

SCOTLAND / JUDGMENT

Pollock & Ors v Drogo Developments Ltd [2017] ScotCS CSOH_64 (13 April 2017)

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[2017] ScotCS CSOH_64 [New search] [Help] OUTER HOUSE, COURT OF SESSION

[2017] CSOH 64 A163/16 OPINION OF LADY WISE In the cause WILLIAM PATERSON POLLOCK and OTHERS Pursuers against DROGO DEVELOPMENTS LTD Defender Pursuers: G MacColl; Thorntons Law LLP Defender: Garrity; MacRoberts LLP 13 April 2017

Introduction

- [1] The issue in this case is whether the defender, a company involved in the development of land, had any right to lay two new drainage pipes through the pursuers' property. By disposition dated 2 September 2008 ("the 2008 disposition") the Scottish Ministers disposed to the pursuers and James Pollock (their brother) certain land extending to 50.5 hectares on the north side of Denny Road, Larbert at the Royal Scottish National Hospital, Larbert ("the subjects"). The interest of the pursuers and their brother as proprietors was registered in the Land Register of Scotland under Title Number STG61960. The pursuers' brother James Pollock subsequently disposed his one quarter pro indiviso share in the subjects to the second and third pursuers. Accordingly the pursuers now hold title to the whole subjects. At the time of the 2008 disposition, the Scottish Ministers retained land adjacent to the subjects that had development potential (the "retained property"). It was always anticipated by the pursuers and their brother that the land would eventually be developed. Accordingly, the disposition in favour of the pursuers and their brother made provision for a number of burdens and servitudes which reflected the anticipated development potential of the retained land. A schedule to the disposition granted certain burdens and servitudes in favour of the property retained by the Scottish Ministers and imposed other burdens and servitudes on the subjects disposed to the pursuers.

- [2] In 2014 the Scottish Ministers sold part of the retained property to the defender. The defender's title to that land ("the defender's property") is registered in the Land Register of Scotland under Title Number STG69787. The defender began subsequently to develop the land transferred to them. In order to facilitate that development they have installed two drainage pipes across the pursuers' land. It is the pursuers' contention that the defender had no right to encroach on their land and did so without any permission. Accordingly the pursuers seek declarator that the defender has wrongfully encroached upon the subjects by the laying of the two pipes. They seek also an order for removal of those pipes or, in the alternative, payment to them of the sum of £150,000. The case came before me for a Procedure Roll discussion. Arguments for the Pursuers [3] Mr McColl submitted that the defence presently advanced on Record was irrelevant and that decree de plano should be pronounced in favour of the pursuers in terms of the first and second conclusions following their fourth and fifth pleas in law being sustained. He referred to the terms of the 2008 disposition, and argued that there was nothing within it that gave the defender any right to lay new pipes through the pursuers' land. The burdens created were set out in a schedule to the disposition. The definitions section in Part 1 of the Schedule defined "the retained property" as meaning the Royal Scottish National Hospital UNDER EXCEPTION OF the disposed property. Part 1 also included a definition of "the Service Strip" which was included in anticipation of there being future development. The Service Strip is defined as: "... that strip of ground lying within the disposed property the dimensions of which are to be determined as follows:-
- (a) the said strip of ground will be no more than 10 metres in width but can be extended to no more than 18 metres in width during the period when the services and utilities referred to in Paragraph 1 of Part 5 of this Schedule are being installed declaring for the avoidance of doubt that once the said services and utilities have been installed, the width of the said strip of ground will revert to being no more than 10 metres in width; and
 - (b) the said strip of ground will follow the route shown hatched in blue on Plan 4 annexed and signed as relative hereto or along such other route as may be agreed between the Disposed Property Proprietors and the Retained Property Proprietors both parties to act reasonably;"
- Mr McColl noted that the specific route of the Service Strip was shown on the last of four plans annexed to the disposition. Importantly, it is accepted and admitted in the defender's pleadings that the disputed pipe falls outwith the Service Strip. The schedule to the disposition comprises five parts. Part 1 has the definitions already referred to, Part 2 lists the real burdens affecting the retained property in favour of the disposed property, Part 3 narrates certain rights benefitting the disposed property and burdening the retained property, Part 4 lists the real burdens affecting the disposed property in favour of the retained property and Part 5 comprises the rights benefitting the retained property and burdening the disposed property.

