

In the cause

JOHN CHARLES URQUHART, ROSEMARY ELIZABETH URQUHART and MARIANNE ELIZABETH URQUHART, all
residing at Coolangatta, Inverugie Road, Hopeman, Elgin IV30 5SX

PURSUERS

Against

(FIRST) J.RHIND & CO, a partnership constituted under the laws of Scotland having a place of business at Woodside Farm, Kinloss, Moray, IV36 3UA, **(SECOND) CARROL RHIND, (THIRD) MOIRA RHIND, (FOURTH) JAMES ALEXANDER RHIND, (FIFTH) GORDON JAMES RHIND, and (SIXTH) ANDREW WILLIAM RHIND**, all of which second to sixth defenders reside at Woodside Farm, Kinloss, Moray, IV36 3UA, and are the whole partners of and trustees for the firm of the first defenders, as such partners and trustees and as individuals, and **(SEVENTH) THE SCOTTISH MINISTERS**, St Andrew's House, 2 Regent Street, Edinburgh, EH1 3DG

DEFENDERS

Pursuers: Upton, Counsel, instructed by Anderson, Anderson Strathern LLP

Defenders: Reid, Counsel, instructed by Forrester, Morton Fraser LLP

ELGIN, 23 May 2024

Having resumed consideration of the cause the Sheriff makes the following findings:

FINDS IN FACT:

1. The pursuers, John Charles Urquhart and Elizabeth Rosemary Urquhart, spouses and their daughter Marianne Elizabeth Urquhart, are the registered heritable proprietors of the subjects known as and forming Millie Bothy, Kinloss, being the whole subjects registered in the Land Register of Scotland under title number MOR17017, hereinafter referred to as 'the subjects'.
2. The first defender is a farming partnership formed under the law of Scotland and has a place of business at Woodside Farm, Kinloss, Moray.
3. The second to sixth defenders are the whole partners of and trustees for the first defender and reside at c/o Woodside Farm, Kinloss, Moray.
4. The second to sixth defenders as such trustees are the heritable proprietors of subjects forming part of Rosevalley Farm ('the first defenders subjects').
5. The second to sixth defenders as such trustees are infeft in the title to the first defenders subjects by virtue of (1) in respect of the fourth to sixth defenders, the disposition in their favour granted by General Accident Fire & Life Assurance Corp; recorded in the Division of the General Register of Sasines for the County of Moray on 26 March 1998, and (2) in respect of the second and third defenders, a deed of assumption and resignation dated 26 May 2010.
6. The seventh defenders, the Scottish Ministers, are registered heritable proprietors of subjects known as and forming Roseisle Forest ('the seventh defenders subjects').
7. The seventh defenders are infeft in the title to the seventh defenders subjects by virtue of a title in their favour registered in

the Land Register of Scotland under title number MOR18398.

8. The pursuers acquired their title to the subjects from Christopher Thomas Allen and Mrs Lynne Hopper or Allen on 31 May 2017.
9. The pursuers took very occasional access to the subjects between 2017 and 2021. That access involved driving across the first defenders subjects to the boundary with the seventh defenders subjects, and thereafter walking to the subjects across the seventh defenders subjects. The pursuers also accessed the subjects via other routes across the seventh defenders subjects without crossing the first defenders subjects, having been provided with a key for locked gates by the Forestry Commission.
10. Mr and Mrs Allen acquired title to the subjects on 23 December 1988.
11. Mr and Mrs Allen took occasional access to the subjects via the first defenders subjects between 1988 and 1993. Between 1993 and 2017 said access took place less than annually. That access involved driving across the first defenders subjects to the boundary with the seventh defenders subjects, climbing a gate or fence and thereafter proceeding by foot across the seventh defenders subjects. The Allen's also accessed the subjects via other routes through the seventh defenders subjects, having been provided with a gate key by the Forestry Commission.
12. The first to sixth defenders were unaware of the pursuers driving across and parking on their subjects beside the north gate at the boundary with the seventh defenders subjects until July 2021.
13. The first to sixth defenders were unaware of the Allen's driving across their subjects and parking at the north gate until the commencement of these proceedings.
14. The subjects, which included a stone bothy, were formerly a salmon fishing station and were so used until at least the 1950's.
15. The said salmon fishing station and bothy were in use prior to the creation of a path or road leading from there to the Rosevalley Farm Steading.
16. A path or road from the Millie Burn adjacent to the bothy leading to Rosevalley Farm Steading existed by 1926.
17. From 1928 onwards, a number of paths and roads were developed in the forestry land now forming the seventh defenders subjects, which paths and roads are linked to the public road network without crossing the first defenders subjects.
18. In the 1950's, the salmon fishing station was accessed by L and Rover along the foreshore at low tide, so that fish could be stored in an ice house or transported direct to market. At high tide the L and Rover would access the station by fording the Millie bothy into what are now the seventh defenders subjects and proceeding along an unspecified inland route.
19. The 1959 Ordnance Survey map shows no continuous route from the subjects across the seventh and first defenders subjects to the public road.
20. There is no evidence of pedestrian or vehicular access being taken to the subjects along the disputed route from the public road, across the first defenders subjects and the seventh defenders subjects between 1960 and 1988.
21. In 1868 Robert McKessack acquired the salmon fishings ex adverso the lands of Roseisle, which were conveyed by the disposition by George Ross MacKessack in favour of Moray Firth Salmon Fisheries Co Ltd, which was recorded in the Division of the General Register of Sasines for the County of Elgin and Forres on 12 January 1926.
22. Following that disposition, the subjects were bounded by land still in the ownership of George MacKessack and by the foreshore.
23. By about 1988 if not some years earlier the stone bothy had become a ruin.
24. The buildings of Rosevalley Farm are shown and are connected to the public highway in Ordnance maps published in 1872 and 1906.
25. The buildings of Rosevalley Farm are shown on the plan annexed to the disposition by George MacKessack in favour of the

Forestry Commissioners (who were the seventh defenders predecessors in title) dated 5 November 1928 and recorded in the General Register of Sasines on 12 November 1928.

26. In each case, the buildings of Rosevalley Farm are shown at a location at the north-west of the road now known as the B9089 and close to what is now the boundary between the first defenders subjects and the seventh defenders subjects.
27. The buildings of Rosevalley Farm have since been demolished.
28. The former site of the Rosevalley Farm buildings is shown on plans and maps copies of which are 6/2/1, 6/3/1 and 6/4/1 of Process.
29. The buildings of Rosevalley Farm are not shown on the Ordnance Survey map published in 1959, a copy of which is 6/5/1 of Process.
30. The buildings of Rosevalley Farm are no longer shown on the current Ordnance Survey maps.
31. Since 2017 there have been two gates at two locations on the route which is at issue.
32. A single gate is located on or towards the north (or seaward) end of the defenders subjects.
33. Another single gate is located adjacent to the south (or landward) end of the defenders subjects at the junction approximately where the route meets the B9089.
34. To either side of the landward most gate are sets of double gates which are used by the first to sixth defenders to take access to the defenders subjects
35. The lands of Rosevalley Farm extend from the boundary of the defenders subjects with the seventh defenders subjects to the north, to the public B9089 road to the south.
36. By 2000 at the latest, the track through the first defenders subjects to the north gate was in a very poor condition. It was not possible to cross the first defenders subjects by car for much of the year.
37. In 2000 and again in 2017 the first defenders carried out works to improve the quality of the route to its current standard, which allows for vehicles to reach the north gate, bounding the seventh defenders subjects.
38. Following an incident involving cattle in 2002, the first defenders installed the north gate.
39. Prior to purchasing the subjects, the pursuers made inquiries into the access position, including securing affidavits from Mr and Mrs Allen and driving over the seventh defenders subjects to the boundary with the seventh defenders subjects, climbing the north gate and thereafter walking onwards to the subjects.
40. On or about 22 July 2022 the first and second pursuers met the fifth defender, at which time the fifth defender stated to the first and second pursuers that in his view there was no valid right of access.
41. On or about 22 July 2022, locks and chains were installed by the first to sixth defenders on the gates on the route at issue.
42. The first to sixth defenders have not offered to provide nor provided to the pursuers any keys or codes for any of the locks.

FINDS IN FACT AND LAW:

1. The express right of access to the subjects set out in the 1926 Disposition granted by George McKessack in favour of Moray Firth Salmon Fisheries Co Ltd extended only to the now demolished farm steading at Rosevalley.
2. There was an implied right of access onwards from the farm steading to the B9089 public road.
3. Both the express and implied rights of access to the farm steading at Rosevalley and onwards to the public road have been extinguished by negative prescription.
4. No right of access to the subjects from the B9089 public road across the first defenders subjects to the boundary with the seventh defenders subjects has been created by positive prescription.
5. The subjects disposed by George McKessack in said 1926 disposition were land locked, there being no land route to the subjects other than the existing way referred to in the disposition, through land then in the ownership of said George

MacKessack, now the first and seventh defenders subjects.

