SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 9

EDI-A662-21

JUDGMENT OF SHERIFF ALISON STIRLING

in the cause

JACQUELINE WALLACE-MARTINEZ AND ANOTHER

Pursuers

against

JANICE FERGUSSON NISBET AND OTHERS

Defenders

Pursuer: McClelland, Advocate; BTO Solicitors LLP
Defender: Conn, Solicitor; Mitchells Roberton

EDINBURGH, 15 February 2023

The sheriff, having resumed consideration of the cause:

FINDS THE FOLLOWING FACTS ADMITTED OR PROVED:

1. The pursuers claim to be the *pro indiviso* heritable proprietors of 2 Albany Lane, Edinburgh and sole owners of the back green of the tenement comprising 25, 27, 29 and 31 Barony Street and 2 Albany Lane Edinburgh. In 1990 the first pursuer bought 2 Albany Lane from James Heeps. She was also granted exclusive title to the back green, but that part of the disposition was *a non domino*. The disposition in her favour was recorded in the Register of Sasines on 5 December 1990.

2. The second pursuer owned the flat then known as the southwest flat on the first floor at 29 Barony Street. That flat was immediately above 2 Albany Lane.

3. An internal staircase was constructed joining the two flats. In 1994 the pursuers purported to convey to themselves both properties as well as exclusive title to the back green. The disposition in their favour was recorded in the Register of Sasines on 25 February 1994.

4. James Heeps and his business partner David Alves had been friends with the first pursuer for about 10 years before he granted the 1990 disposition to the first pursuer. They remain friends. The 1990 transaction was a sale to a friend, rather than a sale on the open market. It was an investment for the first pursuer. She knew there were problems with the title.

5. The first to thirteenth defenders are the heritable proprietors of the other flats within that tenement. Their titles grant them common ownership of the back green.

6. Historically 31 Barony Street was a shop and 2 Albany Lane was a residential flat associated with the shop. 31 Barony Street and 25 - 27 Barony Street have main doors onto Barony Street. The flats now known as 29/1, 29/2, 29/3, 29/4, 29/5, 29/6 and 29/7 Barony Street share a common passage and stair, entering from Barony Street. The tenement block faces Barony Street, and the rear windows face Albany Street Lane. Albany Lane connects Barony Street and Albany Street Lane.

7. It is a very old tenement building. There is no back door from the tenement close into the back green. It predates later tenements which have a means of access through the tenement building. There are two doors into the back green from the neighbouring streets. Most of the proprietors wishing to use the back green would have to go out of the front door of the tenement, turn left along Barony Street, turn left up Albany Lane, turn left again along Albany Street Lane and enter the back green through a door in the wall which runs alongside Albany Street Lane and parallel to the back wall of the tenement. That door is a

heavy wooden door with a bolt on the inside. Only 2 Albany Lane has a door directly into the back green. That door is in the wall between the back green and Albany Lane. The proprietors of the ground floor commercial flat at 25 - 27 Barony Street could and did enter the back green through their window.

8. The address known as 2 Albany Lane now comprises 2 Albany Lane as it was in 1990 and the southwest flat on the first floor at 29 Barony Street. There is an internal staircase joining those two properties to make one interconnected property. The property does not have any windows facing onto Barony Street. The property is entered through a door in the wall running alongside Albany Lane which leads into the back green of the tenement, and then through a door in the conservatory built in the back green and adjoining the flat at 2 Albany Lane. This is the only way into the flat at 2 Albany Lane. There have been locks and an entry phone fitted to the door in the wall since about 1990. The pursuers control the access through that door. No other proprietors have keys.

9. The conservatory is built on the back green. It is adjacent to the rear wall of the tenement. It is an integral part of 2 Albany Lane.

10. There is an outbuilding in the back green, adjacent to the wall at Albany Lane. It was formerly a wash house and cellar. It has formed part of the title to 2 Albany Lane since at least 1962. The pursuers use it for storing gardening tools. The other proprietors of the tenement have no rights in the outbuilding.

11. The easiest way for contractors to get building materials into the back green to allow work to be carried out on the tenement is through Albany Street Lane, which is directly opposite the back of the tenement. There are obstructions including the wash house, the conservatory, a narrow path and shrubs to be negotiated if the door at 2 Albany Lane is used.

The pursuers' use of the back green

12. The pursuers have lived at 2 Albany Lane since 30 November 1990. The pursuers' daughter was born in 1994 and lived there all her life.

13. From about spring 1991 the pursuers have looked after the back green, weeding, replacing plants, pruning and cutting the grass as the previous owners of 2 Albany Street had done. The pursuers paid to have the walls surrounding the back green whitewashed every four or five years.