- [4] It was Part 5 of the schedule that required to be considered in categorising the defender's actions. Their servitude rights were restricted to those given to them in Part 5 and only in so far as the pursuers' land was burdened by the relevant provisions. Part 5 of the schedule to the disposition is in the following terms: "The following rights are reserved in favour of and for the benefit of the Retained Property and are imposed on and burden the Disposed Property namely:-
1. heritable and irredeemable servitude rights to install and thereafter use, inspect, maintain, repair renew, alter or enlarge services and utilities under the Service Strip with all necessary rights of access for such purposes; under declaration that (a) during the installation of the services and utilities as aforesaid the Retained Property Proprietors will erect stockproof fencing on each side of the pipe/cable track but with provision for livestock to cross the pipe/cable track at suitable points and (b) unless the services and utilities are installed as aforesaid within 10 years of the Date of Entry, the servitude rights hereby reserved will fall and will no longer be enforceable by the Retained Property Proprietors against the Disposed Property Proprietors;
 2. heritable and irredeemable servitude rights to widen, straighten and otherwise improve (including without prejudice to the foregoing generality to make provision for payments and street lighting) to local authority adoptable standards the Southern Access Road by incorporating within the existing access road (which for the purposes of this right shall be deemed to include any existing footpath(s) and/or verge(s)) strips of ground on either side of the existing access road up to a maximum width of 10 metres on either side of the existing access road; under declaration that unless the 10 metres on either side of the existing access road; under declaration that unless the existing access road has been widened, straightened and otherwise improved as aforesaid within 10 years of the Date of entry, the servitude rights hereby reserved will fall and will no longer be enforceable by the Retained Property Proprietors against the Disposed Property Proprietors;
 3. heritable and irredeemable servitude rights for all existing services including the main drain to the River Carron serving the Retained Property including the Larbert Hospital Development in so far as the same lie within the Disposed Property with right to use same and all necessary rights of access thereto for cleaning, inspecting, maintenance, repair, renewal, alteration and enlargement thereof.
 4. heritable and irredeemable servitude rights to connect into all existing or future services and utilities lying under the Service Strip but only at the point where the Service Strip crosses the Southern Access Road with the right to use same and all necessary rights of access thereto for cleaning, inspecting, maintenance, repair, renewal, alteration and enlargement thereof.
 5. non exclusive heritable and irredeemable servitude rights of access and egress for pedestrian and vehicular traffic for all existing purposes over the existing road leading to and past Househill Farm between the points marked G, F and H on Plan 1."

- [5] Mr McColl submitted that a number of points arose from the terms of Part 5. First, it was clear that any installation of new services and utilities had to be under the Service Strip. This was something that the parties had plainly agreed, unambiguously, and represented a bargain between them. It had been agreed between the pursuers and their brother and the Scottish Ministers. The defender, as the subsequent owner of the retained property, was bound thereby. Secondly, paragraph 2 of Part 5 created a specific right in relation to an access road. The provision for that made clear that any widening or straightening of the road fell within that part and was time limited. Thirdly, provision was made for servitude rights to benefit the retained property in relation to all existing services. Those services, existing as at 2008, included the main drain down to the River Carron all as narrated in paragraph 3 of Part 5. Significantly, there was no reference to any right to install any services in paragraph 3 of Part 5. Installation was only permitted in terms of paragraph 1 of Part 5, namely along the Service Strip. The background to the requirement for the creation of these servitude rights was that previously the disposed and retained properties had been on one title. It was the splitting of the land into separate parcels that led to the requirement for servitude rights for the services that already existed. Accordingly the burden on the pursuers' title was to provide access for cleaning, inspecting, maintenance repair renewal, alteration or enlargement of those existing services. It was Mr McColl's contention that installing something new or laying pipes somewhere other than the Service Strip could not fall within the terms of paragraph 3 of Part 5 of the Schedule. Of course paragraph 3 included access for the purpose of renewal of an existing service. The contention of the defender that its actions fell within paragraph 3 of Part 5 had to be scrutinised. What the defender averred in answer 6 was the following: "Admitted that the defender has installed two drainage pipes across the Subjects, under explanation as follows. Admitted that sections of the drainage pipes do not follow the route of any pre-existing pipes or services. Admitted that they have not been installed within the route of the Service Strip explained and averred that the defender was entitled to install the two new drainage pipes ('the Services') in the pursuers' property, by virtue of the servitude right reserved in favour of the Defender's Property in terms of Paragraph 3 of Part 5 of the Schedule to the Disposition ('the Servitude'). further explained and averred that the Services comprise a foul drain and a surface water drain. The Services replaced a combined foul and surface water drain. As a result of changed technical regulations, the defender was obliged to replace the pre-existing combined services pipe with two separate pipes. There is no unlawful increase in the burden affecting the pursuers' property by virtue of the installation and operation of the Services. Further explained and averred that the defender was (and is) entitled to relocate existing services within the pursuers' property by virtue of the Servitude hereinbefore condescended upon. The Servitude was constituted in a deed, namely the Disposition. The route of the Servitude is undefined and unrestricted. ..."
- [6] Mr McColl contended that the defender, having accepted that it had installed two new pipes and altered the route, had no basis for suggesting that it was entitled to do so in the absence of the agreement of the pursuers. He submitted that the correct approach was to read the

disposition, in particular the schedule to it, as a whole. It was clear from paragraphs 1 and 3 of Part 5 of the schedule that the parties had decided to regulate the future development situation in advance. Taking the provisions of the schedule as a whole the only proper interpretation of the deed was to give someone in the defender's position the right to install new pipes but only across the Service Strip. As the new pipes were, by admission, neither through the Service Strip nor along the existing services route then nothing in paragraphs 1 and 3 of Part 5 of the Schedule gave the defender any right to do what it had done.