6. Of necessity, as a natural result of the pursuers right of property, there is an inherent right of access to and egress from the subjects over the first and seventh defenders subjects to the B9089 public road by the access route lying approximately to the south of the subjects being the whole route shown tinted mauve and brown on the plan of title sheet MOR17017.
7. Said inherent right of access is restricted to use by pedestrians and carts.

ACCORDINGLY repels the pursuers pleas in law numbered 1, 2 and 4, sustains pleas in law 3, to the extent of a right of access to and egress from the subjects for pedestrians and carts, 5 and 6, the latter as amended at the bar, repels the pursuers pleas in law 1 to 5 in the counterclaim; repels the defenders pleas in law 1 to 12 in the principal action and 1 to 3 in the counterclaim; reserves the question of expenses meantime.

NOTE

Introduction

1. This case proceeded to proof before answer with a site visit on 31 August, oral evidence on 31 August, 6 and 15 September, with submissions on 27 October and 27 November all 2023. The parties were represented throughout by Mr Upton, Counsel for the pursuers and Mr Reid, Counsel for the first to sixth defenders. The seventh named defenders did not enter process
2. The proceedings relate to a disputed right of access over the first defenders subjects to the B9089 public road. The pursuers purchased Millie Bothy, a derelict salmon station, on 31 May 2017. The defenders subjects and the Millie Bothy are separated by land now owned by the seventh defenders.
3. The pursuers crave declarator of the existence of an access right to the subjects over the defenders subjects for pedestrian and vehicular traffic, whether provided for by their L and Register title, implied right, positive prescription or as a result of an inherent right, together with associated craves for interdict and the provision of keys or codes for locked gates.
4. The defenders submit that any express, implied or inherent rights, however constituted, have either prescribed or do not exist, but that if any such right does exist it is limited to pedestrian access only.
5. By disposition granted by George Ross McKessack in favour of Moray Firth Salmon Co recorded in the General Register of Sasines for the County of Elgin and Forres on 12 January 1926, Millie Bothy was disposed together with

“the right of access at all times to the subjects and others above conveyed by the path or road leading from near the said bothy at the Millie Burn to the farm stading at Rosevalley on the said estate at Roseisle and also the right to take ice from the pond on Clarky Hill at Burghead with reasonable access thereto for this purpose; Declaring that in the event of a gate or gates being put across said path or road by me or my successors my disponees and their foresaids shall be bound to keep said gates shut except when is required for passage”.

In 1928 George McKessack granted a subsequent disposition in favour of the Forestry Commissioners which is the split off origin of the seventh defenders present title. In that disposition, Mr McKessack reserved a

“right of access for pedestrians and carts in favour of me and my successors as proprietors of the remaining lands of Roseisle and of the Moray Firth Salmon Fisheries Company Limited and those deriving a right from them by the road or path coloured green on said map leading from a point near the farm stading at Rosevalley through the subjects hereby disposed to the coast near Millie Burn”.

6. Following their purchase, the pursuers registered their title in May 2017 in the Land Register under title number MOR17017. The Land Registration (Scotland) Act 2012 applies. The title sheet provides that it is

“the right of access at all times to the subjects by the path or road leading from or near the bothy at Millie Burn to the farm and steading at Rosevalley on the said Estate of Roseisle. Note: The path or road leading from or near the bothy at Millie Burn to the farm and steading at Rosevalley is tinted mauve and brown on the cadastral map.”

“The farm at Rosevalley extends from its boundary with the seventh defenders subjects to the north, to the public B 9089 road to the south. The right of access consequently extends over the whole length of the Access Route, as it is tinted mauve and brown on the cadastral map on the Land Register. The right is similarly defined in the seventh defenders title sheet no MOR18398. The right has been exercised since it was expressly granted in the disposition by George Ross MacKessack in 1926. The right is mentioned in the title conditions referred to in the defenders titles: reference is made to the disposition by the late George McKessack’s trustees in favour of General Accident Fire & Life Assurance Corp, recorded in the General Register of Sasines on 7 December 1983, and the disposition by General Accident in favour of the trustees of the partners of the defenders firm recorded on 6 March 1998”.

7. I will summarise the witnesses’ evidence before briefly outlining submissions and addressing the various questions which arise. The parties agreed the terms of a joint minute, the contents of which are reflected in findings in fact. Affidavits and/or statements were lodged in respect of all of the witnesses and formed all or part of their evidence in chief. Much of the parole evidence was uncontroversial, resulting in a largely, but not entirely, common factual background to each question of law.

8. The disputed access track that runs across the first defenders subjects can usefully be divided into three sections. The first section runs from the B 9089 to an old shed. The second section runs from the old shed to a red gate. The third section runs from the red gate to the north gate at the boundary between the first defenders subjects and the seventh defenders subjects, referred to as the ‘FLS boundary’. The former Rosevalley Farm Steading was located between the red gate and the FLS boundary, slightly closer to the latter.

Pursuers’ case

9. Each of the pursuers, John Urquhart, his wife Rosemary Urquhart and their daughter Marianne Urquhart gave evidence. Together, they had purchased on 31 May 2017 an area of ground known as Millie Bothy, Kinloss, the title to which is registered in the Land Register of Scotland under number MOR17017. The sellers, Christopher Allen and Mrs Lynn Hopper or Allen, gave evidence about the sale and their use of the disputed access route. The pursuers also called Ian Rae, who worked as a farm manager with the Moray Estate Company until May 1997, which role involved regular visits to Rosevalley Farm during the growing season between March and September and Ralph More, a retired fisherman in his late seventies who had lived his entire life in nearby Burghead and who recalled visiting Millie Bothy as a child.
10. Prior to the purchase the Urquhart’s had investigated the access position, which included reviewing the underlying title, visiting the site and securing affidavits from the sellers, Mr and Mrs Allen, regarding their use of an access route over the first defenders’ subjects. The Urquhart’s pre purchase visits involved driving a vehicle across the first defenders subjects as far as the north gate, which bounds with the seventh defenders subjects at the FLS boundary. Marianne Urquhart’s

evidence was that her father's Mazda estate vehicle could pass through the access route, but doing so required great care. Marianne Urquhart said that, notwithstanding her many walks in the seventh defenders subjects over the years, she had not entered the 'farmer's field' before. She said the family realised that if they were to use the access route they would require a 4x4 vehicle. They had not required to open any farm gates to drive as far as the north gate. They left their car near the gate and walked onto the seventh defenders subjects towards Millie Bothy. The Urquhart's original plan had been to build holiday homes on the site, but planning permission had been refused. They were currently seeking planning permission to redevelop Millie Bothy as a summer home. Mrs Urquhart's father and uncle had fished from the bothy until the 1950's. They felt family connections to the site.

11. Between 2017 and the end of 2022 the Urquhart's had used the access route over the first defenders subjects as far as the north gate bounding the seventh defenders subjects, parked their vehicle and walked the rest of the way to Millie Bothy, but, in Rosemary Urquhart's words, 'not a lot'. Mr Urquhart said in his witness statement that he took access along the disputed route around once a month until the middle of 2021. In evidence he recalled having driven the route four or five times in total. He did not agree that the claim in his statement that he took access around once a month to mid-2021 was an exaggeration.
12. On 14 July 2021, Mr Urquhart met Andrew Rhind, who informed Mr Urquhart that he intended to lock the gates. After that, Mr Urquhart did not 'go so much'. Mr Urquhart sent an email to Andrew Rhind on 24 September 2021 enclosing a copy of the title MOR17017. He received no reply. The Urquhart's did not drive across the defenders subjects in 2022 as they had secured permission from the Forestry Commission to take access over the seventh defenders subjects. They had been provided with keys for gates, which they still used. They characterised this as a licensing agreement which was not permanent. The current agreement, a copy of which was not produced, was due to expire at the end of 2023. On 18 July 2022, Mr Urquhart arranged for the grass on the seventh defenders side of the north gate to be cut back. Prior to that the area was overgrown. Mr Urquhart explained that any construction vehicles which would need to access the subjects would do so across the seventh defenders subjects from the Burghead side per the agreement with the Forestry Commission. It would not be possible to take a digger over the bridge which separates the subjects from the seventh defenders subjects. Mr Urquhart claimed that it would be possible to take a small or medium sized car over the bridge. In his affidavit he said that the last time the bridge was used by a vehicle was by the previous owners, the Allen's. When this was queried in evidence in chief, he described that as 'a guess' and acknowledged that he had no basis for such an assertion. On 22 July 2022, Mr and Mrs Urquhart met Gordon Rhind at the bothy. The Urquhart's had taken a drilling rig to the site to conduct tests for the presence of a fresh water source. The rig had been brought in via a separate track from an eastward direction over the seventh defenders subjects. Mr Rhind told the Urquhart's that they had no legal right of access to use the 'track' over the first defenders subjects to access the bothy. On both occasions in July 2021 and July 2022 the Urquhart's explained their understanding that their title benefitted from a right to access over the first defenders subjects. On the day of the meeting with Gordon Rhind in July 2022, the Urquhart's had driven their Mazda motor vehicle to a nearby picnic area on the seventh defenders subjects and walked to the bothy from there, not crossing the first defenders subjects. After the July meeting the Urquhart's noticed that the gates to the disputed access track were locked. The Urquhart's were not provided with keys to the gates.
13. Mr Urquhart researched the history of Millie bothy. It was built around 1860. Salmon from Burghead Bay were sent by the MacKessacks to the London market and Europe. The MacKessack's had sold their fisheries, including Millie bothy, to Moray Firth Salmon Fisheries Ltd in 1925. Based on conversations he had had with Ian More, now deceased and his brother, Ralph More, he claimed that salmon caught at the bothy had been brought by Land Rover through the seventh defenders subjects and the first defenders subjects to the now B9809 and on to Findhorn Icehouse for packing and then to

