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Servitude of Parking

***Moncrieff* v *Jamieson*:**
An insight from the coal face (or perhaps more accurately the cliff edge)

Introduction

On 4th September 1998, I began drafting the Initial Writ that commenced the interdict proceedings in *Moncrieff* v *Jamieson*[1] at Lerwick Sheriff Court. A case that was only concluded in the House of Lords on 17th October 2007. Indeed it was only really concluded in December 2009 (more than 11 years after it commenced) when the judicial expenses in the House of Lords were settled by the Defenders.

Much has been written about *Moncrieff* v *Jamieson* in recent years and it has become a stalwart in property law lectures. I hope that my 11 year involvement in the case will give you an extra insight to it.

The Topography

It is very important to understand the topography involved. At times in the Court of Session we seemed to be labouring to get their Lordships to understand fully what that topography actually was. This was something that Sheriff Colin Scott Mackenzie had benefited from seeing with his own eyes on a site visit following the conclusion of evidence being given at Lerwick Sheriff Court.

Jimmy and Alison Moncrieffs' house at Sandsound in Shetland is situated very close to the sea at the bottom of a steep cliff. For them to get to their house they have to take access over a road situated on property belonging to Bruce Jamieson. That access road leads from the main public road down to Da Store (which is the name of the Moncrieffs' house, with "Da" meaning "the" in Shetland dialect) and it goes past a house called The Store House which belonged to Keith Jamieson (the son of Bruce Jamieson who owns the land on which the access road is built). Keith Jamieson stayed in The Store House with his wife, Eloise Jamieson.

The Moncrieffs drive down the road from the main public road to the top of the cliff, park their motor vehicle there (on land belonging to Bruce Jamieson) and then access their own property by going down a very steep flight of thirty concrete steps to Da Store itself. It is not physically possible to drive a car onto the land that the Moncrieffs have heritable title to.

[1] 2004 SCLR 135; [2005] CSIH 14, 2005 SC 281, 2005 SLT 225, 2005 SCLR 463; [2007] UKHL 42, 2007 SLT 989, 2007 SCLR 790.

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Historical use of the Access Road

Da Store is a B listed 19th century merchant's house and shop. It was the main Sandsound shop until a new one was built next to the main public road in or around 1927.

Originally access to Da Store was by way of horse and cart taking supplies to the shop and making local deliveries therefrom. The horse and cart would have parked and turned at the bottom of the access road. In 1872[1] tea was taken overland to Sandsound as opposed to being taken by boat from Scalloway (many goods were, however, delivered to the shop by boat from Scalloway). The shop also operated a delivery service in the area with its own horse and cart via the access road. Customers came to the shop from far and near both by road via the access road (on foot and by horse and cart) and by sea.

A Public Road

The original access road was a "public road"[2] constructed by the Zetland County Council between 1900 and 1902. This was not known at the outset of proceedings but research[3] carried out by Jimmy Moncrieff in Shetland Islands Council's archives uncovered the position. Only a small part of this "public road" now formed the current access route the remainder being overgrown following agreed realignments of the access route over the years. However, Shetland Islands Council, during the course of the Sheriff Court proceedings, constructed a new public road to within yards of the Moncrieffs' property with, as part of it, a turning circle at its terminus, and thereafter 'stopped up' the old one. At the Court of Session Lord Marnoch stated[4]:-

> "When we were apprised of this development I confess that I wondered even more at the continuance before us of this hugely expensive litigation. That said, counsel for the respondents was, I believe, well founded in submitting that the right of the public in a public road or highway was essentially a right of passage[5] and I am accordingly persuaded that, because any *de facto* parking on a public road can only take place by way of tolerance, the pursuers continue to have an interest to establish that Da Store, as the dominant tenement, enjoys a real right to park vehicles on ground belonging to the third defender."

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[1] Minutes of Evidence given before the Truck Commission for 23rd January 1872.

[2] In terms of Section 1 of the Roads (Scotland) Act 1984 and Sections 41 and 42 of the Roads and Bridges (Scotland) Act 1878.

[3] Minutes of the County Road Board of Zetland County Council (3rd August 1899, 1st March 1900, 4th April 1901, 15th May 1902 and 15th October 1902), the Zetland County Council (2nd February 1899, 19th October 1899, 7th December 1899 and 4th January 1900) and the Standing Joint Committee of Zetland County Council (1st February 1900).

