

RESPONSE TO REPORT BY DIRECTOR OF VIBRANT COMMUNITIES AND SUSTAINABLE GROWTH (Report Number 30/22)

ACCESS DISPUTE AT 114 FERRY ROAD, MONIFIETH

Introduction

- 1.1 We are instructed by the owners of 114 Ferry Road, Monifieth to make representations to the Land Reform Sub-Committee of Communities Committee in response to Report No30/22 relating to the access dispute at the property. Our clients purchased the property known as and forming 114 Ferry Road, Monifieth (the property) on 13 March 2020. Their title is registered in the Land Register of Scotland under Title Number ANG85063. Copy Title Plan is attached for reference.
- 1.2 In June 2020, our clients locked the entrance gates at the South and North of the property to prevent public access over their driveway. The gates were locked on the grounds that public access was disturbing their privacy and enjoyment of the property and for public safety reasons.

Historic Background

- 2.1 Our clients purchased the property from the Executor of the late Mr Andrew Young. Mr Young had purchased the property in 1967 and lived in the property from 1967 until his death in 2019. The evidence we have obtained from his daughter (his Executor) confirms that throughout Mr Young's ownership, the track was continuously used for vehicle access and parking. Mr Young parked an HGV lorry and car on the track until his retirement in 2007. Following his retirement, the track was used by Mr Young to park one car and for visitor parking
- 2.2 The evidence that we have obtained from the late Mr Young's Executor confirms that no public access was taken over the track prior to the completion of sewage works which were carried out by Scottish Water. The gates at the North of the property were locked and there was no wall separating the rear garden from the driveway. The Executor advised that prior to the sewage works a caravan was parked in front of the gates at the North of the property. At some point in the late 1990's works were carried out by Scottish Water which included the installation of two large pipes through the garden ground of the property. The garden ground was excavated and upon completion of the work, Scottish Water carried out reinstatement works, which we estimate from our investigations, to have been completed around 1999 / 2000. These works included the building of a high wall which separated the rear garden from the track. Following completion of these works, the public started to attempt to take access over the track as a short cut to the field located at the rear of the property.
- 2.3 Mr Young was then plagued by members of the public breaking locks and vandalising the gates on the front and rear of the track in order to gain access. His vehicles were vandalised, dog faeces littered the drive and bags of dog faeces were thrown in his front garden. Mr Young erected several gates during the period from 2000 to 2005 in an attempt to prevent access but these were continually vandalised. Eventually he installed a large set of heavier gates but these gates were also removed and thrown in the Dighty Burn. The

situation was causing Mr Young a great deal of distress and expense. In 2005, he suffered a heart attack and thereafter he reluctantly left the gates open to allow access as he no longer felt able to prevent the public from taking access across his driveway.

Legal Title

- 3.1 The track is included in the title for the property which is shown outlined in red on the title plan. There is no coloration on the title plan to differentiate it from the house and garden. Evidence confirms that the track has been used as a driveway for vehicle access and parking from 1967 to date.
- 3.2 The title is burdened with a servitude right over the track for farm access in terms of a 1953 deed. The Executor has confirmed that she was unaware of this servitude right and has no recollection of the Council taking access over the track. It is understood that an alternative access was created from Wemyss Crescent in the 1980s and this has been used by the Council to maintain the ground situated to the North of the property. Any access which was historically required would have been by prior arrangement given that the track was in continual use for vehicle access and parking.

Safety

- 4.1 The property is situated on a busy public road with high volumes of traffic. In order to access the track, travelling in an easterly direction, a sharp left turn is required. It is impossible to have full sight of the track when access is taken. Entry and exit has to be taken quickly to avoid delaying the flow of traffic which is often exacerbated by the number of parked cars which are situated opposite the property on the public road.
- 4.2 Prior to blocking access, the owners were concerned that they would accidentally hit a member of the public whilst entering their property. The owner has had to swerve on a number of occasions to avoid running into members of the public on the track. It is not safe for the public to exercise access rights over an area which is used daily for access and parking at different periods during the day. The track is not lit and is of a rough surface making it unsuitable for pushchairs and disabled access.
- 4.3 The owners have had a number of accidents entering and exiting the drive. The gatepost at the front of the property was accidentally knocked down whilst entering the drive and they have caused substantial damage to their vehicles on more than one occasion.
- 4.4 The owners found it impossible to exit the property safely in reverse gear. The low wall which separated the front garden from the driveway has now been removed and this has enabled them to create a turning circle which allows them to exit the property in a forward gear.
- 4.5 The width of the track is approximately the width of an average sized vehicle as noted in the Report and therefore it is not possible for members of the public to take access over the track safely when it is used for vehicle access and parking without the risk of injury.