market by train. He said this practice had continued until the closure of most of the salmon netting stations in 1988. He claimed that information boards at Findhorn Heritage Centre detailed the collection of the salmon from all of the stations from Burghead to Findhorn by Land Rover. He later accepted that productions 5/21/1 and 5/21/2, photographs of the Findhorn Heritage Centre information boards, made no mention of Land Rovers. He said that McKessack had not included a right of access from the farm steading to the B9089 because 'there was a public road from the steading to the main road, in other words, it was used by the public'.

14. Mr Urquhart had spoken to Ian More, a retired fisherman who lived in Burghead, and who was terminally ill at the time of their conversation in 2022. Mr More recalled that he and his brother Ralph More spent a lot of time at the Bothy during their school years. Ian More recalled a Land Rover would collect fish from the Bothy and would leave either across the beach if the tide was out or, if the tide was in, leave via the disputed route.
15. Mr Urquhart accepted that the title deed splitting off the bothy site registered in 1926 stated that the right of access extended from Millie Burn to the Farm Steading at Rosevalley. He rejected the suggestion that salmon fishing had ended at the bothy prior to the 1980's. He referred to an extract from 'The Salmon Fishers book', production 5/16, which mentioned minutes of a meeting in 1987 at which the potential purchase of fishing rights at the bothy was discussed. He accepted that his original affidavit was inaccurate regarding the Allen's use of the access route, believing at the time that they had driven their car all the way to the bothy, rather than leaving their car at the north gate. He accepted that he had a licence arrangement to use a forestry logging road over the seventh defenders subjects capable of holding a large lorry and that machinery had been brought to the bothy via that route. He accepted that he held a licence to use that route when he had sworn the original affidavit.
16. Mr and Mrs Allen are the former owners of the Millie Bothy, which they purchased from the Moray Firth Salmon Fisheries Company in January 1989. They sold the subjects to the Urquhart's in 2017. Around the time of the sale, the Allen's swore affidavits which stated that they had used the access track from the B9089 to Millie Bothy for vehicular and pedestrian access regularly, that the access route had been used for camping holidays since 1989 and that the access route was used by them at a minimum of approximately once or twice per year. The affidavits also stated that there had not been a year when they had not used the access track. In evidence, the Allen's advised that the Forestry Commission provided them with a key to access the Bothy, at first via a nearby picnic site and thereafter via a route known as the Burghead Way. If intending to spend time at the Bothy, the Allen's would use their car to go along the Burghead route. The Allen's used the route through the field on what is now the first defenders subjects to go for walks on the beach. They would leave their car at near what is now the north gate and walk the rest of the way. They used their Volvo motor vehicle, which was not a four by four. The track was good enough for a vehicle, albeit dependent on weather. Mr Allen described the route as a 'muddy farm track'. They would never take a car beyond the red gate in winter if it had been raining, as the track was too muddy. They never took the car through the north gate onto the seventh defenders subjects as it was impassable. In good weather, they would visit fortnightly. Both routes were used 'year on year' until 1993, at which time the Allen's moved away from the area. Mrs Allen continued to visit the bothy every two or three years, Mr Allen every three to five years. The Forestry Commission were keen on the Allen's using the Burghead road route. The Allen's allowed friends to use the bothy site, preferring them to use the route through the first defenders subjects rather than sending the forestry gate key in the post. The Allen's were never blocked from accessing the bothy albeit they acknowledged that they never met anyone when accessing the disputed route, so it was possible that the owners of the Rosevalley Farm did not know they were there.
17. Ralph More is a seventy nine year old retired fisherman who has lived his whole life in Burghead. He was a compelling witness with a good memory. His brother Iain died in December 2022. He first visited the Millie Bothy when he was about

- six and Iain was nine. The brothers would go every Sunday during fishing season. The fishing station did not operate on Sunday's, but was still manned by two fishermen. He described the process of salmon net fishing, including the use of boats known as cobbles, which he witnessed on those days when he visited during the week.
18. He last visited the bothy two years ago. In the 1950's the bothy was still roofed and used as overnight accommodation by the fishermen during the season. The bothy was closed over winter. A Land Rover would attend at the bothy every day during the season to take the fish to Findhorn.
19. Usually, the Land Rover would arrive via the beach, dependent on the morning tide. If the tide was in, the Land Rover would come in 'the other way'. When shown production 5/1/1, the witness pointed to the disputed route, but said 'I wouldnae be too sure'. When asked why he had pointed to this route, he replied 'I dunno, nae sure.' He recalled the Land Rover crossed the Millie burn and did not cross a bridge. The Land Rover forded over the burn near where the bridge is now located. The witness had never been along the disputed route. He did not know what route the Land Rover took once it forded the Millie burn. He had last witnessed fishing at the bothy in the late 1950's.
20. Ian Rae is a semi-retired agricultural consultant. He worked as a farm manager for Moray Estate Company until May 1997. He was in charge of farms including Rosevalley Farm. He visited the farm very regularly, at least weekly, during the growing season between March and September. He used the track from the B9089 on the first defenders' subjects for the purposes of accessing other fields, which were of a different layout at the time. It had been arable land, so there was no need for gates at the B9089 road entrance. He was able to use a non-four by four car to access the route. He did not use the route to enter the seventh defenders subjects or visit the bothy.

Defenders' case

21. David Whyte is a retired tractor man who worked at Rosevalley farm and other farms in the area between 1979 and 1998. He was at Rosevalley farm most weeks. He described the farmland at that time as extremely wet. It was possible to drive a pick up as far as the old shed in the field, but beyond that the ground was in poor condition. From the tree line near the red gate to the FLS boundary there was no track. It would not have been possible to reach the FLS boundary by car or pick up. He never witnessed cars using the track. He was not aware of there being any access to Millie Bothy using the track. The full extent of the route was only accessible after the Rhind's purchased the farm and carried out ground works.
22. James Stephen has been employed as a tractor man at Rosevalley Farm since February 2001. Between 2001 and 2017 the land between the red gate and the FLS boundary was in very poor condition. There didn't appear to be any track over that part of the field. It was particularly boggy near the red gate. He said it would not have been possible to drive a car or 4x4 to get to the FLS boundary. He was not aware of any historic use of this section of the disputed route. He was involved in improvement works between the red gate and the FLS boundary which were completed in March 2017. He said it was thereafter possible to drive a 4x4 vehicle to the FLS boundary, but it would remain difficult in an ordinary car. He used the track for work purposes during the summer months only. When shown photographs 5/17/29 and 30, taken in January 2017 prior to the works being completed, he accepted that the photographs did not show the 'guttery muddy hole' which he had described in his witness statement. He explained that the worst section was at the red gate. That section was not visible in the photographs.
23. Grant Nicholson has operated a plant hire, ground works and excavation company for three decades. He recalled being hired by the first defender's to carry out work at Rosevalley Farm in 2000. The farm was in poor condition. The area in question was a field, there was no track beyond the old shed. He installed a new track between the shed and the red gate.

Prior to that there had been a very tough track from the main road to the shed and no road from the shed to the red gate. There was no road, nor any evidence of an old road between the red gate and the FLS boundary. He had revisited the site recently and assessed the route between the main road and the bothy. In his view it would be difficult to get a normal car to the bothy along the disputed route. The footbridge at the bothy boundary was too small for a car. He considered that it would be possible to drive from the main road as far as the FLS boundary at a 'favourable time of year'.