[4] Paragraph 8

[5] Ferguson on *The Law of Roads, Streets, and Rights of Way, Bridges, and Ferries in Scotland* (1904), pp 4 and 7; *Waddell v Earl of Buchan* per Lord Curriehill at (1868) 6 M, p 699

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The Servitude as Expressed in the Title Deeds

The original title deeds to 'Da Store' expressed the servitude simply as "a right of access from the branch public road through Sandsound"[1]. Ironically the firm of solicitors who acted for Jimmy Moncrieff's parents, when they originally purchased 'Da Store' and drafted that servitude in the first break off writ to 'Da Store', were the very same firm of solicitors who represented the Jamiesons when interdict proceedings were raised by the Moncrieffs against the Jamiesons! No conflict of interest there then.

The Demi-Eden: Parking as a Matter of Fact and Agreement

When Jimmy Moncrieff's parents purchased Da Store in 1975 they began refurbishment works and as a matter of course materials were often stored on what was to become the disputed parking area.

When Jimmy Moncrieff acquired Da Store from his parents in 1984 he began major renovation of the main house and he required to transport even greater amounts of building materials than his parents had done which again were often stored on what was to become the disputed parking area.

In or around the autumn of 1988, Jimmy Moncrieff, entered into an agreement with Bruce Jamieson to resurface the original road to allow improved vehicular access. This agreement allowed Jimmy Moncrieff to create an improved parking/turning area for his vehicle (on what was to become the disputed parking area). This work was carried out by a contractor at a cost of £1,012 paid for by Jimmy Moncrieff. The work involved the access road being scraped and resurfaced with the parking/turning area being dug out, hardcored and blinded as shown hatched and cross hatched in black respectively on 'PLAN 1'. Following completion of this work the Jamiesons erected a fence clearly demarking the north side of the access road and the parking/turning area.

Alison Moncrieff moved into Da Store with Jimmy Moncrieff in 1992. In 1993 the Moncrieffs at the request of the Jamiesons entered into an agreement whereby the road access to the south was re-routed (a) to create a more gentle gradient for the Jamiesons non-4x4 motor vehicles; (b) to provide better access for the eventual garage/parking area immediately to the south of Keith Jamieson's house; and (c) to improve vehicular access for the Moncrieffs. It was expressly intended that Alison Moncrieff would be able to get her car down the access road with Keith Jamieson stating to her: "You'll be able to get your car down now Alison". The Jamiesons carried out this work with the Moncrieffs paying the sum of £600 towards the costs.

[1] A subsequent deed referred to "a servitude right of access to and from the branch public road through Sandsound". R Paisley points out, in his commentary on the case (2004 SCLR 135 at 185), that "the variation on the wording did not change the nature of the right because the word 'servitude' is not necessary to constitute a servitude in the first instance".

In 1994 Keith Jamieson again approached the Moncrieffs requesting to further realign the access road so as to sweep further to the south into the flat area which the Jamiesons had already created for the eventual garage/parking area immediately to the south of the house belonging to Keith Jamieson. The Moncrieffs agreed to this subject to Keith Jamieson widening the final section of the access road where it approaches Da Store at the final left turn. This work was carried out on the whole by Keith Jamieson with the assistance of his father, and owner of the land, Bruce Jamieson. The mutually agreed new route and enhanced parking/turning area are shown cross hatched in black and shaded pink respectively on 'BARDELL PLAN 2'. This area is often referred to by Sheriff Colin Scott Mackenzie in his judgement[1] as simply "the pink area".

For the purposes of egress from the parking/turning area the Moncrieffs would reverse up the spur of what was left of the original road, as shown hatched in black on 'PLAN 3', in order to then turn their motor vehicles onto the new section of the access road. I will return to the question of the 'spur' later when discussing the breach of the interim interdict.

As part of the understanding and agreement which existed between the Moncrieffs and the Jamieson the Moncrieffs consistently left the keys in their motor vehicles (two of which were now regularly parked on what came to be the disputed parking area) to facilitate the moving of same by the Jamiesons.

This peaceful coexistence in an "almost idyllic" setting was the "demi-Eden" that Sheriff Colin Scott Mackenzie referred to as having been "shattered" when the Jamiesons started, "almost out of the blue", to construct a new garden wall.[2]

The Wall

Whilst everyone knows that *Moncrieff* v *Jamieson* concerns the right to park, little if anything was made of that 'right' in the Initial Writ. The concern 11 years ago was that a wall was being constructed by the Jamiesons that cut off or at least obstructed the access route to the Moncrieffs' property. They were not going to even be able to get to the top of their steps in a motor vehicle let alone be able to actually park there.

