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Love Thy Neighbour, By Allowing Access for Repairs

A. INTRODUCTION

Angus and Brenda are neighbours. A side-wall of her house is built right to the boundary with his land. The harling is crumbling and Brenda wants to repair it. Can she come onto Angus's land to do so? With his permission she can. But if he refuses access? Baron David Hume, in his lectures at the University of Edinburgh in 1821-22,¹ said:

[An] owner's interest must yield sometimes to the immediate interest even of an individual where this is out of all proportion to the owner's interest in preventing the interference, or where the matter in question, though immediately concerning an individual, does at the same time, in its consequences, though remotely, concern the neighbourhood too ... On the like ground I think it may be maintained with respect to conterminous properties in a Burgh, which in many instances, owing to the crowded situation of the building, cannot be repaired without some temporary interference, as by resting ladders on the next area, that this slight and temporary inconvenience must be put up with, from the necessity of the case.

This statement, however, appeared forgotten until highlighted in Kenneth Reid's *The Law of Property in Scotland*² where he ascribes the right to common interest. There is no reference to Hume in the recently rediscovered Edinburgh Sheriff Court case of *Brydon v Lewis*³ from 1958, where it was held that the owner of a lower tenement flat seemingly had a servitude of necessity enabling access through the garden belonging to the upper flat in order to carry out repairs to a wall. But his statement is mentioned in *Soulsby v Jones*, where Lord President Carloway commented that it was "sound in principle".⁴

¹ *Baron David Hume's Lectures 1786-1822*, vol III (ed G C H Paton, Stair Society vol 15, 1952) 206-207.

² K G C Reid, *The Law of Property in Scotland* (1996) para 359.

³ 12 February 1958 (debate) and 26 August 1958 (proof). See K G C Reid and G L Gretton, *Conveyancing 2017* (2018) 162-165. The case was found by Professor Roderick Paisley.

⁴ [2020] CSOH 103, 2021 SLT 286 at para 26. Case aff'd [2021] CSIH 48, 2021 SLT 1259. See further K G C Reid, G L Gretton and A J M Steven, *Conveyancing 2021* (2022) 152-153.

Thus Brenda can point to Inner House authority allowing her to take access. What though are the exact parameters of this right? Unlike a servitude of access, it would not stop Angus from building on his land. This is clear from *Soulsby*, where the principal argument that such a servitude had been created by acquisitive prescription was unsuccessful. Assuming, however, that access is permissible, how can it be taken? And for how long? What ancillary rights are there, such as to leave equipment while the work is ongoing?⁵ Is compensation payable and, if so, in what circumstances? These and other questions remain unanswered. This contrasts with the position in England and Wales where the matter is governed by the Access to Neighbouring Land Act 1992. This legislation was recently considered by the High Court in *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd*.⁶

B. THE ACCESS TO NEIGHBOURING LAND ACT 1992

The 1992 Act is based on a Report of the Law Commission of 1985.⁷ The impetus for the project which led to it was a “steady trickle of cases in which members of the public or their Member of Parliament have approached the Lord Chancellor’s Department”⁸ or the Law Commission directly about problems arising out of an absence of right to enter a neighbour’s land at common law. Following consultation, however, the Law Commission concluded that “there is no clear indication of how often such [problems] arise.”⁹ Moreover, in most cases drawn to its attention the work requiring access was minor, for example, repairs to gutters. Nevertheless, the Law Commission supported reform because it was unsatisfactory that properties should be left deteriorating where a neighbour refused access.¹⁰ By keeping that reform limited, account was taken of opponents of change who quoted the adage: “an Englishman’s home is his castle.”¹¹

⁵ On this subject in relation to servitudes, see R R M Paisley, *Rights Ancillary to Servitudes* (2022).

⁶ [2022] EWHC 303 (Ch).

⁷ Law Commission, Report on *Rights of Access to Neighbouring Land* (Law Com No 151, 1985).

⁸ *Ibid* para 1.4.

⁹ *Ibid* para 3.3.

¹⁰ *Ibid* paras 3.27-3.28.

¹¹ *Ibid* para 3.16. One wonders what such consultees would have made of G Alexander, *Property and Human Flourishing* (2018).