- [7] So far as the law was concerned Mr McColl submitted that there was a presumption in favour of the freedom of the servient tenement from encroachment. This statement of principle was put the following way in Erskine, Institutes, II ix 33 as follows: "As all servitudes are restraints upon property, they are stricti juris and so not to be inferred by implication." Thus all servitudes are strictly construed in favour of the servient tenement. Similarly, in Rankine on Land Ownership (4 th Edition) at page 417 the importance of the freedom of property is emphasised and the general rule that any restraint or limitation on such freedom required strict proof. Modern writers such as at Cusine and Paisley in their text "Servitudes and Rights of Way" also reiterate this important principle in the interpretation of deeds constituting servitudes of the presumption in favour of the freedom of the servient tenement from restrictions - paragraph 15.06.
- [8] Mr McColl submitted that it was accordingly indisputable that the constituent deed, in this case the disposition, should be construed strictly. Where that deed had provided a specific route the proprietor of the dominant tenement could not unilaterally alter it. In *Hill v MacLaren* (1879) 6 R 1363, a case involving a servitude of way, a question arose as to whether the burdened proprietor could alter the route. In holding that he could not, the Lord Justice Clerk said the following: "The real question therefore is whether, after that grant was made and acted on, it was in the power of the superior, who had contracted to give that passage for the use of the feuar and the residentors on his property, to turn about that passage and alter it so as to suit himself, as if it had been an ordinary right of way through his ground. I am of the opinion that it was not. If we were to hold the contrary I do not see where the matter would end. This is not an indefinite servitude right of way merely. It is a right to a particular passage, or a servitude right of way over a particular portion of the defender's property defined by contract." That passage was accepted in the subsequent case of *Moyes v McDiarmid* and another (1900) 2 F 918 at 924, where the general proposition laid down in *Hill v MacLaren* was said to be "unassailable in principle". These authorities supported the contention that there was no right to alter an established route created in an express and onerous contract. The only circumstances in which variation of a route might be possible would be on the basis of a very urgent necessity - *Moyes v McDiarmid* at 924. However, there was an established route for the variation of real burdens through the Land Court and if the defender's position was that some change in technical regulations had frustrated the operation of the

parties' bargain there were options available to them. However, they had neither pled necessity nor sought to vary the burdens in the Land Court. There is no averment that it would have been problematic for them to use the Service Strip. Accordingly it could be inferred that their motivation in laying pipes on a separate route was mere convenience.

- [9] According to Mr McColl, the central point was that the 2008 disposition makes express provision for a particular route to be used both for the installation of new pipes and in paragraph 3 of Part 5 of Schedule 1 for existing services. Interpreting paragraph 3 of Part 5 in the way that the defender suggests would involve ignoring both the general presumption in favour of freedom and the specific terms of Part 5 of the Schedule. There was nothing to support the attempt on the part of the defender to characterise the situation as one involving a servitude right with no defined route. The defender's rights were limited to using paragraph 1 of Part 5 (the Service Strip route) or to keep the existing services along the route they already took. It has done neither of those two things. Accordingly there was no relevant defence to the action. Excluding the principal defence from probation would in turn lead logically to the granting of decree de plano .
- [10] Mr McColl also addressed the anticipated argument for the defender arising from its fourth plea in law that the pursuers were personally barred from insisting upon removal of the services. He referred to the leading House of Lords' decision on personal bar, *Gatty v MacLaine* 1921 SC (HL) 1. The requirements for a plea of personal bar were set out at page 7 of the reported decision in the following terms: "Where A has by his words or conduct justified B in believing that a certain state of facts exist, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time." In Mr McColl's submission the requirements of the test for personal bar were plainly not met in this case. There had been no words or conduct by the pursuers that could have led the defender to believe that the pursuers endorsed the encroachment in question. Reference was made to certain correspondence lodged in process. In particular a letter from the pursuers' agents to the defender's agents of 24 November 2014 (No 7/1 of process) raised concerns about the defender's proposal to install new services outwith the Service Strip with an indication that this was a matter of concern to the pursuers. An email of 2 December 2014 (No 7/2 of process) gave notice to the defender's agents that "Your clients must stop working on the Pollocks' ground until Mr Keenan and Mr King have met on site and sorted matters out". A further email message of 19 December 2014 (No 7/3 of process) sent by the pursuers' agent to the defender's agent expressly raises the legal issue of whether the new pipes could be regarded as serving "existing services". The pursuers' interpretation is given and a response requested. At No 7/4 of process was an email message of 2 April 2015 in which the pursuers' agents had expressed in very clear terms that they did not accept that the pipes were an enlargement of an existing service and that they objected to the proposed course. The message goes so far as to give an ultimatum to the defender with a threat of proceedings to follow seeking the removal of any new pipes installed by the said developer.. The correspondence as a whole clearly illustrated that the pursuers consistently and repeatedly told the defender that they considered there was no legal entitlement on the

defender's part to lay the new pipes.