14. The pursuers and their children all used the back green. They used it every time they left 2 Albany Lane because that was the only access to the street. They played in it, built snowmen in it, had picnics, parties and barbecues in it. They put a trampoline and a swing in the garden. They hung washing in it. They exercised their dog in it.

15. They did not involve the other proprietors in the decision-making or in carrying out the works in the back green.

16. There were no objections by other proprietors to what they were doing.

17. Until 2004 there was a pavement area extending for about 10 metres along the back wall of the part of the tenement comprising 25 – 27 Barony Street, and under its windows. The pavement extended about 1 metre towards the grass of the back green. There was a low wall running parallel to the back wall of the tenement which divided the pavement area from the grass and shrubs part of the back green. On top of the low wall there were old iron railings. Immediately behind the railings on the back green side there was a 2 metre wicker fence. The effect of the fence was that the occupants of 25 – 27 Barony Street could not see into the back green. Alan Bathgate, who worked at 25 – 27 Barony Street from 1987 and owned it from 1995 – 2000, was not able to see the door in the back wall.

18. In 2004 the pursuers removed the railings and the fence. They raised the level of the pavement area, and placed decking placed on it. Alan Bathgate challenged the second pursuer about the removal of the railings and told him that it was common property. Alan Bathgate did not object to the removal of the fence or the other work done, which greatly improved his outlook. There were subsequently significant problems caused by the decking.

19. In 2014 the pursuers arranged for a stone mason to block up the back door to the back green by filling it in with stone and mortar from the Albany Street Lane side. They concealed the back door on back green side by placing a trellis, large gardening ornaments and large plants in front of it.

20. That work was not done openly. They did not consult the other proprietors. The defenders did not know about it at the time. Susan Richardson only realised that it had been sealed up in about July 2017. Paul Taylor only found out in 2021.

21. If the pursuers were at home they usually facilitated access through the door at 2 Albany Lane when proprietors needed access. The pursuers were often away and not able to be contacted. In those circumstances proprietors sought access over the back wall of the tenement or asked the owners of 25 – 27 Barony Street if they could take access through their back window.

22. The pursuers have occasionally told contractors instructed by other owners to stop what they are doing, but the contractors have carried on with their work.

Possession by the other proprietors

23. Throughout the period from 1987 until at least December 2020 the window cleaner Ewen McPherson cleaned the windows at 25 – 27 Barony Street at least four times a year by

going out of the office windows and standing in the back green. No one ever challenged his being in the back green.

24. Every year in the period from 1987 to 1995 Michael Todd, the owner of 25 – 27 Barony Street before Alan Bathgate, cleared the small pavement area outside the windows. On an occasion during that period he used the back of the property for painting windows.

25. In 1995 Alan Bathgate used the back wall of the back green and the back window of his commercial premises at 25-27 Barony Street to access his office on about five Saturdays when he had left the office at lunchtime and forgotten to take his keys.

26. Alan Bathgate had his windows painted on two occasions once in about 1996 or 1997 and once in about 2012 to 2014, with access being taken via the windows and into the back green. No neighbours took issue with Alan Bathgate using the back green.

27. From at least 1995 to date there has been a problem with the tenement drains, with plumbers attending about six times a year. Plumbers took access via the back window of 25 – 27 Barony Street, or through the door at 2 Albany Lane. If the decking had to be removed to clear a particular blockage, Alan Bathgate contacted the second pursuer. The decking had first had to be lifted within a few months of being put down.

28. In 1997 Paul Taylor's solicitor challenged the pursuers' title in correspondence.

29. In about the early 2000s tradesmen instructed by Susan Richardson to paint the outside of her back window frames took access through the back green by using a ladder to climb over the back wall at Albany Street Lane and unbolting the back door from inside. They then used the door for access until the work was completed.

30. In the period from 1998 to 2022 tradesmen instructed by Susan Richardson were in the back green on many other occasions. On each occasion Susan Richardson or her

tradesmen first rang the bell at 2 Albany Lane. They were never in when access was needed, and access was taken over the back wall by her contractors.

31. On 21 July 2004 Paul Taylor's solicitor wrote to the pursuers' solicitor questioning ownership of the back green. That solicitor responded by letter dated 3 August 2004, referring to the description in the 1990 disposition and 14 years possession of the back green.

32. In 2004 when the second pursuer was removing the railings, Alan Bathgate challenged his title and told him that the back green was common property. The second pursuer claimed he owned it through prescription but did not produce any paperwork. There were other claims made by both men over the years, the final one being in October or November 2020.

33. At some time between 2006 and 2008 there were communal repairs to the tenement, which included roof repair, repair of the skylights and general repair to the internal stair. Scaffolding was erected to the side and rear of the tenement. The decking was removed and the inner legs of the scaffolding were placed on the lower pavement. The scaffolding extended beyond the decking area and into the rear green beyond the small wall.

