular access to be taken by private landowners such as the pursuer, Mr Lawson, the Gilmours, Network Rail, and perhaps also the fishery board, in connection with the salmon fishings. But there was no evidence of members of the public generally taking vehicular access down the access road, and, as I have already held, it was certainly not designed and built to facilitate routine vehicular access. I would therefore decline to grant decree of declarator in terms of the second conclusion.

[112] Having reached that conclusion, I will also refuse to allow the Gilmours to amend in terms of their minute of amendment. In my view, though the point is now academic, it served more to obfuscate than clarify their position.

Contract

[113] The pursuer's case for the existence of an implied servitude was founded on contract, or at least an informal agreement between the Council and the pursuer's parents. His argument for declarator of contractual right in terms of the third conclusion rested on an assignation in his favour. I have already held that there was no agreement to grant an unrestricted right of pedestrian and vehicular access to his parents, in the sense that neither was the right unrestricted, nor was there any contract to that effect. Further, I agree with the Council that any contractual right will have prescribed.

[114] In his submissions, the pursuer no longer insisted on his argument based on personal bar. I shall therefore decline to grant declarator as third concluded for.

Disposal

[115] In order to give effect to the above, I shall repel the pursuer's 1st to 5th pleas-in-law, while sustaining the Council's 3rd, 4th and 7th pleas-in-law, as well as the Gilmours' 1st plea in law insofar as it was directed at the second conclusion only. The result is that I shall decline to grant any of the decrees of declarator sought in conclusions 1, 2 and 3. I shall reserve any question of expenses.

[116] As it happens, the Council acknowledged that it was probably intended at the time they entered into discussions with the pursuer's father that a formal servitude would be granted to the MacNabs to establish their rights over the access road. This would reflect the rights "they purported to hold" over the pre-existing track (written submissions, para 20). If that had been done, the Council said, it would have been restricted to access for pedestrians and agricultural vehicles for the cultivation of Field 3 only (*Ibid*). The pursuer accepted in evidence that the Council had recently offered to grant him a servitude in these terms, but that he had rejected it. My declining to grant the pursuer any of the remedies he seeks is not intended to bring an end to these discussions.

Appendix

This is the "Plan II" referred to in Conclusion 1 of the foregoing Summons.

II

LAND REGISTER OF SCOTLAND

Officer's ID / Date: MAP OF AREA REFERRED TO 2017.

TITLE NUMBER: PLAN of LOCATIONS of POINTS IN NARRATIVE

ORDNANCE SURVEY NATIONAL GRID REFERENCE

NH5457 NH5557 NH5458 NH5558

140m

Survey Scale: 1/2500