- [11] The line taken by the defender (in answer 5) was that the pursuers threatened but did not raise interdict proceedings. However, Mr McColl submitted that there was no obligation on the part of an aggrieved party to litigate. It made no difference that the pursuers had chosen not to raise proceedings until the expiry of 12 months after they had threatened to do so. They were not required to take active steps to prevent installation of the pipes and no relevant personal bar case could exist in a situation where they had clearly objected in advance to the defender's actions. There could be no question of a suggestion that they permitted the defender's carrying out of and completing the installation of the new services. Accordingly the test for personal bar was not met and any suggestion of prejudice to the defender was irrelevant in this context. No proof on the issue of personal bar was required as the lack of permission on the part of the pursuers was self-evident from the correspondence. Acquiescence was not pled. Even if the pursuers failed to take positive action at the same time as objecting they had still objected. Critically, there was no averment that the defender had ever relied upon anything said or done by the pursuers in taking a decision to lay the pipes. The only explanation that appears is that the defender took legal advice and decided to go ahead. That involved taking the risk that it did so unlawfully.
- Submissions for the Defender [12] Mr Garrity submitted that so far as the principal arguments for the pursuers were concerned, an issue could arise as to whether there was a dispute of fact in relation to whether the services were new services or replacement services. That issue arguably required a Proof Before Answer before determination of whether the situation that had arisen fell within paragraph 1 or paragraph 3 of Part 5 to the schedule to the disposition. The defender's position was that what had existed previously was a combined service drain which had been replaced and renewed by the laying of two pipes. The defender had been obliged to replace the pre-existing combined services pipe with two separate pipes as a result of changed technical regulations all as averred at answer 6. His primary position, however, was that the defender's fourth and fifth pleas in law should be sustained as the pursuers' were personally barred from insisting upon removal of the services and in any event they had suffered no material prejudice as a result of the operation and route of the new pipes. He accepted that, should the pursuers' arguments in relation to relevancy be sustained, an issue of discretion would arise in relation to remedy. The pursuers have alternative conclusions for removal of the pipes or for the payment of damages. As the pursuers have suffered no material prejudice the court could exercise discretion not to order removal.
- [13] In response to the principal argument made by Mr McColl, Mr Garrity began by drawing attention to the 2008 disposition and the plan appended thereto. It showed the previous line of services in question which were not contained within a Service Strip. The "old foul drain" was in fact a combined drain, which is one that combined foul and surface water. On a plan produced by the defender, No 7/5 of process, the two new pipes are then shown. Mr Garrity contended that it was clear from comparing the previous line of services with the line of the two new pipes that there was in one sense less encroachment on the pursuers' land than

previously. There was an overlap between the previous line of services and the line of the new pipes and so the defender had not completely departed from the old line or route. Turning to the material terms of paragraph 1 and 3 of Part 5 of the schedule to the disposition, Mr Garrity agreed that paragraph 1 related to the installation of new services such as drainage and the installation of new utilities such as fibre optic cables and gas pipes. In contrast, paragraph 3 related to “all existing services”. It was noteworthy that there was no mention of utilities in paragraph 3. Mr Garrity argued that those utilities would include “the main drain”. Repair, renewal, alteration and enlargement of that main drain would be permitted by paragraph 3. It was submitted further that as paragraph 3 does not specify any particular route for the works that can be carried out to existing services there was no straight line by which and only by which those services could operate. In contrast, paragraph 1 did restrict the route for any new services being installed. Further, the ten year restriction in paragraph 1 separates it from the different servitude right in paragraph 3 which has no limitation of time.

- [14] According to Mr Garrity paragraph 3 entitled the defender to “alter the line” of the existing main drain. The entitlement arising from paragraph 3 of Part 5 to replace the combined drain could be derived from two sources. First there was an express right in paragraph 3 to renewal, alteration and enlargement of existing services. Alternatively if there was concern that the provision in paragraph 3 was insufficient then there was a right at common law. Reliance was placed on the case of *Alvis v Harrison* 1991 SLT 64. That was a decision of the House of Lords in relation to an action of declarator raised by the proprietor of a castle against an adjacent proprietor in respect of that adjacent proprietor’s alleged encroachment upon the pursuer’s proprietary rights in the driveway of the castle. The adjacent proprietor had an expressly granted servitude right of access over the relevant part of the driveway. He had encroached upon the verges of the driveway by constructing a bellmouth for a new access road which he had built on his own land linking the castle driveway with the public road. In finding that when the adjacent proprietor constructed and used the bellmouth on the verge he was doing no more than he was entitled to do within the terms of the grant of servitude Lord Jauncey of Tullichettle set out certain general principles applicable to servitude rights of access and their use, including the following: “(1) Where a right of access is granted in general terms the owner of the dominant tenement is entitled to exercise that right not only for the purpose of the use to which the tenement is then being put but also for any other lawful purposes to which it may be put thereafter ...
- (2) The right must be exercise civiliter , that is to say, reasonably and in a manner least burdensome to the survey and to tenement. As it is put in Rankine, *Land Ownership in Scotland* (4 th Ed.), p.417: ‘it must be exercised in the mode least disadvantageous to the servient tenement, consistently with full enjoyment.’” Mr Garrity argued that *Alvis v Harrison* was authority for the proposition that where a right of access is granted in general terms the purpose to which it can be used is not restricted. Albeit that on one view the schedule to the disposition did define specific purposes, Mr Garrity argued that the right of access therein was ancillary to the principal right to use the services. He posed the question

of whether there are any restrictions at common law in the use of a servitude and its route. His answer was that so long as the right is exercised civiliter there is no other restriction. Transposing that to the circumstances of the present case, replacement of the combined drain was expressly permitted by paragraph 3 of Part 5 of the schedule to the disposition. Even if that was wrong and the right was implied rather than expressed, the common law provided the same conclusion.