On Sunday 23rd August 1998 Keith Jamieson approached the Moncrieffs and advised them that he was arranging for a contractor to come the following week to start building a stone dyke around the Jamiesons' property. Keith Jamieson did not state that he intended to change the line of the dyke from that of the fence which had demarked the Moncrieffs' parking/turning area and the Moncrieffs did not expect any changes. However, when construction began it became clear to the Moncrieffs that the Jamiesons intended to

[1] 2004 SCLR 135
[2] 2004 SCLR 135 at 164

square off their garden and effectively cut off access to the parking/turning area used by the Moncrieffs.

Negotiations?

Discussions took place but the Jamiesons appeared unwilling to change the line of the new wall. According to the Moncrieffs, it was made clear to them that the Jamiesons wished to straighten up their garden boundary and were not concerned by the affect that this would have on the Moncrieffs' access. Indeed, Keith and Eloise Jamieson appparently went so far as to say that they would leave the Moncrieffs with only enough room to park their two cars end for end without any room at either side to open the doors! The Moncrieffs were therefore left with little alternative but to raise interdict proceedings at Lerwick Sheriff Court to prevent building works continuing. Thus commenced 9 years of litigation which ended up in the House of Lords.

During the first few months of that litigation I did attempt, on behalf of the Moncrieffs, to negotiate settlement terms. However, the Jamiesons' solicitors stated in a letter dated 2nd December 1998 that it would require to be "a condition precedent of any negotiation" that their clients would "be able without further interference to construct the dyke along the original line of the boundary fence of the croft of The Store as indicated on the ordnance survey map of the district". This was an approach that was hardly likely to facilitate a negotiated settlement. As this letter did not contain the time honoured phrase "without prejudice" it formed a production for the Moncrieffs at Lerwick Sheriff Court. In evidence Keith Jamieson claimed to have no knowledge of this letter and had apparently not instructed the issue of it!

An attempt was also made by Counsel to settle the matter during the course of the Sheriff Court proceedings. However, by then the question of expenses had become a stumbling block and it appeared impossible to reach a negotiated settlement that did not ignore the costs to both parties to date. Thus the litigation continued and the costs spiralled.

Interim Interdict

The interim interdict granted at Lerwick Sheriff Court on 11th September 1998 as amended on 18th September 1998 was in the following terms:-

> "Interim Interdict against the Defenders and their agents, contractors and employees from preventing the Pursuers' from exercising their contractual and servitude right of access over the access road and turning area leading to the property at Da Store (otherwise The Store), Sandsound, Shetland by parking or depositing vehicles, plant and building materials on the said access road and turning area, erecting any fences or walls on or across the said access road and turning area or by otherwise blocking the said access road and turning area."

Breach of Interim Interdict

I promised that I would return to the question of the 'spur', as shown hatched in black on 'PLAN 3'. This was the locus of the breach of interim interdict proceedings. This is a little known episode in the history of *Moncrieff* v *Jamieson* as it went unreported (other than, of course, in 'The Shetland Times'). It does, however, provide some colour to the dispute which by this time had the producers of 'Neighbours from Hell' knocking on the doors at Sandsound.

The Jamiesons had clearly decided that the 'spur' did not fall within the ambit of the wording of the interim interdict and so they decided to set up a blockade across the 'spur' consisting firstly of a tractor/digger and thereafter of a line of two 1 tonne bags of sand and two pallets of concrete blocks. Keith Jamieson also parked, on 3rd December 1998, his Landrover on the access road so as to prevent the Moncrieffs getting past.

At a Proof before Answer held at Lerwick Sheriff Court on 19th January 1999 Sheriff Colin Scott Mackenzie found Keith and Eloise Jamieson to have been in breach of the interim interdict. They appealed to the Sheriff Principal who found that only Keith Jamieson was in breach of the interim interdict and that only on 3rd December 1998 in respect of parking his Landrover on the access road. The 'spur' therefore, in the eyes of the Sheriff Principal, did not fall within the ambit of the interim interdict.

The Main Sheriff Court Action

After that small diversion it was back to dealing with the main Sheriff Court Action. To begin with I will touch briefly on some of the more colourful aspects of the evidence given and the comments made by Sheriff Colin Scott Mackenzie.

Guy Fawkes

Evidence was lead of continuing harassment by the Jamiesons against the Moncrieffs including allegedly the firing of rockets by the Jamiesons at the Moncrieffs' house on 5th November 1999. The Shetland Times[1] reported Alison Moncrieff's evidence on this incident as follows:-

> "She said she was upstairs bathing her baby and got a real fright. It was a loud explosion, almost like a bomb being dropped on their roof."

