

Scott v Gordon-Duff



No Substantial Judicial Treatment

Court

Lands Tribunal (Scotland)

Judgment Date

21 August 2025

Where Reported

[2025] LTS 18

[2025] 8 WLUK 311

2025 G.W.D. 43-410

[Judgment](#)

Subject

Heritable property

Keywords

Access; Discharge; Permitted use; Scotland; Servitudes; Title conditions; Variation

Judge

[D Lovell](#);

[C C Marwick](#), FRICS

Counsel

For the applicants: In person.

For the respondent: Forrester-Smith.

Solicitor

For the respondent: Turcan Connell.

Case Digest

Summary

After weighing the factors set out in the [Title Conditions \(Scotland\) Act 2003 s.100](#), the Lands Tribunal allowed a heritable proprietor's application to vary a title condition restricting their servitude right of access over a private access road, but only to remove the benefited estate's right to widen the road. It refused to discharge a title condition restricting the permitted use of the burdened subjects, as any relaxation beyond the permitted use would result in an increase in the burden on the road, and would fall foul of [s.90\(5\)](#).

Abstract

Heritable proprietors applied for variation and discharge of title conditions restricting use of a private access road and the permitted use of their subjects.

The subjects comprised two plots and were originally part of a larger estate. A private access road between the plots belonged to the estate. The subjects were sold to the previous owners in 2007. The break-off disposition created a non-exclusive servitude right of access "along the private road measuring 4 metres in width".

An access title condition limited the subjects' use of the road to no more than three private dwellinghouses. Both the subjects and the estate were prohibited from parking cars on or obstructing the road. No fences could be erected "along" the road. The estate reserved the right to widen the road.

A use title condition restricted use of a farmhouse on the subjects to one private dwellinghouse, and a farm steading to two separate private dwellinghouses. The surrounding grounds could be used solely as garden or amenity ground.

In 2022, the applicants acquired the subjects and the respondent acquired the estate. The applicants sought to vary the access title condition to provide that no fences could be erected along the boundary of the four metre width of the road, but could be erected beyond that boundary on their land, and to remove the respondent's right to widen the road. The applicants sought discharge of the use title condition. They wished to diversify the subjects' use to include an agricultural smallholding, a wind turbine, holiday lettings and caravan pitches.

The previous owner had never lived in the subjects, which had been farmed by the respondent's tenant farmer. The applicants erected fencing purportedly within the subjects' boundary. Agricultural vehicles using the access road had generally been less than four metres wide, but the respondent claimed that larger vehicles had difficulty negotiating areas of the road with fencing.

Held

Application granted in part.

The tribunal considered the factors set out in the [Title Conditions \(Scotland\) Act 2003 s.100](#) in assessing the respondent's interest to enforce the title conditions.

(a) Change in circumstances - The purpose of the prohibition on parking cars on or obstructing the road was to ensure unimpeded access for all users. In that context nothing had changed. The subjects' occupation was not a relevant change and reinforced the need for unimpeded access (para.166).

The applicants' residence at the subjects was aligned to the use envisaged when the use title condition was created. Garden or amenity ground was designated for up to three dwellinghouses. There was no change to the character of the subjects (para.187).

(b) Benefit - Although a wide range of agricultural vehicles and machinery was able to use the track with relative ease, the fencing imposed limitations on a small number of users. Subject to reciprocal prohibitions on parking, obstructing and fencing, and to maintaining the servitude rights, there was no limit on the estate's use. The access condition maintained unimpeded access, to the estate's and other users' benefit (paras 167-173).

The use condition limited commercial use or development. If that preserved the area's character and amenity and avoided overuse of the road, it conferred benefit on the estate, their tenants and other road users. The respondent presented no independent or expert evidence on the estate's valuation, and no detailed submissions on how discharge would affect the estate, other than in respect of the road. Short term occupation would alter the subjects' character, however no evidence was led on letting frequency and the impact was unknown. It was not clear how smallholding farming and the domestic wind turbine would be more detrimental to amenity than the permitted three dwellinghouses and amenity ground. The respondent led no evidence of any diminution in value or real impact on the estate (paras 188-194).

(c) Enjoyment - The access condition prohibited fencing along the road, not specifically at a four metre width. The erected fences were possibly outside the subjects' registered boundaries. There applicants had no right to place fencing on the respondent's land. The title condition was a reasonable burden, considering its purpose. The duty not to park or obstruct was reciprocal. The respondent did not consider the reserved right to widen sufficiently specific to allow encroachment onto the subjects. The access title condition did not impede enjoyment of the subjects (paras 174-178).

The designated use for private dwellinghouses was not an unreasonable restraint of trade, contrary to public policy, illegal or repugnant with ownership. The subjects were sold off from the estate specifically for private residential use. Given the subjects' size and location, the permitted use was not unduly restrictive. It did not impede the enjoyment of the subjects (paras 195-200).

(e) Time elapsed - The conditions remained as relevant as when created 18 years ago and no significance was attached to their age (paras 180, 202).

(f) Purpose - The general prohibition on obstructing the road benefited both parties. The prohibition on fencing along the road was an example of that general prohibition. Impeding reasonable access to other users would amount to a breach. The access condition's purpose was clear and reasonable (para.181).

The use condition prevented commercial development to preserve the rural character and amenity of the area. That was a reasonable purpose (para.203).

(g) Planning consent - Although the planning consents were useful when considering permitted development in the context of a residential property, the primary consideration was whether the proposals would be detrimental to the estate (paras 204-208).

(j) Other factors - The only development contemplated at the servitude's creation was two additional private dwellinghouses. Any relaxation beyond the permitted use would increase the burden on the road. The proposed discharge or variation would fall foul of s.90(5) (which prevented the creation of a new obligation without the burdened proprietor's consent) or have no practical effect as the access servitude did not permit the use (paras 215-216).

Acquiescence - Although works might have been carried out, the applicants had not yet commercially let the subjects. There had been no additional letting of the steading farmhouse. No acquiescence had occurred (para.224).

Negative prescription - Negative prescription might have occurred, but only to the extent of past grazing and mowing acknowledged by the respondent (para.227).

Compensation - The respondent had not demonstrated any substantial loss or disadvantage beyond an *ex facie* issue with the access servitude. There was no evidence that the subjects' value in 2007 would have been higher without the use condition, and the respondent did not own the estate at that time (paras 228-229).

Decision - The proposed variation to the access condition was not required, but variation in part was permitted. Fencing on the subjects was already permitted, provided it did not breach the prohibition on fencing along or obstructing the road. The four metre width did not denote the extent of the respondent's retained property. It denoted the width of the access servitude. The reference to "along" related to the width and extent of the road's legal ownership and not the access servitude. The respondent accepted his reserved right to widen the road was not sufficiently specific to allow encroachment onto the subjects. The access condition would be amended to remove the sentence "the Benefited Property reserves the right to widen the Private Access Road" (paras 218-220).

The applicants bought the subjects with knowledge of the restrictions. Given the lack of evidence of detriment, the tribunal would have relaxed the use condition to permit smallholding farming, two caravan pitches and the wind turbine. No relaxation for additional holiday letting would have been permitted as the applicants' proposals were not clear. However, the access servitude issue was material for factor (j). Any relaxation of the use condition would fall foul of s.90(5). It would leave the question of access via the road unresolved. That outweighed other factors. The tribunal refused the application to discharge the use title condition *in hoc statu* (paras 230-232).