24. Andrew Rhind, the sixth defender, is a partner of the first Defender J. Rhind and Co, a farming partnership. The other members of the partnership are the second to fifth named defenders. The partnership purchased the first defenders subjects, Rosevalley Farm, in March 1998. The Farm is a mixed arable farm with livestock. There are around five hundred cattle at the farm. Andrew Rhind said that vehicle access along the disputed route raises health and safety concerns for cattle, livestock and road users of the B9089, which he described as a 'fast moving road'. Such access would disrupt farm operations, there being no passing places along the disputed access route. He said that prior to March 2017 the route was impassable for cars from the site of the former steading, about two hundred metres beyond the red gate and the FLS boundary. Before then it was very muddy and accessible only by tractor. Before 2002 there was no access between the first defenders subjects and the seventh defenders subjects as there was no gate. In addition, there was blown sand, as well as dumped wire and earth at that part of the boundary. In 2002 the defenders had cleared the area and installed a gate, so that they could recover cattle more easily, there having been an incident when cattle escaped into the seventh defenders subjects through a damaged fence. The seventh defenders and the first defenders split the cost of the gate. When challenged, he denied that there had been a gate at that location prior to 2002. When it was suggested that the existing gate strainer posts had been present before 2002, he said that the defenders had installed the gate posts. Prior to 2000 the route from the B9089 to the former steading was impassable. Prior to Mr Urquhart using an industrial strimmer over around two hundred metres of FLS land near the north gate, that part of the seventh defenders subjects was accessible only by excavators. He understood that there had been access from the bothy to the farm steading in the past. The steading had been demolished in 1938. The borehole works carried out at the bothy site by the pursuers had involved equipment being brought to the bothy via a different route, not over the first defenders land. At a chance meeting with Mr Urquhart in July 2021 Mr Rhind had prevented him from taking access over the disputed route. He did not respond to an email sent by Mr Urquhart soon after offering to contribute to the maintenance of the route. He did recall one evening when he spoke to tourists in a campervan who were parked around the area of the red gate, where the track stopped at that time. It was mid-summer and dry. In winter the part of the route between the old steading and the FLS boundary was full of ruts and not passable prior to the work carried out by the Rhind's in 2017. He said the FLS path to the bothy is heavily used by the public, and that the bridge over the Millie Burn is around 900mm wide. The current bridge replaced a previous bridge between ten and fifteen years before. Neither the current bridge nor its predecessor were suitable for vehicles. To his knowledge neither pedestrian nor vehicular access had been taken by the pursuers or the Allen's, even after the final section of track was upgraded. The gate at the FLS boundary had always been locked.
25. The High Road, now known as the Moray Coast trail, runs from Burghead to Findhorn via the Millie Bothy and Bessie Bothy to Findhorn. The sea is beginning to reclaim the road, which has eroded away in parts. He understood from various people who were aware of how salmon fishing operated that the High Road was used to take fish to Burghead or Findhorn. There was alternate access to the bothy site via a track running from the east of the bothy to Burghead Road. He understood this was the route used by the pursuers to bring heavy machinery to the site. He also understood that the bothy site can be accessed from the shore.
26. Gordon Rhind, the fifth defender, is also a partner in James Rhind & Co farming partnership. He understood that the farm steading had been removed around the start of the Second World War. Prior to 1945 a drainage ditch ran across the

disputed access route. Until the end of 2000 the drainage ditch marked the end of the track, south of the former steading. The section of the track from the old shed to the red gate was not passable by either a regular car or 4x4 until it was upgraded in 2000. There was a farm track from the B9089 to the red gate. At one point the former owners, the McKessack's, had sold the land, but preserved a right of access from Rosevalley Steading to the bothy, both of which the MacKessack's had an interest in. There was no access beyond the steading to the B9089. When the partnership took over the land, the track from the B9089 to the shed was accessible by 4x4 vehicle. The section from the shed to the red track was accessible only by tractor. The section from the red gate to the FLS boundary was not passable. It was boggy and rough. Significant work was carried out to make the route passable in 2000 and 2017, in 2000 to the red gate and in 2017 to the FLS boundary. Prior to that work, the final section had been a ploughed field. He did not think that there had been a gate at the FLS boundary prior to the Defender's carrying out the works. The section of the disputed access track on FLS land had been cleared by the pursuers. It was now possible to access that section with a 4x4 vehicle. In one section of the route across the seventh defenders subjects there were two sharp bends at which, in his opinion, an ordinary car would get stuck. There was a footbridge over the Millie Burn by which you could access the bothy. The bridge was narrow and not suitable for vehicles. The bothy can be accessed via other FLS tracks. He had never seen anyone use the disputed access route to get to the bothy. He accepted that such access might have been taken when he was not present. The gate at the FLS boundary was kept locked. Pedestrian access would have been possible, but would have involved climbing over the gate. He had gone to have a look at the Bothy site on 21 July 2022 having read on Facebook that access had been taken to the bothy, where he met with the first pursuer. The witness told the pursuer that he did not want him to use the defenders land for access. He explained that vehicular access, particularly by lorries or heavy machinery, would disrupt farming activities.

27. James Rhind, the fourth defender, is a partner in James Rhind & Co farming partnership. The fifth and sixth defenders are his sons. When the partnership bought the farm in 1988 it was in poor condition. It had been neglected. The drainage was very poor. When they bought the land the track was almost non-existent. The section from the B9089 to the old shed was passable. The section from the old shed to the red gate was not passable. The defenders had to carry out extensive works to make it passable. The section from the red gate to the FLS boundary was like a bog and not passable by any vehicle. It did not appear that it had been used for anything. In 2000 the defenders had carried out work on the section between the main road and the red gate and in 2017 on the section running to the FLS boundary to make that section passable. He said that the track running through the seventh defenders subjects to the bothy is not suitable for ordinary vehicles. There is a bridge at the bothy site which is not suitable for vehicles. He was not aware of the Allen's having used the access route over the first defenders land. He was not aware of the pursuers ever having used the disputed access route. He had never seen anyone using a vehicle over the disputed route nor had he seen any tyre marks suggesting a vehicle had used the route.

Prior to the 2017 work it would not have been possible to cross the first defenders subjects to access the subjects via the seventh defenders subjects in a vehicle. It was possible to reach the Millie Bothy via other routes using good quality forestry roads suitable for vehicular access.

Maps and aerial photographs

28. Both the pursuers and defenders lodged a series of maps and aerial photographs which were spoken to by several witnesses, including John Urquhart, and Andrew, Gordon and James Rhind.
29. The 1872 Ordnance Survey map, production 6/3/1 shows the location of the Rosevalley Steading and Farmhouse. The field enclosures differ from those of the present day. The map shows the farm track from the main road to the farm steadings and farmhouse. The surrounding land is arable. The plan does not show the Millie Bothy. James Rhind noted that there

was no indication of a track from Rosevalley steadings to the sea. The nearby Bessie Bothy is shown, as is a track leading to it.

30. The 1906 Ordnance Survey map, production 6/4/1, shows the Rosevalley farm and steading, surrounded by scrub. The farm track to the main road is still present, as is a second access route to the farm across the railway towards Burghead Road. The map shows the Millie Bothy, but no track from the bothy to the steading. The fifth defender said this suggested that salmon were not being taken out via Rosevalley farm.
31. The 1928 Disposition plan, production 6/2/1, shows the bothy, the Rosevalley farmhouse and the path between them. It also shows the line of the current access track on the defenders land to the main road, as well as a second path from the farm going east towards Burghead.
32. Production D5 is an Air Ministry plan prepared in 1940. When questioned, Mr Urquhart accepted that the plan did not show a track running between the farm steading and the bothy, but suggested that this may have been as a result of a decision by the Ministry of Defence to leave that detail off due to the sensitivity of the area at the time.
33. The 1959 Ordnance Survey map, production 6/5/1, an enhanced image of which was subsequently lodged by the pursuers as 5/29 & 30, no longer shows the farm steading or farmhouse. The witnesses Andrew, James and Gordon Rhind said that the map shows no track or clear path between the bothy and the former location of the steading. There are other forestry tracks over what is now the seventh defenders subjects. James Rhind said that it looked like the land had been planted in parcels and that each parcel was surrounded by a track. There are tracks heading away from the farm to both Findhorn and the railway. Mr Urquhart accepted that the copy of the map reproduced in court did not show a continuous track from the road to bothy. The copy showed that the track from the road to the former steading did not meet the track running across the rough pasture and woodland to the bothy. He claimed that the digital archive copy which he had viewed showed a continuous track across the first and seventh defenders subjects.
34. Production 5/27 an enhanced image of which was lodged later as 5/31, is a copy of the 1966 Ordnance Survey map. The pursuers accept that the map has not been reproduced with sufficient clarity to show the track. John Urquhart testified that he had looked at the digital copies of the map and said that it showed the access route running through the first defenders and seventh defenders subjects towards the first defenders subjects, which are not shown on the map. Two unidentified buildings appear to be marked on the map on the seventh defenders subjects, near the boundary with the first defenders subjects, but no evidence was led about the nature of these buildings.
35. A Forestry Commission plan, production number 5/15, bears a Crown copyright in 2011. The plan shows a path along a route running from the bothy to the boundary between the first and seventh defenders subjects, and then onward to the B9089. The witness Andrew Rhind said in his statement that there was no path at the time the plan was made and that the route shown did not accurately reflect the course the path takes through the seventh defenders subjects.
36. The pursuers produced aerial photograph production number 5/28. The photograph was taken in 1974. Mr Urquhart said in his statement that the route of the access road is clear from Millie Bothy to the B9089. Andrew and Gordon Rhind said that the photograph did not show a vehicular track connecting the Millie Bothy to the steading directly, especially, Gordon Rhind noted, when comparing the track to the other forestry roads. Gordon Rhind said the photograph showed a track from the B9089 to the red gate.
37. The pursuers produced aerial photograph 5/18, taken in 2004. Mr Urquhart said that it showed there were no trees in the area between the north gate and the access road and the track leading through the seventh defenders subjects.
38. The pursuers also produced an aerial photograph 5/20 taken in 2021, production 5/20, which Mr Urquhart said showed that the entire length of the disputed route from the B9089 to the Millie bothy is clear.