In cross examination Andrew Hajducki Q.C. referred to the Jamiesons having, just the day before the alleged incident, returned from hospital in Aberdeen and said:-

[1] 18th May 2001

> "Are you seriously suggesting that they have come back from Aberdeen after a very difficult time with their baby and then started firing rockets at your house."

Alison Moncrieff responded:-

> "One of the first things they did after coming back was to chase away our electrician Robbie Wishart."

Unwanted Visitors

On the question of chasing away the Moncrieffs' visitors, The Shetland Times[1] reported on the proceedings at Lerwick Sheriff Court of 1 December 2000:-

> "The only light relief came when a reference was made to the obstructions on the road preventing deliveries and callers, which included Jehovah's Witnesses.
>
> Mr Mitchell said he knew people had different views but some might say that their neighbours were doing them 'a favour' by keeping certain visitors away."

Young Matrons

Sheriff Colin Scott Mackenzie states[2]:-

> "Both the Second Pursuer and the Second Defender (good-looking young matrons who bore, I irrelevantly thought, a remarkable physical similarity the one to the other) stood four-square behind their menfolk in the attitudes they struck…"

Lady Macbeth

He goes on:-

> "…though perhaps the Second Defender displayed more of the characteristics of Lady Macbeth than did the Second Pursuer."

The Cat

The Sheriff expanded on his Lady Macbeth theory:-

> "Certainly the Second Defender's reported reaction or lack of it when the Second Pursuer accidentally ran over and killed the latter's own pet cat in

[1] 8th December 2000
[2] 2004 SCLR 135 at 181

> the presence of her young child – largely because obstructions placed on the access route by the First Defender had unsighted her, seemed singularly heartless".

Virgil

And the Sheriff ends his Judgement by reminding all parties of the words of Virgil[1]:-

> 'Facilis descensus Averno: Noctes atque dies patet atri ianua Ditis; Sed revocare gradum … hoc opus, hic labor est'.[2]

Literally translated that reads:-

> "The descent to the Underworld is not hard. Throughout every night and every day black Pluto's door stands wide open. But to retrace the steps and escape back to upper airs, that is the task and that is the toil."

The Law according to the Sheriff

Whilst the Sheriff's passing thoughts liven up a reading of his Judgement it is, of course, the legal import thereof that is of real interest to us. On 7th July 2003 after 39 callings of the case at Lerwick Sheriff Court, including 10 days of evidence and 4 days of closing submissions, and after having visited the site himself, Sheriff Colin Scott Mackenzie found in favour of the Moncrieffs.

Significantly the Sheriff stated:-

> "It is obvious that a servitude of vehicle parking is a prime candidate for recognition and our law is flexible enough to allow that to happen. It is not a large step to recognise a right to park as ancillary to a right of access. Other jurisdictions have done so. The two notions must merge at times."[3]

Thus *Moncrieff* v *Jamieson* became, at least to Roddy Paisley, "one of the most important cases on servitudes in the last one hundred years"[4], and that even before the Court of Session and House of Lords decisions that were to follow.

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[1] 2004 SCLR 135 at 185
[2] Aeneid, vi, 126
[3] 2004 SCLR 135 at 172
[4] Commentary by R Paisley: 2004 SCLR 135 at 185

The Court of Session

Ken Reid and George Gretton reckon that there is "something about this case that reaches the soul of the judiciary".[1] An example of this being the opening paragraph of Lord Marnoch's opinion[2] which quotes from the opening paragraph of Mr Justice J Donohue's opinion in the Canadian case of *Lafferty* v *Brindley*[3]:-

> "Among its many charms Huron County boasts magnificent sunsets. If you look west from the plaintiffs' right of way along the lake bluff on a summer's evening the spectacle of the fiery orb sinking into the inland sea is sure to instil a sense of calm tranquillity. That feeling is an illusion! The very ground beneath your feet convulses in contending claims of adverse possession, prescriptive easement, and proprietary estoppel. It is a privilege of the people to enjoy sunsets but the lot of lawyers to litigate land disputes."

This, Lord Marnoch said, with very little adjustment, would precisely echo his own sentiments in *Moncrieff* v *Jamieson*.