After carefully considering the merits of an “automatic” right of access, the Law Commission recommended a “discretionary” scheme where court authorisation was needed.¹² It argued that the advantage of this approach was that the exact conditions under which the particular access would be taken could be specified. As for the counter-argument that litigation is expensive and uncertain, the Law Commission stated:

We expect that, in clear cases, the existence of a right to apply to a court would be enough to secure the necessary access. If [the neighbour] had no good reason for refusing, his choice would lie between giving way on the best terms he could obtain and fighting a case, which would end, not only with an adverse decision, but also with an award of costs against him.¹³

It was recommended that access could be taken for preservation work, not improvements.¹⁴ The court would have to be satisfied that the work was reasonably necessary for the preservation of the applicant’s land and could not be done without that access. If, however, the taking of access would cause hardship for the neighbour and thus be unreasonable then authorisation would be refused.¹⁵ An access order if granted would set out the type of work to be done, the land over which the access would be taken and timings. The owner taking access would have to make good any damage to the neighbouring land and indemnify the neighbouring owner for any loss, such as an impact on its ability to trade.¹⁶

When implemented by a Private Member’s Bill, which became the 1992 Act, the Law Commission’s recommendations were adopted with minor changes. The Bill was sponsored by Lord Murton of Lindisfarne, but only after a previous attempt to take it forward in the House of Commons, by John Ward MP, failed due to procedural hurdles.¹⁷ Paradoxically, the proceedings in the House of Lords in relation to Mr Ward’s aborted Bill had significant engagement by Scottish peers despite it being restricted to England and Wales. During the second reading, Lord Carmichael of Kelvingrove stated:

¹² Ibid paras 3.29-3.63.

¹³ Ibid para 3.41.

¹⁴ Ibid paras 4.2-4.8.

¹⁵ Ibid paras 4.98-4.105.

¹⁶ Ibid paras 4.2, 4.14-4.16, 4.30-4.31, 4.32-4.34 and 4.48-4.59.

¹⁷ See Hansard HL Deb 11 December 1991, col 819. Lord Murton was MP for Poole from 1964 to 1979. Mr Ward was his successor.

I understand that the legal position in Scotland is somewhat different ... I have a feeling that Scottish title to land is perhaps more explicit in allowing some flexibility for those owning or occupying neighbouring land. I am sure that ... the Lord Advocate will be able to enlighten the House on the point or indicate whether there are equivalent loopholes in Scottish law on which, at a future date, he may think legislation for Scotland would be helpful.¹⁸

He was supported by Lord Mackie of Benshie:

I hope that ... the Lord Advocate will assure us that foolishness does not pertain in Scotland and that there are methods whereby in Scotland an unreasonable neighbour, or rather the neighbour of an unreasonable man, can be protected.”¹⁹

The Lord Advocate, Lord Fraser of Carmyllie, replied as follows:

I do not come to the Dispatch Box trying in any sense to indicate that Scotland has solved the problem or that in this particular area of law it can claim any superiority. As in England, there is no such general right of access to neighbouring land in Scotland. It is only possible if there is some statutory or contractual right or a right arising out of land law. It is certainly not completely general.

On the other hand, the land law of Scotland is very different from the law of England. While there may be those who think that some such legislation ought to be provided in Scotland, I should most firmly counsel against any effort to extend this Bill to Scotland. It will be readily appreciated that it would not happily sit with the rest of Scottish law. Curiously enough, although there have been marked problems on this side of the Border, the situation does not seem to have given rise to quite the same difficulties North of the Border.²⁰

¹⁸ Hansard HL Deb 16 June 1991, cols 172-173.

¹⁹ Ibid, col 180.

²⁰ Ibid, col 181.

Why the Bill would not “happily sit” with Scots law was not explained. Thirty years on there remains no legislation in Scotland on the matter.²¹

C. PRIME LONDON HOLDINGS 11 LTD v THURLOE LODGE LTD

The applicant owned Amberwood House, South Kensington. Originally a school, it became a residential property in the early twentieth century and its occupants have included Dame Margot Fonteyn. The applicant was now redeveloping it as a “super prime” property and requested access over a passageway on neighbouring property belonging to the defendant. This was to erect scaffolding to carry out rendering and painting of the building’s north wall. The defendant, whose property was also being redeveloped, refused. The applicant therefore sought an access order under section 1 of the 1992 Act. According to Nicholas Thompsell, who heard the case as a Deputy Judge, this was the first time that the High Court had considered the legislation.²² The application was successful.

The court worked through the provisions in the 1992 Act. First, the works were held to be “reasonably necessary for the preservation of the whole or part of”²³ Amberwood House. What was needed was “maintenance, repair or renewal”,²⁴ thus falling within one of the cases of “basic preservation works”²⁵ for which access could be authorised. Secondly, it was accepted by the defendant that it was impossible to carry out the work without access over its land.²⁶ Thirdly, it was held that the making of an order would cause “interference with, or disturbance of, [the defendant’s] use or enjoyment”²⁷ of its land. Fourthly, an order would not cause the defendant to “suffer hardship”²⁸ but the court would consider “the

²¹ Except for the Tenements (Scotland) Act 2004 s 17 which gives flat owners access over parts of their tenement belonging to other flat owners.

²² In *Prime London Holdings 11 Ltd* para 1 he notes his understanding that the 1992 Act had been the subject of County Court litigation but that “the only published decision to which counsel were able to refer me was a decision of HHJ Bailey in the Central London County Court in *BPT Ltd v Patterson* [2016] All ER (D) 229.” In fact the 1992 Act was considered by the Court of Appeal in *Dean v Walker* (1997) 73 P & CR 366, which again involved wall repairs, with one of the two judges who heard it being coincidentally Wall J. I owe this reference to Professor Roderick Paisley.