[15] Mr Garrity accepted that the more contentious aspect of his argument was that he contended also that where a servitude is granted over an area of land, the owner of the dominant tenement is entitled to choose the route. He maintained that this was the case and that the route could be varied by the owner of the dominant tenement where the deed creating the servitude does not contain any particular restriction on route. He acknowledged that Cusine and Paisley (at paragraph 12.134) express the view that once a route is exercised and established the dominant proprietor cannot vary it. However, Mr Garrity contended that the learned authors were wrong in their conclusion on that point. The writers referred to in support of their proposition do not support it other than in respect of a servitude right of way. For example Bankton, in his *Institute of the Laws of Scotland* at section 3, paragraph 18 confirmed that where a servitude of a road is constituted through another's ground it cannot be altered to the prejudice of the dominant tenement and must always be in the same place where it was accustomed. Erskine's *Institute of the Law of Scotland*, Book II at paragraph 34 states the following: "As servitudes are limitations of the property, it is a rule, that they must be used in the way least burdensome to the servient tenement. Thus, the servitude of a road, whether a coach or foot road, constituted through the grounds of another indefinitely, without describing through what particular part of the ground the road shall pass, must be continued in that line in which it has either been used before by the owner of the servitude, or which has been marked out for the road by authority of the magistrates; and the rest of the servient tenement is free ... so as not to carry the road through his neighbour's garden or orchard; nor, after having made the choice of one road, and used it for some time, can he abandon it, and wantonly carry a new one through another part of the field ..." Mr Garrity sought to distinguish a servitude of way from a servitude of use such as that which featured in the present case and argued that a restriction on using the same route did not apply to the latter. In general terms, he contended that where there is no restriction on the dominant tenement the proprietor can vary the route. He acknowledged that an issue arose as to whether a servitude of use should be treated in the same manner as a servitude of way standing the commentaries to which he had referred.

[16] It was emphasised that there are no averments of loss by the pursuers in this case. There is no suggestion of damage to land or loss of crops involved. Absent any such averments Mr Garrity submitted that a drain flowing into two pipes rather than one underneath the ground should make no difference to them as proprietors. It was indisputable that the servient tenement (in this case the pursuers) has the right to vary the line of the servitude which would enable the pursuers to move the pipes or ask the court so to order. That much was clear from legal writers including Cusine and Paisley at paragraph 12.58. The servient

tenement can redirect or narrow a servitude of this type where there is no fixed line or width. The question was why had the pursuers raised this action in a situation where their use of their land appeared unaffected? If the defender had not exercised its rights civiliter the pursuer would surely be able to point to some loss or damage.

- [17] In support of the defender's fourth plea in law in relation to personal bar Mr Garrity submitted that because the pursuers had acquiesced in the alteration of the route of the servitude, they were personally barred from seeking the orders concluded for. He argued that the pursuers' acquiescence was a sufficient basis for the defender's reliance on it thus forming the necessary requirement for the plea of personal bar. He submitted that there were four material facts relevant to support his argument. First, the pursuers were aware of the defender's works on the burdened property. Secondly, the pursuers were aware of the provisions of their title to the burdened property and had, on their own averments, the power to stop the defender from continuing with its works. Thirdly the pursuers took no steps to prevent the defender carrying out and completing its works at the time. Instead they delayed by over 12 months in raising this action. Fourthly, the defender would be unfairly prejudiced if the court were to grant the orders concluded for in respect of the removal of the drains. In the case of *Earl of Kintore v Pirie* 1903 5 F 818, the issue was whether a mill owner was entitled to increase abstraction of water for the use of his mill. He had for more than 40 years taken water from a river by a lade for the use of his mill but then carried out alterations in consequence of which he abstracted an increased amount of water. One of the issues arose was whether the pursuer, the owner of the salmon fishings above the mill, had acquiesced in the works that the defender had carried out. The Lord President (Kinross) made observations on the two things that were necessary to support the plea of acquiescence. He stated: "Two things are necessary to support this plea - (1) that the person who is alleged to have acquiesced shall have had power to stop the things complained of; and (2) that he shall have had full knowledge of what was being done." (at p 849). By analogy, in this case the pursuers had power to stop the things they complained of and the defender had carried out the works with the pursuer's full knowledge of what was being done. The effect of the pursuers' acquiescence was that they were personally barred from seeking removal of the pipes. Mr Garrity accepted that, if on the interpretation of the disposition argument the decision was against the defender, then the declarator in terms of the first conclusion would be granted and the personal bar issue would relate only to the second and third conclusions. He accepted that no new servitude right could be created by acquiescence; nonetheless a failure to object could operate to bar a future remedy. In support of that contention he relied on *Reed and Blackie on Personal Bar* at paras 6.56 - 6.58 and 6.62. In that text, the learned authors expressed the view that while servitudes could not be created by acquiescence, a burdened proprietor is barred from objecting to the benefitted proprietor's exercise of the right in question where they have acquiesced. They then state: "Personal bar requires inconsistent conduct. In the case of acquiescence in respect of servitudes, this amounts to a failure to make objection to the benefitted proprietor asserting a right against the burdened property." Under reference to the case of *Stirling v*