Submissions

39. Both parties provided detailed written submissions and a lengthy list of authorities. Further submissions were made by WebEx on both 27 October and 27 November 2023. Other than some limited submissions made by the defender in relation to parts of Mr Urquhart's evidence, both parties were in agreement that the court should find the witnesses credible and reliable.

Pursuers Submissions

40. The pursuers' primary submission was that the pursuers Land Register title is conclusive of both the action and the counterclaim as it provides for a right of access over the whole of the access route from the Millie bothy to the B9089. Whilst the defenders submitted that the registered title was inaccurate, no application for rectification had been made to the Keeper of the Registers or to the Lands Tribunal for Scotland.
41. The servitude right is written into the title conditions of the defenders titles. The disposition by the late George McKessack's trustees in favour of the General Accident Fire & Life Assurance Corp recorded in 1983, number 5/6/1 of process imposed the burdens set out in the 1926 disposition.
42. If it were necessary to look at the 1926 disposition, its reference to *'the path or road leading from near to the said bothy at Millie Burn to the farm steading at Rosevalley'* would require to be construed and that the reference in the deed to the road is to the B9089 public road. Construing the right of access as being only to the farm steading was wrong for a variety of reasons. Such a right of access would be pointless. There was no evidence that any activity at the bothy required persons, goods, or materials to be taken to the farm buildings. The 1926 disposition granted no right to use the steading. The bothy users required access to the public road network. The disposition contemplated no other route of access, other than that leading to the farm. It plainly contemplated that that was the route for taking access to the public road. The Court should accept the Keepers construction that the 1926 disposition as referring to the road as leading to the lands of Rosevalley farm without truncation at the site of the former steading.
43. Esto the 1926 disposition were construed as expressly granting a right between the bothy only as far as the steading, there was an implied right of access from the bothy to the public road where it is reasonably necessary for the comfortable enjoyment of the property. The defenders had made an important concession that the disposition contained a right of access. Reference was made to *Cusine & Paisley, Servitudes and Rights of Way* at 8.04 and 8.09, and the *Stair Memorial Encyclopaedia* volume 18 paragraph 435. The terms of the 1926 disposition were more than sufficient to carry the implied right of access to the public road. The reference to the definite article in the disposition pointed to there being an existing way. Prior to 1926 there had been de facto use of the route. The dominant proprietor only entered with the granting of the 1926 disposition. A right of access is to a public road or is nothing of any use. It was perfectly obvious that the track had been used. It was a reasonable inference that the southern part of the track leading from the steading to the public road had been used for the purpose of access and egress from the bothy to the public road.
44. The reference in the 1926 disposition was to a right to use a *'path or road'*. The use of the word 'road' contemplates vehicular traffic. The 1928 disposition granted by George McKessack, 6/1/1 of process expressly stated that the land now forming the forestry plantations was subject to a right of access for the benefit of not only Mr McKessack, but also to the Moray Firth Fishery Co to which he had earlier disposed the Millie bothy. The description included a reference to both a 'road' and 'carts', implying that vehicular access was contemplated in 1926. George More had referred to a Land Rover fording the burn in the 1950's. There was evidence of vehicular access from 1988. Reference was made to *Ferguson v*

Gregors [2023] SAC (Civ) 24 paragraph 52 and *Cusine & Paisley* at section 12.194 and pages 525-6, section 3.03, page 159.

45. *Esto* the L and Register was not conclusive and the 1926 and 1928 dispositions left doubt that there was a right of vehicular access, evidence of use remained relevant to refute the defenders plea of negative prescription. The onus was on the defender to prove that the right had been extinguished by negative prescription. The defender had led no evidence about what had happened pre 2000. Reference was made to *Johnston Prescription and Limitation (2nd edition, 2012)* 22.08 to 22.15. All positive servitudes in existence out with the limits of living memory would be unenforceable were the burden of proof on the pursuers. In this case, there were maps and photographs which contained positive evidence of the existence and use of the route. The 1984 aerial photograph, production 5/9/11 of process, showed that there was a track, even if it was overgrown. The court was invited to accept Mr Urquhart's evidence that the whole route was shown in the digital archive copies of both the 1959 and 1966 maps. Parties were agreed that a positive prescriptive right can exist alongside an express grant. The defenders had to plead or lead evidence that the Allan's or the pursuers had acquired a right of access over an alternate route. Even were the 1926 servitudes fully or partially extinguished by 1988, the evidence of use had established a fresh servitude right of pedestrian and vehicular access over the whole access route on the defenders land was constituted by positive prescription through more than twenty years use, ending at the latest in 2021. Reference was made to sections 3, 8 and 9 of the Prescription and Limitation (Scotland) Act 1973. Reference was made to *Aitken Trustee's v Caledonian Railway Company (1904) 6F 465* regard was to be had to the nature of the subjects and the uses to which it could be put in assessing level of use. The pursuers contrasted the expectations of use of a suburban driveway with a remote acre of upland grazing. The only conceivable uses of the bothy in this case were camping and occasional day visits. The level of use supported the pursuers' position of use as of right, especially when multiple routes are available. Reference was made to *Soulsby v Jones 2021 SLT 1259* The use had been patent. Vehicles had not just been driven along the route, they had been left parked on the land. The use was not ephemeral. The pursuers' evidence was that vehicles had driven over the first defenders subjects to get to the bothy. It mattered not whether they then took a car or walked through the seventh defenders subjects. The differences between the pursuers and defenders witnesses' accounts of the condition of the route could be explained by the passing of the seasons and changes in weather conditions. Scottish Ministers had conceded the position in respect of the forestry land.
46. *Esto* the pursuers had no express, implied or prescriptive servitude right, there was an inherent right of access over the access route as an imprescriptible pertinent of their right of ownership of Millie Bothy. As at 1926, the subjects disposed were land locked by other lands still owned by the disponent. Reference was made to *Bowers v Kennedy 2000 SC 555* paragraphs 9 to 25 and *ASA International Ltd v Kashmiri Properties (Ireland) Ltd 2017 SC 107*. In *Bowers*, the Inner House had noted that Erskine's test of necessity, but preferred Stair and Bankton's criteria which extended to convenience. It was submitted that, per *Bowers*, the right is not only to 'passage by the high-ways, but such other passages as are necessary and convenient', by 'all necessary and convenient passages though the disponers grounds, and such as were accustomed at the date of the right through the grounds of neighbouring heritors'. The right is to be identified by reference to what was in contemplation when the enclave was first split off. Express reference to a servitude right along a particular route discloses that at the split off parties contemplated that that route would be used. In order for the site to be capable of beneficial enjoyment the right must be to vehicular access as there is a building to be redeveloped and maintained. It was accepted that it was possible for a right of vehicular access to be extinguished by negative prescription whilst a right to pedestrian access remained because of use during the prescriptive period. The presumption was that the route runs over the grantors property, rather than burdening an innocent neighbours land. *Innellan Golf Club v Mansfield (Sheriff Principal of North Strathclyde, unreported, 12 July 2012)* could be distinguished on that basis. Were the route to be the foreshore, the innocent neighbour would be the Crown. Applying the principles in *Bowers*, the inherent right of access is by way of the road

between the Millie bothy, the site of the steading and the public road.