Whilst declining to derive any guidance as to the Scottish law of servitudes from the Canadian law of easements, even though there was a remarkable similarity between the facts of this particular Canadian case and that of *Moncrieff* v *Jamieson*, Lord Marnoch nonetheless reached exactly the same conclusion as was reached in that case and, thus, he was willing to imply a right to park. He explained why[4]:-

> "[W]hile I recognise, and endorse, the principle that a grant of servitude must be strictly construed, that principle must on occasion yield to the competing principle that the grant of a right carries with it, by implication, what is necessary to the reasonable enjoyment of that right…..It is conceded - and, in my opinion, rightly conceded - by counsel for the defenders and appellants, that in the circumstances of the present case the right of access in question must be construed, by implication, as including the right to turn and the right to load and unload goods and passengers. In my opinion, granted the particular location of the dominant property, the length of the access route in question and the nature of the terrain traversed by that route, it is quite simply unrealistic to draw a line between those implied rights and the entitlement of a visitor to park his vehicle for the duration of his visit which might extend over hours, nights, weeks or even months. And, once that be accepted, there is, in my opinion, no real distinction between what I have just described and a right on the part of the occupier to park for unlimited

[1] K G C Reid and G L Gretton, *Conveyancing 2005* p 94, footnote 1
[2] Paragraph 1
[3] Ontario Superior Court, 25 July 2001, unreported
[4] Paragraph 24

> periods of time in connection with the reasonable use of his property. In short, I consider that any purchaser of the servient tenement as at 1973 would very readily have anticipated all of the foregoing rights as being necessary to the reasonable enjoyment of the dominant tenement. Questions of precisely how and where these rights are to be exercised, and how many vehicles can be parked, are questions which hopefully can be resolved by both parties acting sensibly but, if necessary, can be decided under reference to the test which I have just described and to the general rule that the proprietor of the dominant tenement must exercise his servitude right *civiliter*."

This covers the 'bottle of Claret' argument advanced by Iain G. Mitchell Q.C. on behalf of the Moncrieffs. Was a visitor to Da Store arriving as a dinner guest, bearing a bottle of Claret, allowed to unload the bottle of Claret but then had to return to his motor car and park it some considerable distance away before returning on foot to enjoy dinner?

Lord Philip agreed that such a visitor could enjoy his dinner (perhaps not the Claret if he was driving) in the knowledge that his motor car was parked near to hand for the journey home[1]:-

> "I consider that the right to park is necessary for the convenient and comfortable enjoyment of the right of access. I come to that conclusion for this reason. It would constitute a legitimate exercise of the right of access for the proprietor of the dominant tenement to drive himself in a motor vehicle to the end of the access road adjacent to the steps leading down to Da Store with a view to gaining personal access to his property. If, as the appellants contended, he was prohibited from parking his vehicle there until he wished to leave again (whenever that might be) he would be obliged to remove it to a place beyond the third defender's land and to gain ultimate access to his property on foot. In those circumstances he could not gain personal access to his property in a vehicle of a kind permitted by the grant. His right of vehicular access would therefore, in my view, effectively be defeated. While it is well settled that a grant of a servitude right falls to be construed strictly in order to minimise the burden on the servient tenement, the grant cannot be construed so strictly as to defeat the right granted."

Lord Hamilton, however, considered that servitudes must be strictly construed and was not prepared to regard parking as a necessary incident of a servitude right of access. Such a right, if required, should have been expressly granted in the original split off disposition relative to Da Store.[2] No doubt his dissenting opinion gave the Jamiesons hope of a successful appeal before the House of Lords. And so to London we were taken.

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[1] Paragraph 90

[2] Paragraph 78

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The House of Lords

At times I doubted that we had their Lordships behind us. Lord Rodger in particular seemed set on comparing the remote location of Sandsound in Shetland to his own property in Edinburgh's New Town. If he could not park immediately outside of his own Edinburgh property, which was often the case, then why should Mr Moncrieff be able to park immediately outside (or at least at the top of the flight of steps) of his one?[1]:-

> "Especially in cities, there are many flats or houses without any adjacent land on which cars can be parked. That feature is often a significant factor for people when deciding whether to buy the flats or houses and, if so, at what price. Those who own such properties can get to them by car, but are very familiar with the need to drop off their shopping and passengers before trekking off to search for a resident's parking space some streets away. Those with young children and no-one to watch them have to take the children to the parking place and then trail them back home, whether up or down a steep hill, whether through icy rain or in blistering sun. These are simply the inevitable everyday consequences of the owners' decision to buy the house or flat in question. If they find the situation intolerable, they have only themselves to blame. If they can afford to move, they can try to find another suitable house or flat which has parking. Otherwise, they simply have to put up with their predicament."

Lord Rodger was clearly echoing the sentiments of Eloise Jamieson who, according to the evidence given at Lerwick Sheriff Court by Alison Moncrieff, apparently said things like[2]:-

> "You chose to live here. You will either have to like it or lump it"

Lord Neuberger seemed to be moving in the same direction[3]:-

> "I have real doubts as to whether the Sheriff was correct to hold that the expressly granted servitude in this case could not reasonably be enjoyed without there being a right to park. It seems to me that there is force in the argument that the servitude could be fully enjoyed without there being such a right: its enjoyment would merely be of more limited value to the owner and occupier of Da Store."