Privacy and Enjoyment of Property

5. During March to June 2020 when public access was prevented, the owners of the property had cars parked in the drive damaged by members of the public. Dog owners would also allow their dogs to foul on the track which was then walked into the property and members of the public would often gather in the drive and sit on the low wall separating the front garden from the track to have a conversation. The owners found this to be an unreasonable disturbance of their enjoyment of their property as well as an invasion of their privacy

Public Use

6. The Report confirms that a questionnaire was issued in December 2020 to help assess the levels of public use and this confirmed that 48% of the 52 respondents stated that they used the route prior to 1995. The evidence we have obtained confirms that the public did not take access over the track until the reinstatement works by Scottish Water were completed in 1999 / 2000 and therefore it is our position that no access was taken prior to 1995.

Possible Public Right of way

7.1 Although access was taken by the public from approximately 2000, it is our position that the previous owner, Mr Young tolerated public access to avoid damage to his property. In doing so he granted consent under duress and this consent has now been withdrawn by the present owners. Accordingly, a public right of way has not been created by prescriptive acquisition.

7.2 The Google Street View dated June 2018 at Appendix 2 of the Report shows a very small red car parked up against the fence and we would suggest that this was parked in this way to avoid damage to the vehicle rather than to facilitate public access.

Alternative Routes

8. The track does not form part of the core path network. Appendix 2 of the Report contains a map showing the core paths and the track coloured red in the context of the public road network. Details of alternative routes are provided but are not shown coloured on the map. It is our position that these alternative routes offer safe access. The track sits between Panmurefield Road and Grange Road where traffic lights are located for safe crossing to pedestrians.

Planning History

9. Planning application 20/000452/full was submitted and granted. This application was to provide additional accommodation as an elderly relative resides with the owners. The application included provision for three car parking spaces in the front garden to provide additional parking for the owners. However, only one car can be parked at the front of the property as the remaining area is required to provide a turning circle to enable vehicles to exit the property in a forward gear.

Conclusion

- (a) Our client is the legal owner of the track. Since 1967 it has been continually used by the owner of the property for vehicular access to the residential property and ancillary parking. The track is the only vehicle access to the property and has been used as a driveway for a period of 55 years.
- (b) Public access cannot be exercised safely given the owners' rights to use the track for access and parking.
- (c) The track does not form part of the core path network.
- (d) There are safer alternative routes to the land located to the North of the property.
- (e) The track is adjacent to the garden ground and although a wall separated the track from the garden ground for a period of time, it can be argued that the track is within the curtilage of the property.
- (f) In all the circumstances the owners are entitled to use the track as a driveway. In terms s.6 of the Land Reform (Scotland) Act 2003 the courts are required to have regard to what a reasonable person living in the property would require in order to have a reasonable measure of privacy and to ensure that their enjoyment is not unreasonably disturbed. It is our position that the track should be excluded from public access rights on the grounds of safety and in addition, privacy and unreasonable disturbance of the owners' enjoyment of the property in terms of s.6.
- (g) Over the last year no attempts have been made by the public to take access over the track and we therefore assume that acceptable alternative routes are now being used.

For the above reasons we consider it inappropriate for the Council to serve a notice under Section 14 of the Land Reform (Scotland) Act 2003 and have instructions to appeal any notice served. We would ask the Sub-Committee to consider the terms of our response and refuse to agree to proceed with formal enforcement procedures.

Alison Marks

For Thorntons Law LLLP