47. There was no Record or evidence to support the defenders' assertion of there being a servitude right over an alternate route across the seventh defenders subjects. There was evidence from which it could be inferred that the Allan's had been allowed to use a key by FLS, but there had been no evidence of a licence or any other right being established over other FLS routes. The pursuers had temporary licences granted by Scottish Ministers to take access to the bothy through the forestry plantation by other routes. A permission was not a right. There was no evidence that such a permission was extant as at 1926. Permission can be withdrawn.
48. It was accepted that if an enclave, when it is split off, has a passable frontage onto a public road then, on Erskine's test, there was no need for access by any other way. The defenders argued that the Millie Bothy was bounded partly by the high water mark of the sea and that this was a public way. It was submitted that the inherent right identified by the Institutional writers and Bowers was over land. The underlying policy was the need for practical access to use and enjoy land. It would be wholly impractical to render access a function of the nature of the coast in question. In any event there had been no pleadings and no evidence led by the defenders as to the practicality of taking access to the bothy by the sea.
49. The foreshore below the high water mark belonged to the Crown. The defenders had no record and there had been no evidence to satisfy the proposition that the foreshore was '*the existing way*'. There is no authority for the proposition that the foreshore is a public right of way. Professor Reid at page 526 of *The Law of Property in Scotland* (1996) had gone beyond the underlying authorities of *Officers of State v Smith* (1846) 8.D. 711 and *Marquis of Bute v McKirdy & McMillan Ltd* 1937 SC 93. The defender had not identified a specific route along the foreshore to any public terminus. Reference was made to *ASA International Ltd v Kashmiri Properties (Ireland) Ltd*, the inherent right is one which provide such access as is '*necessary for comfortable enjoyment, in a practical common sense manner*'. The evidence was that vehicles had been driven on the foreshore only at low tide. Such a contingent and hazardous way did not meet the test.
50. Since George McKessack is to be deemed per the Inner House in Bowers to have granted an inherent right of access, over which route was he granting that? There was no basis that he had any title to convey any right of access by sea or along the foreshore. He did have title to grant that right over the access route at issue.
51. Whether the test is what is necessary and convenient or necessity, vehicular access was necessary for the development and restoration of the subjects. The underling policy was that land is a nationally limited resource which should be capable of being used and enjoyed. Reference was made to *Rankine, Land-ownership* pages 430-1 and *Cusine & Paisley, Servitudes and Rights of Way*, 11.25.
52. The pursuers *inter alia* invited the court to grant interdict in terms of their fifth crave and an amended sixth crave ordering the defenders to maintain such locks and chains on the gates only on condition of providing the pursuers with the necessary key or keys, or equivalentents such as code numbers for combination locks.

Defenders Submissions

53. The defenders position was captured by three broadly stated alternatives. First, that any servitude rights have been extinguished by negative prescription. No servitude was subsequently created by positive prescription. No inherent rights of access exist. Second, esto all rights have not been extinguished by negative prescription, the pursuers property benefits only from a limited servitude of pedestrian access to the site of the former Rosevalley steading. No separate inherent right of access exists. Third, esto all rights are not extinguished by prescription and such rights extend beyond Rosevalley Farm steading, whether as a result of a servitude or an inherent right, the right of access is a right of pedestrian access only.
54. The primary position was that there is no servitude right, whether constituted in terms of the 1926 disposition, by implication or by prescriptive possession prior to 1960, because any right had been extinguished by negative prescription.

The parties were not in dispute as to the applicable law. It was striking that there was no direct evidence of use of the access route prior to the Allen's taking ownership in 1988, but that there was witness evidence of vehicular access to the bothy over the foreshore in the 1950's. Mr More's evidence was significant as he said that the bothy had ceased to be used for fishing by 1960. The 1959 map did not show a continuous track from the bothy to the public road. The 1959 map did not support the proposition that the Land Rover crossed the first defender's subjects on those occasions when Mr More saw it ford the burn and head inland. The 1906 map showed two routes to the public road. The pursuers' contention that the onus was on the defender to prove that the right had prescribed was not correct. In *Prescription and Limitation (2nd edition)* Johnston had noted different approaches at 22.13. In any event, the question was academic because there had been evidence about use of the route. The court had heard from witnesses and seen maps and photographs. The evidence showed that the route had not been used. Fishing had ended at the bothy by the 1960's. There was evidence in the maps that the route had fallen into disuse. The Allen's had described the route as overgrown. A servitude was a right to connect a benefitted property to something else. It was necessary that one goes to the benefitted property. A part had become entirely disused. The defenders relied on the period between 1960 and 1988 to establish negative prescription. The pursuers' submission that old servitudes would prescribe for lack of evidence in living memory did not arise. It was known that fishing activity ceased, there was no track on the 1959 plan, the bothy fell into ruin, the track was overgrown and further, there had been no evidence that the track was ever used for taking fish from the bothy, over the seventh defender's subjects, over the first defender's subjects to the public road. The evidence was that fish had been transported by other routes.

55. If not extinguished by negative prescription, the title should be construed in the least burdensome way to the burdened property. The terms of the servitude in the 1926 disposition were unambiguous. It is a right of access to 'the farm steading at Rosevalley'. Reference was made to *Alvis v Harrison 1991 SLT per Lord Jauncey 64E* even were it to be concluded that there is ambiguity, the least burdensome interpretation ought to be preferred. Reference was made to *Dunlea v Cashwell 2017 SCLR 675*. If there were such a choice, the least burdensome interpretation would be a right of access to the site of the former steading, not a right of access to the public road. The exercise of interpretation is objective. Mr McKessack's intentions were not relevant, as set out in *ASA International v Kashmiri* at page 15.
56. The inaccuracies in the Land Register did not assist the pursuers. Their title was first registered on 16 June 2017 under the Land Registration (Scotland) Act 2012. By comparison to the regime under the Land Registration (Scotland) Act 1979, the so called Midas touch was gone. As noted by Greton and Reid in *Land Registration (2017)* at 9.20, 'The acquisition under the 2012 Act of a real right depends on the validity of the deed and not on the mere fact of registration.' Reference was made to *Wylie v Wittman (Lands Tribunal, 17 March 2020 (LTS/LR/2018/09))*, 539. The correct measure of the pursuers' right is the terms of the 1926 disposition, which provided for a servitude right of access as far as the former site of the Rosevalley Farm Steading.
57. It was submitted that any implied right of servitude would have been extinguished by negative prescription. *Estoppel* that had not operated, there was no basis for an implied right of servitude. The 1926 disposition contained a right of access. The pursuers' position that a more extensive right of access than parties agreed in 1926 was not permissible. Reference was made to *Innellan Gold Club v Mansfield (Sheriff Principal of North Strathclyde) unreported, 12 July 2012* at page 8. In any event, the circumstances did not satisfy the required standard set out in *ASA International v Kashmiri Properties (Ireland) Ltd* at pages 19 and 26. There were a number of different access routes to the property, including over the sea and foreshore. The implication of a right was accordingly not necessary for convenient and comfortable enjoyment.
58. As to the creation of a servitude by positive prescription, there was no evidence of twenty years possession of the required frequency and intensity. It was clear that there was no possession as of right, as was well established by the Inner House

decision in *Aberdeen City Council v Wanchoo* 2008 SC 27 at 18. There is no evidence of possession pre 1988. After 1988, the evidence was extremely limited, particularly after 1993. The purpose of positive prescription was to indicate unequivocally to the proprietor of the servient tenement that a right is asserted. The owners of the defenders property were not aware of access being taken at all.

59. Even were such a servitude to have been created, there was no evidence of vehicular access having been taken to the subjects, neither the Allen's nor the pursuers having ever gone beyond the FLS boundary.
60. It was accepted that an 'enclave' has an imprescriptible inherent right of access, per *Bowers v Kennedy*. The subjects were not an enclave. It was possible to enter and leave without the addition of an inherent right burdening the first defenders subjects. In addition, the pursuers had failed to discharge the burden of proving that the route over the first defenders property was the appropriate route. There was evidence that access had been taken over the foreshore historically. It was not necessary for the pursuers to have access to their property over the defenders property. The court was referred to *Menzies v Marquess of Breadalbane* (1901) 4 F 59 at 61. Whilst less convenient, the foreshore was available to the pursuers. The bothy was neither landlocked nor an enclave. In any event, the pursuers had failed to discharge the evidential burden to prove that access over the defenders property was the only reasonably available means of access. In *Innellan Golf Club v Mansfield*, at page 6, Sheriff Principal Kerr held that in order to constitute an inherent right of access, a party required to show, among other things, that 'no other route for such access is reasonably available'. In the present case the evidence was that the Allen's and the pursuers had used two different routes over FLS land. The pursuers had led no evidence to show why the access route over the defenders property, over farmland and a narrow forest path, is more suitable than either of the other routes.
61. If the Millie Bothy did benefit from a right of access over the first defenders subjects, the 1926 disposition did not provide for vehicular access. Access should be construed narrowly, per *Cusine & Paisley Servitudes and Rights of Way* at 3.03. There was an absence of evidence of vehicular access over the route. The physical condition of the route, particularly prior to the improvements made by the defenders, did not support such a right. The modern bridge over the Millie Burn supported a right of pedestrian access only, as did Mr More's evidence of the absence of a vehicular bridge when the salmon bothy was in operation. A servitude for use by 'carts' does not extend to motor vehicles, per *Crawford v Lumsden* 1951 SLT (Notes) 62. Were there a right of vehicular access, it had been extinguished, there being no evidence of vehicular access pre 1988 and vehicular access between 1988 and 2017 having been taken only as far as the FLS boundary.