²³ Access to Neighbouring Land Act 1992 s 1(2)(a).

²⁴ 1992 Act s 1(4)(a).

²⁵ 1992 Act s 1(4).

²⁶ 1992 Act s 1(2)(b).

²⁷ 1992 Act s 1(3)(a).

²⁸ 1992 Act s 1(3)(b).

prospect of financial loss”²⁹ when making an order. Fifthly, although there would be interference and disturbance, on the facts this would not be to “such a degree ... that it would be unreasonable to make the order”.³⁰

The 1992 Act provides for certain losses arising out of access taken under an order to be compensatable, namely “any loss, damage or injury, or ... any substantial loss of privacy or substantial inconvenience”.³¹ The amount payable here would depend on when the work was carried out and how it impacted on the defendant’s own redevelopment works. Finally, the court considered the question of payment to the defendant for the privilege of entering its land. But no amount is payable on this ground if the land requiring the work done on it is “residential”.³² The court engaged in a detailed discussion of what constitutes “residential”. This will interest those having to interpret that term in other contexts in Scotland.³³ It concluded that, despite the fact that Amberwood House was currently unoccupied due to the redevelopment work, it was still residential. The work being done was with the intention of it remaining a residence.

The court thus made an order but the judge noted: “If this case has proven anything, it has proven that the Biblical precept to ‘love thy neighbour’ is one that owners of neighbouring properties would do well to abide by.”³⁴ The effort and cost could have been avoided by “only a modicum of goodwill”.³⁵ He expressed the hope that his detailed analysis of the 1992 Act would help potential litigants and avoid cases on it for another thirty years. His advice, however, has apparently fallen on deaf ears. His judgment is being appealed.

D. SCOTS THOUGHTS

We return to Angus and Brenda whom we met earlier. The 1992 Act is inapplicable in Scotland but here are some tentative thoughts about our law. First, declarator could be sought

²⁹ *Prime London Holdings 11 Ltd* para 81.

³⁰ 1992 Act s 1(3). Under the Law Commission’s recommendations it was only unreasonable hardship which would preclude an order being made.

³¹ 1992 Act s 2(4).

³² 1992 Act s 2(5), (7). The payment provisions do not appear in the Law Commission Report. They were introduced during the Bill’s passage and the exception for residential land apparently after “pressure from the country landowners’ interests”. See *Prime London Holdings 11 Ltd* paras 195-197.

³³ For example, in relation to leases, real burdens or enforcement of standard securities.

³⁴ *Prime London Holdings 11 Ltd* para 263.

³⁵ *Ibid.*

by Brenda that there is the right to take access under the authority of Hume as approved in *Soulsby*. Ideally, the precise terms on which the access would be taken would be spelled out.³⁶ Secondly, although such a right to take access is not a servitude, it is suggested that the *civiliter* principle would apply: exercise of the right must be reasonable and impose the minimum possible burden on the land being accessed, consistent with full enjoyment of the right.³⁷ Thirdly, it is suggested, again by analogy to the law of servitudes, that there are ancillary rights such as leaving scaffolding.³⁸ Fourthly, Brenda will be liable for any damage caused to Angus's property under general principles of the law of delict.³⁹ Fifthly, Angus must also be compensated for any period of being unable to use the part of his land being accessed.⁴⁰ An analogy may be drawn here from the case law on the use of another's land where that is not granted by the owner without charge.⁴¹ It would, however, seem preferable for there to be a clear statutory framework like in England and Wales. Having now considered the 1992 Act and its application in *Prime London Holdings 11 Ltd*, it is not clear to me why Lord Fraser was so against the legislation applying in Scotland. While the Scottish Law Commission is presently fully committed on property law work,⁴² it should consider a future project on the issue.

Andrew J M Steven
University of Edinburgh

³⁶ Although the court has power "to pronounce such decree of declarator as they may think right within the limits of a too widely stated conclusion": *Rothfield v North British Railway Co* 1920 SC 805 at 830 per Lord Dundas. I am grateful to David Welsh for this reference.

³⁷ See e.g. Erskine, *Inst* 2.9.34; D J Cusine and R R M Paisley, *Servitudes and Public Rights of Way* (1998) paras 12.180-12.185.

³⁸ Hume, quoted above, refers to "resting ladders".

³⁹ See E C Reid, *The Law of Delict in Scotland* (2022) paras 31.10-31.12.

⁴⁰ A real-life example, where my view was sought, involved scaffolding being erected onto city centre parking spaces which could then not be occupied by lessees.

⁴¹ N R Whitty, "Unjustified enrichment" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2022) paras 506-517.

⁴² On heritable securities and owners associations for tenements.