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[1] Paragraphs 85. Whilst Lord Rodger may not specifically refer, in his speech, to his own personal situation his views, in this regard, were made clear at the hearing itself in the House of Lords on 11th and 12th Jul 2007.

[2] As reported in *The Shetland Times*, 18th May 2001

[3] Paragraph 125

Lord Hope, however, saw it differently[1]:-

> "The situation in this case, it need hardly be said, is far removed from the urban situation to which Lord Rodger refers where people who buy flats or houses without adjacent car parking just have to put up with it."

Indeed Alison Moncrieff had said in evidence at the Sheriff Court[2]:-

> "This is not like a town or city where people are anonymous. This is a small country area where people help each other out and there should be give and take".

Lords Scott and Mance appeared to side with Lord Hope on this one. Ultimately, Lord Rodger (perhaps through gritted teeth) was 'prepared to yield' to the Sheriff's conclusion given that the Sheriff would have had a full appreciation of the actual situation and the facts involved.[3] Likewise, Lord Neuberger was prepared, despite his doubts, to accept that the combination of factors involved would be sufficient to imply a right to park.[4]

Thus it was perhaps the 'unusual'[5] circumstances of this particular case that resulted in all five Law Lords finding in favour of the Moncreffs.

In so doing they considered not only the question of a right to park as ancillary to a servitude right of access but also the question of whether you could have a free-standing servitude right to park. A majority of the Law Lords[6] thought you could thus allowing car parking to join the list of 'known' servitudes in Scots Law[7].

Iain G. Mitchell Q.C. commented:-

> "This case is hugely important for the law of both Scotland and England. Lawyers have been arguing for years over whether there is such a thing as a servitude or easement of parking, and, indeed, in Scotland, it had become received wisdom that the common law would never recognise *any* new servitudes beyond those which are already recognised.
>
> In this judgment, the House of Lords has now recognised that there is a servitude of parking in Scotland and an easement of parking in England,

[1] Paragraph 34

[2] As reported in *The Shetland Times*, 18th May 2001

[3] Paragraph 98

[4] Paragraph 127

[5] Paragraphs 33 & 36 per Lord Hope; Paragraph 97 per Lord Rodger; Paragraph 101 per Lord Mance; and Paragraphs 117 & 124 per Lord Neuberger. Only Lord Scott did not use that particular word in his Speech although he does refer to the geography involved as being "all-important" (paragraph 48).

[6] Lords Scott (Paragraph 47), Rodger (Paragraphs 72 & 75) and Neuberger (Paragraph 137). Whilst they considered it unnecessary to reach a conclusion on this point, Lords Hope (Paragraphs 22 & 24) and Mance (Paragraph 102) appear supportive of the principle.

[7] D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) Chapter 3.

and, at the same time, by doing so, the House of Lords has turned the received wisdom on its head.

The Scottish Parliament recently legislated on the recommendation of the Scottish Law Commission to open up what the Commission thought was a closed list of servitudes by providing for a statutory means of creating servitudes, but in light of this decision, we can see that the legislation may not have been necessary - the common law has once again proved itself to be flexible and adaptable to modern life. It will be very helpful for people whose cases do not fit within the narrow requirements for the statutory servitudes."

The Practical Implications of *Moncrieff* v *Jamieson*

So what are the practical implications of the House of Lords decision?

Some might consider these to be very limited. Given the unusual circumstances involved "there are unlikely to be many other such cases".[1] Was the outcome simply result driven given those unusual circumstances with none of the Law Lords being "willing to accept a situation where the dominant owners might have to walk in the Shetland weather conditions from their parked vehicles some 150 yards or so to the dominant tenement"?[2]

With the assistance of articles written by others[3] since the decision was issued I would offer the following thoughts:-

1. The Free-standing Servitude Right to Park

A free-standing servitude of parking clearly now exists and can be established by any means by which a servitude may be created (including prescription or implied grant) and that both before and after 28th November 2004 when Section 76 of the Title Conditions (Scotland) Act 2003[4] came into force.

2. Establishing an Ancillary Right to Park

An ancillary right to park can be established by a dominant owner if (a) he has an express grant of a servitude of vehicular access; and (b) that the right to park is reasonably necessary for the comfortable enjoyment of the right of

[1] K G C Reid and G L Gretton, *Conveyancing 2007* p 117.