DECISION

62. Whilst the majority of the evidence was uncontroversial, I formed the view that some parts of John Urquhart's evidence were best characterised as assertion, some other parts as exaggeration, particularly in relation to both his research and his interpretation of maps and photographs. Where in conflict, I preferred the evidence of the various defenders who gave evidence. Whilst I found Mr and Mrs Allen to be credible witnesses, I preferred the evidence of the defenders as more reliable in relation to the installation of a gate at the boundary with the seventh defenders subjects in 2002.

Is the Land Register title conclusive of the action and counterclaim?

63. It is a matter of agreement that the pursuers' purchased the subjects in May 2017 and that title was registered on 16 June 2017. It follows that the Land Registration (Scotland) Act 2012 applies. The so called 'Midas touch' provided for in the 1979 Act does not apply in this case. I am satisfied that an acquisition by the pursuers of a real right is dependent on the validity of the underlying deeds and that the Land Register title is not conclusive.

What was the extent of the servitude right granted in 1926?

64. The express grant contained in the 1926 Disposition is

“the right of access at all times to the subjects and others conveyed by the path or road leading from near the said bothy at the Millie Burn to the farm steading at Rosevalley on the said estate of Roseisle and also the right to take ice from the pond on Clarky Hill at Burghead with reasonable access thereto for this purpose”

The disposition also contains a reservation in favour of the disponent and his successors to a

‘right of access to the foreshore across said piece of land hereby disposed by the present path or road along the side of the Millie Burn...’

65. The subsequent disposition by George McKessack in favour of the Forestry Commissioners dated 5 November 1928 and recorded in the GRS on 12 November 1928 of what is now the seventh defenders subjects provided that the subjects disposed were burdened inter alia with

“A right of access for pedestrians and carts in favour of me and my successor as proprietors of the remaining lands of Roseisle and of the Moray Firth Salmon Fisheries Company Limited and those deriving a right from them by the road or path coloured green on said map leading from a point near the farm at Rosevalley through the subjects hereby disposed to the coast near Millie Burn subject to contribution for maintenance rateably with other users...”

66. There is no express grant of a right of access to the public road now known as the B9089 in the 1926 disposition. Unlike the access to Clarky Hill, there is no express reason for the right of access to the farm steading. When the 1926 disposition was signed and registered, Mr McKessack had an interest in both the salmon fishing at the bothy and in Rosevalley farm. The plan attached to the 1926 disposition sets out the boundaries of the bothy site, but includes nothing about the lands which bound the site.

67. The plan attached to the 1928 disposition, shows a track leading from the public road to Rosevalley farm steading, which track extends through the other side of the steading, across the boundary of the now seventh defenders subjects to the bothy site now owned by the pursuers.

68. I am satisfied that there was an express grant of access from the subjects to the Rosevalley farm steading. The farm steading was located a short distance to the south of the modern boundary between the first and seventh defenders subjects.

69. Per Lord Jancey in *Alvis v Harrison* 1991 SLT 64

‘It must be borne in mind that the issue to be decided depends first and foremost upon the construction of the grant of servitude upon which the appellant relies. It may be that in order to determine the true construction of an express grant it is necessary to have regard to the surrounding circumstances prevailing at the time, but if the terms of the grant are clear and unambiguous the character of any actual possession and use at the time of the grant or thereafter is of no consequence.’

70. In this case the terms of the grant are clear and unambiguous. The express right of access in the 1926 disposition is to the farm steading, not to the public road beyond. This interpretation is bolstered when considering, some two years later, the same grantor provided in the 1928 disposition for access ‘from a point near the farm at Rosevalley through the subjects

hereby disposed to the coast near Millie Burn.' There is no mention of the public road. Instead, there is a greater degree of specification that the access runs to the subjects from a point near the seaward, not public road, side of the steading.

Have any rights been created by implication?

71. The central issue here is the presumed intention of the parties as evidenced by the circumstances at the time the tenements were severed, as distinguished from the separate question of necessity. The lands over which the track ran from the subjects to the public road remained in Mr MacKessack's ownership and possession after the grant in 1926. Prior to the 1926 deed, both the dominant and servient tenements were held by the same party. The 1926 disposition uses the definite article when referring to 'path or road', which I accept implies there was an existing way and that use thereof preceded 1926. That existing way led to the farm steading and both the 1906 Ordnance Survey map and the 1928 disposition show two paths or roads leading from the farm steading onwards to the public road, all running over the lands retained by Mr MacKessack. The 1926 disposition refers to access, whilst the subsequent disposition of what are now the seventh defenders subjects refer to access for pedestrians or carts.

The question is whether, as at 1926, it was reasonably necessary for the comfortable enjoyment of Millie Bothy and its owners and occupiers to be able to take access from the bothy site to the public road via the first defenders subjects. Between 1906 and 1926 a new road or path had been created. That road linked the bothy to the public road via the farm steading. The salmon station was a commercial enterprise at that time. I am satisfied, on balance that it was reasonably necessary for the comfortable enjoyment of the benefited tenement that there was an implied grant of right of access to the public road via the farm steading, albeit on the basis of the available evidence, I cannot say whether this was over one or both of the then available routes. The reference to carts in the 1928 disposition supports the analysis of commercial use and the consequent need to access the public road.

Have all servitude rights (however constituted) in relation to the access route been extinguished by negative prescription?

72. The pursuers submit that there is evidence of continual, if sometimes occasional, use of the servitude right over the last thirty five years, from 1988. Prior to that, they submit that no material evidence was led by the defenders to prove extinction by non-use. However, the evidence of Mr and Mrs Allen was that when they purchased the bothy site in 1988 the track to the former site of the steading was heavily overgrown and planted with saplings. The aerial photograph taken in 1984, production 5/9/11, shows the line of a route which appears to be significantly overgrown. Fishing at the bothy had most likely ceased by the 1960's, as explained by Mr More. As referred to earlier, the 1959 OS map does not show a route connecting the Rosevalley farm steading site to the bothy.

73. Given the terms of section 14 of the Prescription and Limitation (Scotland) Act 1973, time prior to the Act coming into force on 25 July 1976 counts towards completion of the prescriptive period provided at least one day of the prescriptive period took place after that date. Accordingly all evidence from 26 July 1956, in particular the route shown in the OS map and the end of fishing at the bothy are relevant considerations. Whilst there is a reference to the possible purchase of fishing rights in the 1980's in the book discovered by Mr Urquhart, there was no evidence of anyone fishing at the site using any part of the access route after 1960.

74. Whilst there was some dispute between parties about the onus of proof on this issue, I do not consider that to be of significance in this case. Both parties led oral evidence, written evidence, maps and photographs relating to the route from the late 1950's to 1988 when the Allen's purchased the subjects. On the basis of that evidence, on balance I am satisfied that

any servitude, whether express in terms of the 1926 disposition, or established by implication or indeed by prescriptive acquisition prior to 1960, has since been extinguished.

Have any rights been created by positive prescription?

75. The pursuers submit that the evidence established a new prescriptive right of pedestrian and vehicular access and egress to go to the Millie Bothy whether prospectively from 1988 to 2008 or retrospectively from 2001 to 2021. The defenders submit that there is no evidence of twenty years possession of the required frequency and intensity. Whilst there was some evidence that the Allen's drove the route as far as the red gate before walking the rest of the way to the bothy fairly regularly between 1998 and 1993, the evidence at its highest was of the route being used thereafter by Mr Allen once every three to five years and once every one to three years by Mrs Allen. The Allen's accepted that they sometimes used alternate routes through the seventh defenders subjects during visits. The pursuers took access on occasion between 2017 and 2021. Even accounting for the nature of the subjects, the evidence of use of the disputed route, particularly between 1993 and 2017, is extremely limited.
76. Applying the approach set out in the leading case of *Aberdeen City Council v Wanchoo* 2008 SC 278 per Lord Easie at para 18, I am satisfied that the evidence of occasional purported acts of possession in this case is insufficient to establish possession as of right.
77. Other than the two occasions when Mr Urquhart met Andrew and Gordon Rhind respectively in 2021 and 2022, no one had seen or challenged the Allen's or the pursuers' use of the route. Other than one campervan noted by Andrew Rhind, a tourist not otherwise connected to this case, neither the Rhind's or those who gave evidence that they worked on their behalf and were regular workers at the site, especially in the growing season when the condition of the route would be drier, had ever seen anyone use the route. I find that there was insufficient evidence to support an unequivocal indication to the proprietor of the servient tenement that the right was being asserted and the nature of that right. Indeed the defenders led significant and consistent evidence to the contrary.
78. I am not satisfied that there was sufficient evidence to find that there had been an unequivocal indication to the proprietor of the servient tenement that the right was being asserted and the nature of that right, applying the approach set out by Lord Watson in *McInroy v Duke of Atholl* (1891) 18 R (HL) 46.
79. Accordingly, both in terms of use and unequivocal indication, I find that no servitude has been created by positive prescription.

Is there an inherent right of access?