Haldane

- [1829] 8 S 131 the authors state also in relation to the effect of personal bar: “The extent of the right established by acquiescence goes no further than what has already been endured by the burdened proprietor: for the purposes of a right of aqueduct, for example, the burdened proprietor’s tolerance of a 6cm pipe bars objection to a pipe of those dimensions but does not give the benefited proprietor the right to replace it with another which is 23cm in diameter.” Mr Garrity submitted that these passages were relevant to the question of remedy. The pursuers may be barred from seeking removal of the pipes even if the substantive point of interpretation is determined in their favour. Further, even if the pursuers were not technically barred from seeking removal, the court would require to address whether it was appropriate, in the absence of averments of prejudice, whether so to order. Reply on Behalf of the Pursuers
- [18] In response to some of the arguments presented for the defender, Mr McColl emphasised that there was no right of replacement of pipes in paragraph 3 of Part 5 of the schedule to the 2008 disposition. Further, it was wrong to assume that there had been no material prejudice to the pursuers in this case. The pursuers own the land below the ground and would, but for any wrongful encroachment, make such use of it as they saw fit. The pleadings contained a denial that there was no material prejudice suffered by the pursuers.
- [19] It was noteworthy that there was no challenge to the presumption in favour of freedom of the proprietor. Mr McColl submitted this favoured the pursuers’ interpretation on the substantive argument. So far as variation of the route was concerned again this was not something conferred by right in terms of paragraph 3 of Part 5. In relation to *Alvis v Harrison* 1991 SLT 64, that case had concerned a right of access and whether it extended to the verges of a road. There was no alteration of the line of the access route and so it was unsurprising that the defender was found to have been entitled to exercise the right he had been given. In the present case, it was the terms of the disposition that inform the extent of the right given to the defender. It was submitted that the relevant authorities were against the defender. In particular there was no authority to vouch the proposition that the route could be altered. There was clearly a defined route in this case because of the line of the existing services. There was no basis in the writings referred to support the contention that the inability to alter the route of a road did not include the route of a pipe or other service. Once there was a fixed route, the dominant proprietor could not change it as to do so would overburden the servient proprietor’s freedom in their land.
- [20] On personal bar, it should be noted that the defender does not have an acquiescence plea. Accordingly only the requirements for personal bar in *Gatty v MacLaine* were relevant. There was still no offer on the part of the defender to prove reliance on something that the pursuer did or did not do. It was clear from the correspondence that the defender had been in receipt of full legal advice. There was no authority for equipping “non-acquiescence” with the raising of court proceedings. While the raising of court proceedings was important in any question of prescription, it had no bearing on an issue of acquiescence. The

correspondence illustrated that there was no tacit acceptance on the part of the pursuers at all. The passage relied on from the case of *Earl of Kintore v Pirie* contained obiter observations only in so far as those were relevant to the facts of that case. A clear objection had been made by the pursuers in the present case which precluded acquiescence even if, contrary to the pursuers' submissions, that was a relevant feature of the case. Discussion [21] The pursuers' land is burdened by a number of servitude rights created in favour of and for the benefit of the defender's property. The extent of those servitude rights is set out primarily in Part 5 of the Schedule to the 2008 disposition, narrated in full at paragraph [4] of this Opinion. The scheme of Part 5 is to identify a number of distinct servitude rights in favour of the dominant tenement (currently the defender) that must be afforded to it by the servient tenement (currently the pursuers). Paragraph 1 of Part 5 of the schedule is the only paragraph that imposes a servitude permitting the installation of new services and utilities. The paragraph sets out requirements for fencing to be erected on each side of the pipe/cable track to be laid but with provision for livestock to cross it at suitable points. Further, the right to install new pipes and tracks along the Service Strip is time limited. The installation must be carried out within 10 years of the date of entry otherwise the servitude rights will fall. However, there is no limitation of time on the right to use, inspection, maintenance, repair, renewal, alteration or enlargement of those new services and utilities once installed. The Service Strip is clearly delineated on one of the plans append annexed to the disposition. There was agreement before me that this servitude was created in anticipation of a proposed development, which is now being carried out by the defender. Paragraph 2 of Part 5 of the schedule relates to an access road. Again this provision is time limited and creates servitude rights to widen straighten and otherwise improve the access road. The purpose of paragraph 3 is to impose servitude rights for all existing services, that is those in existence at the time of the 2008 disposition which are narrated as specifically including "the main drain to the River Carron serving the retained property including the Larbert hospital development in so far as the same lie within the disposed property...". The specific right conferred by this servitude is to use the existing services. The necessary ancillary rights of access for cleaning, inspecting, maintenance, repair, renewal, alteration and enlargement thereof are all narrated. Paragraph 4 of Part 5 anticipates that where services and utilities are installed under the Service Strip to be created the right to connect those future services and utilities is restricted so that it must take place at a point where the Service Strip crosses the southern access road. Again ancillary necessary rights are provided for. Paragraph 5 confers a servitude right of access and egress for pedestrian and vehicular traffic over an existing road.