[2] D Bartos *'Advance to Free Parking?'* (2007) 75 *Scottish Law Gazette* 203

[3] R Paisley, *'Clear View'* (2007) 52 *JLSS* Dec p 50; D Bartos *'Advance to Free Parking?'* (2007) 75 *Scottish Law Gazette* 203; K G C Reid and G L Gretton, *'Car parking in paradise', Conveyancing 2007* pp 106 – 117; Emma Slessenger, *'Car Parking Rules OK' Conv.* 2008, 3, 188; and G Junor, *'Warning – parking problems ahead (Moncrieff v Jamieson applied)'* SLT 2008, 1, 1-2; Kenneth Mackay, *'Servitudes - new ground?*' (2009) 54 *JLSS* Feb p50

[4] Which disapplied for express grants the rule that a positive servitude had to be of a type known to law provided that it was not repugnant with ownership. As a result of *Moncrieff* v *Jamieson* this now appears to have been the position at common law in any event for all servitudes.

vehicular access.[1] The latter may be difficult to establish unless the circumstances are as unusual as they were in *Moncrieff* v *Jamieson*, i.e. the impossibility of actual vehicular access onto the dominant tenement at the time of the grant.

3. New Types of Servitudes

The House of Lords recognised the possibility of new types of servitude to accommodate modern inventions or conditions. Thus the case could be used as a spring board to create other 'servitudes' that are not currently on the list of 'known' servitudes in Scots Law.

A recent case in the Outer House of the Court of Session: *Romano* v *Standard Commercial Property Securities Ltd and Atlas Investments Ltd*[2] saw the pursuer attempting to rely on *Moncrieff* v *Jamieson* to establish a "heritable and irredeemable right to attach to the subjects known as the ground or upper ground floor of the tenement 209 Buchanan Street, Glasgow...a shop front, including fascia".

Lord Carloway states[3]:-

> "There is no recognised servitude of signage (or shop front). This is no doubt because it is seldom, if ever, necessary to advertise a shop or restaurant upon another's property."

In dismissing the pursuer's claim he opines[4]:-

> "In *Moncrieff* v *Jamieson* Lord Scott considered the Scots law on servitudes to be the same as the common law of "easements"[5]. He expressed the view that any right of limited use may be capable of being created as "a servitudal right *in rem*"[6]. In what must be assumed to be a careful use of language, he was, presumably, not saying that any such use could thereby become a "servitude", as that term has hitherto been known in Scots law, distinct from an ordinary real burden or condition. *Moncrieff* v *Jamieson* is certainly not authority for such a wide proposition. There may be authority in England that there is an easement of public house signage (*Moody* v *Steggles*[7]), but without a qualified understanding of English property law, this court cannot express a view on the significance of that to Scots law. So far as domestic law is

[1] For a detailed analysis of the two tests and the application thereof see K G C Reid and G L Gretton, *Conveyancing 2007* pp 111 - 117.
[2] [2008] CSOH 105; see Craig Blackwood, *'Servitudes and shop fronts'* (11 Sep 2008) JLSS online; see also K G C Reid and G L Gretton, *Conveyancing 2008* pp 108 - 111.
[3] Paragraph 25
[4] Paragraph 28
[5] Paragraph 45; Cf Lord Neuberger at Paragraph 136
[6] Paragraph 47
[7] (1879) 12 Ch Div 261, Fry J at 265

concerned the pursuer's claim to have a servitude right must fail, since it is of a type neither known to the law nor akin to an existing category."

In the very recent case of *Compugraphics International Ltd v Nikolic*[1] which concerned the question of ownership of pipes, ductwork and associated support structures for an air conditioning system it was concluded by Lord Bracadale that "a servitude of overhang derived from jus projiciendi is recognised by the law of Scotland".[2] Not once in that case is *Moncrieff v Jamieson* mentioned so whether it influenced Lord Bracadale in any way is unclear.

4. Meaning and Effect of the Words in an Express Grant

When interpreting the meaning and effect of the words in an express grant it is now clear (although it possibly always was) that one must examine the facts which were observable on the ground at the time of the grant, and account can be taken of the use to which the dominant tenement might then reasonably have been expected to be put in the future.[3]

In *Waterman v Boyle*[4], where the English Court of Appeal considered *Moncrieff v Jamieson* for the first time, it was held that an express right to park two vehicles at a property did not imply a further right to park additional vehicles.

