Advance to Free Parking ?

Moncrieff v. Jamieson, House of Lords, 17th October 2007

The Facts

Imagine a long Shetland voe or sea inlet cutting through the west of Shetland. Next to the shoreline of a long Shetland voe lay a merchant's house and former shop ("the dominant tenement"). Through most of its history access to it had been from the sea. From the land a traveller required to leave the public road, and pass 150 yards along a derelict road over neighbouring land ("the servient tenement") which stopped just short of the dominant tenement. Thereafter a footpath led through a gate into the dominant tenement and then down a steep flight of stairs to the house. Until 1973 the dominant tenement was part of the neighbouring land. The former shop and house were disused. At the time of the break-off in 1973, access was on foot and the derelict road was disused. The break-off deed granted to the disponee "a right of access from the branch public road through [the nearby village]". The right of access was no more detailed than that. Over the years the succeeding owners of the dominant tenement renovated the derelict road and began to use it for vehicular access. They created a turning circle at the end of it and began to park two cars and a trailer there. All of this was on the servient tenement. The area parked on was marked in pink on a plan. Access into the dominant tenement still required to be on foot. This was tolerated and unchallenged for a period of about 11 years. The neighbours then fell out.

The Orders Sought

The dominant owners sued for –

(1) declarator that the right of access in the break-off deed carried with it an ancillary right to park on the neighbouring land such vehicles as were reasonably incidental to the enjoyment of access to the dominant tenement; and

(2) interdict prohibiting the neighbouring owner from interfering with the exercise of the right of access and the accessory rights of parking and depositing vehicles in the pink area

The Previous Decisions

The dominant owners were successful in front of the sheriff at Lerwick. The servient owners appealed to the Inner House. The Inner House refused the appeal by two judgments to one. The servient owners appealed further to the House of Lords.

The Concessions

The servient owners conceded that –

- the right of access was a servitude despite the omission of that word;
- the right of access was included vehicular passage and had as an incident the right to put down and uplift passengers and to load and offload vehicles.

The Arguments

The arguments as presented are not wholly clear from the speeches of the judges. However in general terms, on the declarator the dominant owners argued that in the circumstances at the time of the grant the right to park had –

(1) arisen as an right incidental or ancillary to the express grant of the right of vehicular access; or

(2) arisen as a free-standing servitude impliedly granted upon the break-off of the dominant land in 1973.

These were the bases upon which the sheriff had granted declarator.

In relation to the declarator, the servient owners argued that (1) for the right to arise as ancillary to the express grant, it had to be necessary for the servitude to be effective and that as vehicular access could be had (albeit without parking), up to the boundary of the dominant land, the servitude was effective without any such ancillary right; (2) the right to park is incapable of being a servitude; and

In relation to the interdict, the servient owners argued that the order was imprecise as it did not specify the number of vehicles entitled to park or the parking times and the like.

The Decision

All five Law Lords found for the dominant owners. In recent years it has been fairly unusual for more than two or three Law Lords to give separate speeches, particularly when all agree on the result. Here four of the five Law Lords gave substantive judgments with Lord Mance agreeing in essence with Lord Hope. This illustrates the difficulties which many of their Lordships found with the case. The result is also that it is not straightforward to find clear principles from the decision on a number of issues.

A common feature of all of the speeches appears to have been an understandable sympathy for the dominant owners' difficulties of access. As Lord Hope put it, "For the owners use of their vehicles would involve walking a distance of about 150 yards in all weathers and in times of darkness as well as in daylight over . . . a significantly steep descent or climb in open and exposed country. In the case of a mother with very young children, for example, this would mean leaving them unattended and unsupervised in the house while parking or collecting her vehicle or alternatively taking her children with her on foot in such conditions to and from the place where she had to park her vehicle. Owners who had no difficulty in driving but found walking difficult because they were disabled or elderly would have to do this too . . .".

New Types of Servitude

All of the Law Lords confirmed that there is no prohibition on the expansion of the types of servitude to deal with modern inventions and new operations.

Right of Parking as Ancillary to Servitude of Vehicular Access

Lord Scott observed that a servitude of vehicular access does not usually have this ancillary right. Ultimately, however, the consensus was that the ancillary right of parking had arisen because it was necessary for the comfortable use and enjoyment of the expressly granted servitude in question.

Lord Hope drew on the analogy of a drover requiring a stance for his cattle on the way to market which would temporarily exclude the owner from his land. Lord Rodger used the decision of Maecianus from the Roman law Digest where it was decided that a dominant proprietor of a servitude right of pasture had a right to erect a hut on the servient land to protect him from the winter weather while he was looking after his animals there.

These analogies assisted the court to find that the servitude in this case could only be enjoyed with an ancillary right to park. Even Lord Rodger and to a lesser extent Lord Neuberger whose speeches show doubt on this issue, eventually found for the dominant proprietor on the basis of the exceptional facts found by the sheriff in the case.

Exclusion of Servient Owner from his Land

All of the Law Lords were clear that the mere exclusion of the servient owner from use of part of his land could not of itself prevent the creation of such an ancillary right just as it could not prevent the creation of a servitude itself.