- [22] As a matter of ordinary construction, it is clear that Part 5 distinguishes the installation of new services from a right to use the existing services. No specific right is conferred in the disposition to install any services anywhere other than under the Service Strip. The defender admits on Record that it has installed two drainage pipes across the pursuers' land and that certain sections of those drainage pipes do not follow the route of any pre-existing pipes or services. It is admitted further that those pipes have not been installed within the route of

the Service Strip. Having regard to the clear and unambiguous terms of Part 5 of the schedule to the 2008 disposition, I have concluded that the installation of the two new pipes in question cannot fall within paragraph 3 of Part 5. The installation of such pipes is expressly allowed by paragraph 1 but only on a specified and defined route. Paragraph 3 does not allow for installation at all and so any new service pipes would require to be laid under the Service Strip unless either by agreement with the pursuers unless the defender's actions in laying the pipes could fall with the description in paragraph 3 of renewal of existing services. It is not seriously suggested by the defender that the pursuers agreed to the installation of the new pipes. A point is made about acquiescence to which I will return. So far as renewal is concerned, the defender contends that the two new pipes are replacing the previous combined foul and surface water drains. While accepting that the route of the former drain has been altered, it contends that it was entitled to relocate the existing services. However, I note that there is no express right to replace the existing services, merely to use those already in existence, the route of which was established prior to 2008. Renewal and replacement are clearly not synonymous in this context. In my view, the express right in paragraph 3 to renew, alter and enlarge existing services does not entitle the defender to reroute or relocate those services. Accordingly I reject the contention that any ability to lay new pipes on a diverted route is conferred expressly by the disposition. The issue of substance for discussion that must then be addressed is whether such a right arises at common law.

[23] There was no dispute in the discussion before me that Scots Law confers a presumption in favour of the freedom of property from encroachment. Accordingly, any servitude that restrains a proprietor's freedom to do what he wishes with his property will be strictly construed in favour of the servient tenement – *Erskine Institute* II ix at 33; *Rankine, Land Ownership* (4th Edition) p 417; *Cusine and Paisley, Servitudes and Rights of Way*, paragraph 15.06. As Rankine puts it: "Servitudes, like all real rights, are restraints on the freedom of property. This freedom, like the liberty of the subject, is dear to the law, and strict proof is required of any limitation of it" There can be no doubt that the disposition in this case restricts the route for the installation of any new services, namely along the Service Strip. As already indicated, there was at the time of creation of the servitude of the use of the existing services including the main drain, an established route for that which, it is accepted, has been altered by the defender. The available authorities tend to support the contention that where a particular route has been established for a servitude it cannot be altered unilaterally. That proposition is supported by *Hill v MacLaren*

(1879) 6 R 1363, albeit in relation to the question of whether the burdened proprietor could alter the route, and also in *Moyes v McDiarmid* and another

(1900) 2 F 918 at 924. While variation of a route would be possible on the basis of urgent necessity, there is no such suggestion that necessity applies here. The modern authority of *Alves v Harrison* 1991 SLT 64 is not in point in relation to the alteration of a route as it concerned the extension of the purpose of a right of access not an alteration of its route.

- [24] The argument presented on behalf of the defender in this case requires an examination of a view expressed by Cusine and Paisley in *Servitudes and Rights of Way*, at paragraph 12.134, that once a route is exercised and established the dominant proprietor cannot vary it. Mr Garrity contends that such a proposition is wrong. Accordingly it may be worth setting out the context in which the opinion is expressed. It appears under a section headed “To choose the route within the servient tenement by which the servitude may be exercised”. The passages begin at paragraph 12.131 of the learned authors’ text and the section begins by acknowledging the Institutional authority to the effect that where a grant or reservation of servitude is indefinite as the exact route, the grant is not void due to lack of precision but the dominant proprietor may choose the route over which the servitude is exercisable, albeit in such a way as not to prejudice the rights of the servient owner. There is then a contrast between the view expressed by Bankton (II vii 18) that the dominant tenement may choose any place most commodious for him so long as it is not invidiously to the other’s detriment and the view of Erskine (Book II ix 34) that the parties should, in the absence of agreement, refer to the court to determine the route. The authors prefer the principle as formulated by Bankton. However, they go on to clarify that general statement of principle in a number of respects. The second and third points of clarification are relevant to the argument before me. The authors’ state: “Secondly, the principle applies to confer on the dominant proprietor the right to choose the route or location of the first exercise of the servitude and does not confer on the dominant proprietor a right unilaterally to vary the route of exercise after this has been established and exercise has commenced. Thirdly, the principle cannot override the express provisions of a grant which sufficiently indicate the route of the servitude.” The footnote to that passage invites the reader to consider paragraphs 12.34 – 12.72 of the same text. Those passages contain a comprehensive analysis of the extent to which a servient proprietor may divert the route of a servitude. In general terms, the writers conclude, on the basis of authorities such as *Hill v MacLaren* and *Moyes v McDiarmid* already referred to, that where a specific line is set out in a deed for the exercise of a servitude, it cannot be deviated from unilaterally. The question, however, is whether the passages relied on by the writers, namely Bankton and Erskine, disavow the contention that a dominant proprietor can vary the route of a servitude of use as opposed to a servitude of way. This centres on the passage from Erskine, *Institute of the Law of Scotland*, Book II paragraph 34 which is worth restating: “As servitudes are limitations of the property, it is a rule, that they must be used in the way least burdensome to the servient tenement. Thus, the servitude of a road, whether a coach or foot road, constituted through the grounds of another indefinitely, without describing through what particular part of the ground the road shall pass, must be continued in that line in which it has either been used before by the owner of the servitude, or which has been marked out for the road by authority of the magistrates ...”
- [25] Mr Garrity argued that this passage did no more than set out a rule for servitudes of way and that the servitude described in paragraph 3 of Part 5 of the schedule to the 2008 disposition being a servitude of use could be distinguished. I cannot agree with that interpretation. In