I was particularly interested to read the Judgment in *SP Distribution Limited v Rafique*[5] which concerned a property at Clarence Street in Edinburgh, a street that I once stayed in whilst a student at the University of Edinburgh. Reference is made in this case to *Moncrieff v Jamieson* and to ancillary rights. It was held that an express servitude of access to cellars did not include by implication a right to construct a flight of steps.

5. *Caveat Emptor*

Perhaps a purchaser's solicitor will need to review the standard clauses in their style offer to purchase to ensure the "parking position" is fully covered in relation to rights that may be required over other property and also those that may affect (unbeknown to a purchaser) the property seeking to be acquired. As recognised by Lord Rodger, a seller no doubt simply continues to give no warranty beyond what he grants, as to the nature or quality of the subjects being sold.[6]

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[1] [2009] CSOH 54
[2] R Paisley has pointed out that this is also a pipeline servitude
[3] Lord Hope (Paragraph 7)
[4] [2009] EWCA (Civ) 115
[5] 2009 GWD 40-688
[6] G Junor, *'Warning – parking problems ahead (Moncrieff v Jamieson applied)'* SLT 2008, 1, 1-2; see *Holms v Ashford Estates Ltd* 2009 SLT 389 for an interesting case involving rights of access/parking and a warrandice claim.

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6. Ancillary Rights other than Parking

The case assists with the implication into a servitude of many ancillary rights and not just that of parking. A particular activity could be justified as a right ancillary to a servitude although it does not exist as a servitude in its own right. Roddy Paisley has provided some examples[1]:-

> "Do servitudes of access usually come accompanied by ancillary rights of repair and maintenance? Of course. Can the right of support of the road or the drainage of surface water be an ancillary right? Clearly, yes. Indeed, in appropriate cases so could upgrading a road to adoptable standard, placing a fence on either side of the road, parking at the side of the road, painting traffic directions, erecting signs and placing pavements on a road."

He accepts that:-

> "Inevitably, it would have been better to have provided for such additional rights by express drafting in the first place, but the decision in *Moncrieff* assists when the drafting is less than fully comprehensive."

7. Drafting New Servitudes

When drafting new servitudes a conveyancer may wish to consider:-

(a) If parking is to be included, clauses regarding the duration of the parking. Perhaps a "single yellow line" clause or a "loading" clause or the like with specified times. You may wish to bring parking to an end at some future date, after a specific number of years, with a "sunset" clause.[2]

(b) Ensuring exclusions of possible implied ancillary rights. Perhaps specifying the right granted and then stating "and includes no ancillary rights whatsoever".[3]

(c) If ancillary rights are required then these should perhaps be expressly stipulated.

(d) Defining clearly the route of the rights granted with reference to colouring on a plan.

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[1] R Paisley, *'Clear View'* (2007) 52 *JLSS* Dec p 50

[2] D Bartos *'Advance to Free Parking?'* (2007) 75 *Scottish Law Gazette* 203

[3] Emma Slessenger, *'Car Parking Rules OK' Conv.* 2008, 3, 188; Kenneth Mackay, *'Servitudes - new ground?*' (2009) 54 *JLSS* Feb p50

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8. The Cost of Litigation to Parties and to the Public Purse

Moncrieff v *Jamieson* has been cited, in the same breath as *Donoghue* v *Stevenson*, by the Law Society of Scotland in support of the state continuing to bear a significant part of the costs of our justice system[1]:-

> "The Committee believes that the State has a duty to produce a system for resolution of disputes and to assist people in achieving equality of arms. As such, a significant part of the cost of the provision of the courts should be borne by the state. It is in the interests of the wider public that there is a robust and respected system for resolving judicial disputes. There are numerous examples of cases which have shaped the development of Scots Law where the value of the actual subject matter of the dispute is low; however the impact of the decision has been great. *Donoghue* v *Stevenson* is the classic example but there are several others, including the recent House of Lords case of *Moncrieff* v *Jamieson*."

The Last Word

I will leave the last words on the matter to Jimmy Moncrieff who said, outside the House of Lords, on 17th October 2007:-

> "Well we are obviously delighted that the House of Lords found unanimously in our favour. Five judges and no dissenting judges and that is a tremendous decision. It's a vindication of our position and our rights to access and parking at our house but it has gone on far far too long. Its 9 years and has been a tremendous financial and personal cost but at least justice has been done at the end of the day".

The Website & 'The Movie'

A dedicated 'parking law' section of inksters.com containing full details of the case and resources on it, including the *Moncrieff v Jamieson* video, can be viewed at:-

www.moncrieff-v-jamieson.com

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2 March 2010

[1] Response to the Scottish Civil Courts Review: A Consultation Paper (March 2008)