Lord Scott noted, particularly in relation to English law, that there would be a limit to the extent that a servitude or easement could oust or exclude an owner from his land but that the limit was not crossed in this case. The right of parking was not such as would oust an owner from his land as he could still park anywhere on the land, subject merely to the right of the dominant owner to park there also.

Civiliter Principle

Lords Hope, Mance, and Scott found that the *civiliter* principle prevented prejudice to the servient owners. Lord Hope pointed out that the use of parking "must not impose an undue burden on the servient tenement". Questions of how and precisely where the right to park is to be exercised can "be decided under reference to the rule that the servitude right must be used *civiliter*". Thus for example the right did not involve storage of vehicles on the servient land. The number of vehicles would be limited in this way but no indication could be given of precise numbers. Lord Scott noted that the principle of *civiliter* restricted the use of the dominant owner to reasonable use of the dominant tenement as a domestic dwelling.

Lord Neuberger took the view that the extent of the parking right would be limited by what was necessary for the use of the tenement taking account of the presumed intention of the parties at the time of the express grant. On this basis he alone ventured the view that two or three spaces near to the gate to the dominant tenement would be all that was necessary.

Lord Rodger dissented on the *civiliter* principle to limit the amount of the vehicles parking on the servient land but thought that it could apply to the place on the servient land which could be occupied by them. This echoes Lord Neuberger's analysis.

Free Standing Servitude of Parking

Lords Scott, Rodger and Neubgerer were all of the view that there could in principle exist a servitude right of parking. Lord Hope reserved his view but his comments on this issue tend to support the view that there can be a free-standing servitude of parking.

Lord Scott went further and alone took the view that a free-standing servitude of parking had actually been created.

Implied Grant
Only Lord Scott found that there had been an implied grant of a free-standing servitude of parking. The remaining judges took the view that the grant was an express grant and the question was whether there was a right of parking ancillary to the express grant. The Court therefore did not approve the application in the Inner House of **Ewart v. Cochrane** (1861) 4 Macq. 117 (the leading case on implied grant of servitudes).

Lord Rodger did however agree with Lord Scott that the express grant of one servitude could carry with it the implied grant of another servitude.

Servitude created by Acquiescence
Again Lord Scott was the sole judge to find *obiter* that a servitude could be created by acquiescence of the would-be dominant proprietor.

Construction of Express Grant of Servitude
Lord Hope, with whom Lord Mance concurred, was the only judge to see the issue of whether there was a right of parking as being a matter of the construction of the express grant. The others simply applied the "necessary for the comfortable use and enjoyment of the expressly granted servitude" test for the implication of ancillary rights.

Precision of Interdict
All of the judges agreed with Lord Hope's analysis on this issue. He found that given that the details such as the number of vehicles to be parked on the pink area, and the times of parking which could be tolerated as part of the exercise of the ancillary right would vary from time to time. It was therefore undesirable for the court order to specify a maximum amount of vehicles and times of parking. He also noted, perhaps somewhat optimistically, that these issues ought to be capable of being worked out by the parties themselves, given reasonable co-operation on both sides. He therefore disagreed with the view of Lord Hamilton in the Inner House that the absence of such details in the interdict would be more likely to promote rather than avoid future conflict.

Comment
The principal issue, for all of the judges was whether the right to park could be implied as a right ancillary to the servitude right of vehicular access. This depended on whether parking at the boundary was necessary for the reasonable enjoyment of the right of vehicular access.

One would have expected that the starting point would have been a consideration of what a right of vehicular access entails. Only Lord Rodger appeared to consider the not

unreasonable argument that as servitude of access is a right of passage through the servient tenement to the dominant tenement, it is difficult to see how a right to park on a 150 yard stretch of private road is essential to allow a vehicle to be driven through the servient land into the dominant tenement.

The outcome of the case appears to be result driven. At the end of the day none of the Law Lords, including despite his doubts, Lord Rodger, were 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.

In both the drover and shepherd analogies referred to by Lords Hope and Rodger it is clear why the ancillary right was necessary for the exercise of the servitude in question. The principle could justify a passing place on the access road, or on a very long road perhaps a camping site or a rest place in long distance path, to enable the completion of the passage. Lord Hope concluded,

> ". . . it is impossible to reconcile such hardships [the walking of the 150 yards with young children or by a disabled or elderly person] with the use that might reasonably be expected to be made of the servitude right of vehicular access for the convenient and comfortable use of the property. It would mean . . . that the proprietor's right of vehicular access would effectively be defeated."

From the point of view of sympathy for the dominant owners this is entirely understandable. But from a legal point of view this passage is difficult. A servitude right of access is a right to pass over the servient property. How is the right to pass over the property defeated if cars can not be parked at the boundary of the dominant tenement ? Vehicles can pass over the property. Without the parking at the boundary the vehicular right would at present be restricted to dropping off and without the parking the convenience and comfort of the dominant tenement would be reduced. But ancillary rights are implied in an express grant to enable enjoyment of the servitude itself and not the dominant tenement which is benefited by the servitude. It is difficult to see why the expectation of a certain use for the dominant tenement should lead to expansion of the servitude or any right ancillary to it. As Lord Rodger observed, if the servitude was thought to be insufficient this would be reflected in the purchase price and additional rights attached the servitude could possibly be bought from the servient owner for a price.