my view, the passage cited from Erskine articulates a general rule, consistent with the important presumption in favour of freedom of property, that servitudes must be used in the way least burdensome to the servient tenement. The passage goes on to give an example of the servitude of a road and confirms that where it is established along a particular route it must continue in that line. The use of the word “thus” at the beginning of second sentence of the passage narrated tends to support that interpretation. To put it another way, altering the route of any established servitude conflicts with the requirement to minimise the burden on the servient tenement. Altering the route of a road is an obvious example of a conflict with the rule but the requirement to minimise the burden by continuing on an already constituted route applies equally to any established servitude. Applying that principle to the facts of the present case, the “existing services” covered by paragraph 3 of Part 5 to the disposition include the main drain, the route of which was established prior to 2008 and which the defender accepts it has not followed when laying the new pipes. In my view the defender had no entitlement to alter the established route of those existing services. No contractual right was conferred upon them to do so and the common law does not provide such entitlement. I consider that the conclusion reached by Cusine and Paisley on the basis of the passages from the Institutional writers referred to, particularly that of Erskine cited above, is correct. It cannot be said that there was no restriction on the dominant tenement in this respect, standing the terms of the disposition. The defender had no right to choose the route because the route had already been chosen and had been in existence for some time. No other way of exercising the right civiliter was available. Put simply, the defender has either gone ahead and either unilaterally altered the route of an existing servitude without an entitlement to do so, or installed new services outwith the Service Strip contrary to the terms of paragraph 1 of Part 5 to the schedule. Whether its actions are interpreted as installation under paragraph 1 or unilateral variation of an existing services route under paragraph 3 it had no right to lay the two new pipes where it did. Accordingly, I conclude that the pursuers are entitled to decree in terms of their first conclusion.

- [26] Turning to the issue of personal bar, as Mr McColl pointed out, the defender has no plea of acquiescence. Rather, it seeks to contend that the fact of acquiescence, gives rise to a plea of personal bar. Adapting the test for personal bar set out in *Gatty v MacLaine* 1921 SC (HL) 1, the defender argues that the pursuers, having refrained from raising proceedings to prevent the laying of the pipes, justified the defender’s belief that they had no objection thereto. Mr Garrity accepted that, if the pursuers were successful in securing decree in terms of the first conclusion, this argument goes only to remedy; the defender having acted to its prejudice in laying the pipes, should not be required to remove them.
- [27] It seems to me that the difficulty with the defender’s argument on personal bar is that, on the material before the court, the pursuers appear to have articulated strenuous opposition to the defender’s proposed actings. While they threatened proceedings to prevent the laying of the pipes, they raised no action until the present one. However, a decision not to resort to litigation at a particular point is not tantamount to acquiescence. The pursuers

were not silent on this matter. They raised their objections through proper channels and it was clear to both sides that there was a dispute about the interpretation of the disposition. The passage cited by Mr Garrity in Reid and Blackie on Personal Bar at paragraph 6.58 does not assist the defender. The learned authors state that acquiescence in respect of servitudes "... amounts to a failure to make objection to the benefitted proprietor asserting a right against the burdened property". In my view the pursuers' objections, made at the material time, are sufficient to negate any suggestion of acquiescence.

- [28] However, the defender's inability to found a strictly relevant personal bar case is not an end to the matter. The fifth and sixth pleas in law for the defender also go to the issue of remedy. I did not understand Mr McColl to dispute that the court has discretion on the question of remedy in a case of this sort. The history of the objections made by the pursuers and their delay in forcing a determination of the issue earlier through litigation will have a bearing on appropriate remedy. There is a dispute about whether any material prejudice has been suffered by the pursuers as a result of the defender's actions. I have not yet heard argument for and against the alternative remedies sought in the pursuers' second and third conclusions. I cannot rule out that evidence will be required before determination of that issue.
- [29] I have decided that the best course is to have the case put out By Order to clarify the orders to be made consequent to my decision and to ascertain the nature and scope of any ongoing dispute about appropriate remedy. While I have decided the issues of substance argued before me, I will not pronounce an interlocutor giving effect to my decision until counsel have had the opportunity to make further representations at the By Order hearing, at which I would also expect the issue of expenses to be addressed. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotCS/2017/\[2017\]CSOH64.html](https://www.bailii.org/scot/cases/ScotCS/2017/[2017]CSOH64.html)

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