80. The parties agree that it is authoritatively established that an 'enclave' benefits from an imprescriptible inherent right of access, as set out by Lord President Rodger in *Bowers v Kennedy* 2000 SC 555.
81. The defenders argue that the subjects are not an enclave as it is possible to access the subjects without burdening the defenders with an inherent right. They refer to the evidence of access over the foreshore by Land Rover in the 1950's, the possibility of access from the sea, and the present licence arrangement over the seventh defenders subjects. They also argue that the pursuers have failed to discharge the evidential burden of proving that the route over the defenders subjects is the appropriate one.
82. Whilst the pursuers currently benefit from temporary licences which permit access over the seventh defenders subjects via another route, I am satisfied that such an arrangement is not a right. Whilst the Allen's too appear to have benefitted from a similar arrangement from 1987 onwards, there is no evidence that they did so as of right, nor is there evidence that such

an arrangement existed when the subjects or indeed the seventh defenders subjects were first disposed in 1926 or 1928 respectively.

83. In this case, until 1926, what are now the pursuers, first defenders and seventh defenders subjects were in the same ownership. When he disposed the subjects, George MacKessack retained ownership of all land surrounding the subjects. He did not dispose what is now the seventh defenders subjects until 1928. When he disposed the subjects, there was an existing route over land, referred to in the 1926 disposition, leading from the bothy to the farm steading. Without further specification, the foreshore is not considered to be a public place. Whilst there was a provision allowing storage of items required for salmon fishing at reasonable places along the foreshore still belonging to the disponent during the salmon fishing season, there was no express right of access to the bothy along that part of the foreshore or across that part of the foreshore to the sea. Notwithstanding the defenders submissions, whilst there was evidence of cobbles being launched near the bothy a short distance out to sea for the specific purpose of salmon fishing, there was no evidence led that it is possible to access the subjects from the sea. The evidence in relation to the use of Land Rovers postdates the granting of the disposition by three decades. As at 1926, none of the routes which now exist over the seventh defenders subjects were in place. The land now forming the seventh defenders subjects were not split off from Mr MacKessack's title until two years later. The plan attached to the 1928 disposition is clear, there was only one route to the subjects. That was the existing way. Whilst production 6/4/1, the 1906 Ordnance Survey map demonstrates that the bothy was in operation prior to the access route referred to in the 1926 disposition, in 1906 the bothy and the whole lands surrounding it were owned by the MacKessacks. No other routes to or from the subjects are shown on the 1928 plan, including the so called 'High Road' about which I heard no evidence as to when it was developed. There is no evidence that any other route through the MacKessack's remaining land to a public road was reasonably available. I am satisfied that as at 1926, the subjects were otherwise land locked.
84. Applying the approach of Lord Inglis, quoted in Bowers, "When a man sells a portion of his ground which has an access through the other portion which he reserves there is an implied grant of that access". I am satisfied that there was an existing way through the portion which Mr MacKessack reserved, "the path or road leading from near the said bothy at Millie Burn to the farm steading at Rosevalley on the said Estate of Roseisle". The 1872 and 1906 OS maps both show a track leading from the farm steading to the main road. The plan attached to the 1928 disposition shows there was a track leading all the way from the bothy, through the farm steading, to the main road. The 1928 disposition makes provision for both pedestrian and cart access across the now seventh defenders subjects by 'the road or path coloured green on said map...'. I note the reference to the definite article. The road or path already existed by that date. Similarly, the 1926 disposition, whilst it does not contain a plan showing the route, contains both a reference to 'the present path or road along the side of the Millie Burn' and a reference to 'the path or road leading from near the said bothy at Millie Burn to the farm steading at Rosevalley'. No forestry paths are shown on any of the maps. Indeed, it would be 1928 before the land which now forms the seventh defenders subjects was disposed by Mr MacKessack. There is simply no evidence that the other routes through what is now the seventh defenders subjects existed as at 1926. Given the subjects were otherwise land locked, I am satisfied that on the original lands owned by MacKessack being divided in 1926, the Moray Firth Salmon Fishery Co had a right to the necessary access for the enjoyment of the subjects along the existing way to the Rosevalley Farm Steading and beyond to the public road.
85. As the right arises out of necessity, necessity dictates its duration. Whilst there is evidence that the pursuers and their predecessors the Allen's did have other means of access to the subjects via other forestry roads under either informal or time limited licence agreements, there is no evidence of there being any other means of access as of right at any time since 1926.

86. I consider that, when they bought the subjects, the pursuers, qua owner, became entitled, of necessity, to obtain free ish and entry to it over the first defenders subjects. The essence of that right is that the pursuers' should be able to get to the subjects from the public road. As to the route to the public road from the site of the former steading, the plan attached to the 1928 disposition shows the route from the subjects, across the now seventh defenders subjects and onwards onto the first defenders subjects as far as the steading. From the steading, the plan shows two routes through the first defenders subjects to the public road. One of those routes, towards the railway line, no longer exists. The remaining route is that leading over the first defenders subjects from the public road to what is now the north gate. Per Lord Adam in *Loultits Trustees v Highland Ry Co (1892) 19 R. 791*, the presumption is almost irresistible that land is sold with the existing access.

If any rights do exist, what mode of access is permitted?

87. The pursuers submit that both pedestrian and vehicular access are necessary for the comfortable enjoyment of the subjects, in particular for the development and maintenance of the site. It was suggested that there would be few, if any, enclaves in Scotland which could be used and enjoyed without vehicular access in ways which were in contemplation when the titles were split off, they must be very exceptional. It was accepted that the right is to be identified by reference to what was in contemplation when the enclave was first split off.
88. The 1926 disposition of what is now the first defenders subjects provides a 'right of access', but makes no express mention of pedestrians, vehicles or indeed carts. The 1928 disposition in favour of the Forestry Commissioners of what is now the seventh defenders subjects described the servitude granted in the 1926 disposition as for 'pedestrians and carts'. The defenders highlight that the Second Division in *Crawford v Lumsden 1951 SLT (Notes) 62* concluded that it was common knowledge that by 1916, the date when the disposition was granted containing the servitude right in dispute before the Inner House and some ten years earlier than the relevant disposition in the instant case, motor vehicles were in common use. On that basis, the court found itself unable to hold that the term cart was intended to cover any other type of wheeled vehicle.
89. Both the physical condition of the route itself, particularly over the seventh defenders subjects for much of the intervening century, the condition of the track between the red gate and the north gate prior to the work carried out by the first defender from 2000 onwards and the nature of the modern bridge, do not support a right of vehicular access.
90. I have concluded that the subjects having formerly been in the same ownership, there was, in 1926, an 'existing way', referred to in both the 1926 and 1928 dispositions. The extent of the original right of access by that existing way was reflected in the 1928 disposition as being limited to pedestrians and carts. That is what was necessary for the comfortable enjoyment of the subjects. That is the amount and extent and nature of the burden. Accepting that the words in the deeds require to be given a reasonable and fair construction, in this case neither the surrounding circumstances nor the evidence of subsequent exercise of the right support a greater right. I reject the pursuers' submissions that vehicular access over the first defenders subjects was necessary for the original development and subsequent maintenance of the bothy as speculative. As to construction, the 1906 map, referred to previously, shows that the bothy was constructed prior to there being any path or route between it and the first defenders subjects, or indeed any other path. There was no evidence of any inland route being used for maintenance. The bothy is now a ruin and has been for at least thirty five years. The site has had no commercial purpose for sixty years.
91. *Cusine and Paisley Servitudes and Rights of Way (1998) 3.03* note that the construction to be taken to a mode of access is the same as for other terms of a servitude and that in the absence of a contrary indication, access should be construed

narrowly. In this case, even were it not a matter of interpretation of the deeds, I am satisfied that the evidence of the physical condition of the route, particularly prior to the improvements carried out by the first defenders, does not support there being a right of vehicular access. Other than the reference to carts in the 1928 disposition, there is no evidence that any other vehicular access along the length of the way as it existed in 1926 or indeed thereafter was exercised or required by any of the previous owners of the subjects.

Net effect

92. Both the pursuers and defenders have been variously successful in respect of express and implied grants, the effects of negative and positive prescription, the existence of an inherent right and mode of access. I find that the net effect of those successes is that the pursuers title to the subjects has as a pertinent, as the natural result of the pursuers right of property, a heritable and irredeemable right of access to and egress from the subjects for pedestrians and carts over the access route lying approximately to the south of the subjects being the whole route shown tinted mauve and brown on the plan of title sheet MOR17017 leading from the public road designated B9089 to the subjects over the first and seventh defenders subjects.
93. The first to sixth defenders must deliver to the pursuers all such keys or combination numbers or other means of opening locks and chains placed over gates at both the northern and southern ends of the access route over the first defenders subjects within seven days.
94. Per parties' joint motion, I will reserve the question of expenses meantime.

David Harvie
Sheriff

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