The anomalies of such an ancillary right to park were observed by Lord Rodger. Thus in an urban situation where there was access over a public road to a residence with no parking space on it, the owner might have to walk some distance over the public road from the place where he parked the car to the his residence. In this instance where the access was over a private road to a residence with no parking space on it, the owner had an implied right to park a number of cars of uncertain limit adjacent to the boundary free of charge .

Furthermore if there was one space for parking on the dominant tenement but more than one car was thought to be necessary for the reasonable enjoyment of the dominant tenement, did that imply an ancillary right to park the additional cars ? As Lord Rodger

noted, if the majority approach was adopted then it would be difficult to see why such a right should not be implied.

The majority sought to deal with the issue of the extent of the ancillary right by reference to the civiliter principle. "Civiliter" means "in moderation" with the result that the dominant owner can do no act by which the burden of the servitude becomes heavier on the servient tenement. But this principle has always been applied to regulate the exercise of the servitude right. It has not, at least until **Moncrieff** been used to determine the extent of the servitude right or any ancillary right. The difficulties in applying the civiliter principle to limiting the extent of the ancillary right are illustrated by the reluctance of the Law Lords in using the principle to indicate the maximum amount of vehicles entitled to park. Lord Hope indicated that the number of vehicles and times of parking would vary from time to time. Taking that to be the case it is difficult to see how the civiliter principle can be given any specific content, or be of any practical use. What advice is the lawyer to give to either party on the number of cars that can be parked ?

Effect on the Law

Leaving aside the critique, where does **Moncrieff** leave the law ? First and foremost the court recognized the possibility of a free-standing servitude of parking in Scots law. It is not repugnant with ownership, at least in so far as it does not cover the whole of the servient land. It may or may not be repugnant with ownership if it covers the whole of the servient land. So it seems that it is possible to make valid express grants of servitude rights of parking which will bind and benefit singular successors. It also must carry with it the possibility that a servitude right of parking may have been established by prescription or implied grant even before 28th November 2004. On that date section 76 of the Title Conditions (Scotland) Act 2003 came into force. It 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. The court appears to have confirmed that this was the position at common law in any event for all servitudes.

Secondly, in order to establish an incidental right to park, it is sufficient for the dominant owner to show –

- that he has an express grant of a servitude of vehicular access; and
- that the right to park is necessary to the reasonable enjoyment of the right of vehicular access.

When is the right to park necessary for vehicular access ? **Moncrieff** does not make this clear. However test would appear to be that without it the vehicular access would be effectively defeated. This is a high test. It is suggested that only special features such as the impossibility of vehicular access onto the dominant tenement at the time of grant will justify a court implying a right to park into a right of vehicular access.

Thirdly, the court recognised the possibility of new types of servitude to accommodate modern inventions or conditions.

Finally, Lord Hope found that the meaning and effect of the words in the express grant must be determined by examining the facts which were observable on the ground at the

time of the grant, and that account could be taken of the use to which the dominant tenement might then reasonably have been expected to be put in the future. These remarks appear to take no account of the well established House of Lords authorities (**Anderson v. Dickie** 1915 S.C. (H.L.) 79; **Hunter v. Fox** 1964 S.C. (H.L.) 95; and **Alvis v. Harrison** 1991 S.L.T. 64, 67G per Lord Jauncey of Tullichettle) on the construction of expressly granted servitudes and real burdens to which he was not referred. In essence the first two authorities support the principle that in finding the meaning of the words one is restricted to the four corners of the deed. The third supports this view while allowing regard to surrounding circumstances at the time of the grant if the terms are unclear or ambiguous.

Express grants of both servitudes and real burdens share the feature, absent from ordinary contracts, that the wording is intended to bind singular successors of the granter and grantee who can not be expected to be aware of what could be observed or thought but not expressed at the time of the grant. In both instances the acquirer of the servient or burdened property has to rely on the faith of the wording of the express grant. Despite Lord Hope's remarks it is submitted that he should not be seen as laying down a new rule of construction for express grants of servitudes or real burdens.

Drafting

There are no styles for servitudes of parking. There is ample scope for disagreement over parking rights. It would seem to make sense for clauses regarding the duration of the parking to be inserted. Thus one could have a "single yellow line" clause, or a "loading" clause or the like with specified times. There is also the possibility of a "sunset" clause bringing the servitude to an end after a specific number of years.

Conclusion

The speeches are difficult to read and are not easy to understand or reconcile. It will not be straightforward to advise clients as a result. The one clear conclusion is that servitudes of parking are possible in Scots law. It will remain for future litigation to settle the extent of the ratio of the decision. In some respects it may come to resemble the well know case of **Smith v. Bank of Scotland** 1997 S.C. (H.L.)111where in another result-driven decision the House of Lords sought to confer benefits to a spouse who guarantees the debts of another spouse. Thought to be revolutionary at the time, the subsequent case law almost uniformly amounts to a retreat from the apparent basis of that landmark decision.

David Bartos 8th November 2007