34. Between July and November 2017 work was done on Susan Richardson's flat. A toilet was formed and an extractor fan had to installed with a pipe going out through the back wall. The contractors needed to be in the back green to do the work. The pursuers were not at home and the contractors were eager to get finished. They used a ladder to get over the back wall into the back green.

35. From December 2020 on there was extensive refurbishment of 25 – 27 Barony Street requiring access from the back green. Janice Nisbet and her contractors used her back window for access because the pursuers were not available to open the door. Specialist drain cleaners were employed to remove concrete from the drains, using large heavy

equipment and removing a lot of spoil. A back window was repaired. There were at least three other incidents between December 2000 and November 2022 when specialist drain cleaners had to attend. On one occasion contractors put items over the back wall because they were too bulky to go through the window. Janice Nisbet allowed tradesmen for two other properties to gain access through her window, including a BT engineer in early November 2022.

36. Janice Nisbet has gone out in the back garden to enjoy the weather, take photographs and look at the building and has never been challenged by the pursuers.

37. On 29 April 2021 Janice Nisbet wrote to the pursuers about the drains, advising that she had a right in common to the back green and that included a right of access for work on her property. She attached her registered title. The pursuers responded claiming ownership. Janice Nisbet responded challenging their title and indicated that she intended to reinstate the back door. Janice Nisbet made proposals to resolve the matter amicably, including by a joint application to the Lands Tribunal. The pursuers responded by raising the action for interdict.

38. None of the defenders or their predecessors in title raised with the pursuers any concern about the doorway in the back wall having been blocked up until Janice Nisbet wrote to the pursuers by letter dated 6 May 2021.

39. In correspondence over the period from April to September 2021, Janice Nisbet on behalf of the defenders intimated to the pursuers an intention to reinstate the doorway in the wall and asserted on their behalf that those defenders held rights of common ownership in the back green.

40. On 13 October 2021 the action was warranted.

41. On 2 December 2021 the defenders lodged defences and a counterclaim in which they sought declarator that the back green including the solum of the conservatory formed part of the common property of the proprietors of the tenement, and that the pursuers had no exclusive right in it. That is when judicial interruption of the prescriptive period occurred.

Titles recorded by other proprietors of the tenement since 1990 and their rights to the back green

42. On 16 May 1995 Alan Bathgate's title to the office at 25 - 27 Barony Street was recorded in the Register of Sasines.

43. On 24 October 1997 Paul Taylor's title to 29/7 Barony Street was recorded in the Register of Sasines. It was subsequently registered in the Land Register on 12 January 2018. His title includes a "right in common with the other proprietors of the houses of the tenement of which the subjects in this Title form part to the bleaching green behind the same entering from the lane immediately behind" [ie Albany Street Lane].

44. On 17 June 1998 Susan Richardson's title to 29/1 Barony Street was recorded in the Register of Sasines. She transferred a half share to her husband in 2021. Their title includes a "right in common with the other proprietors of said tenement to the bleaching green behind the same entering from the lane immediately behind" [ie Albany Street Lane].

45. On 18 February 2000 Fiona and Stewart Pitt's title to 29/4 Barony Street was recorded in the Register of Sasines. Their title includes a "right in common with the other proprietors of said tenement to the green situated at the back or south side for the purpose of drying and bleaching clothes … with access to said green by the door entering from the meuse lane on the north side of Albany Street".

46. On 12 June 2001 Arabella Graham's title to 29/3 Barony Street was registered in the Land Register. Her title includes a "right in common with the other proprietors of said tenement to the bleaching green behind the same entering from the lane immediately behind" [ie Albany Street Lane].

47. On 20 May 2003 Brian and Morna Carmichael's title to 31 Barony Street was registered in the Land Register. Their title includes "(Second) a right in common with the other proprietors of the said tenement to the backgreen … (Third) free ish and entry to the subjects in this Title and to the said backgreen by the entrance in Albany Street Lane, aforesaid".

48. On 29 December 2009 Robert Ashgill's title to 29/6 Barony Street was registered in the Land Register. His title includes a "right in common with the other proprietors of said tenement to the bleaching green behind the same entering from the lane immediately behind" [ie Albany Street Lane].

49. On 25 January 2021 the title of Janice Nisbet and Brian Yates to 25 – 27 Barony Street was registered in the Land Register. Their title includes "a right in common with the other proprietors in the said tenement to the green behind the said tenement". Their title is the only title without wording about "entering" or "free ish and entry".

50. Joan Burgess's title to 29/2 was recorded in the Register of Sasines on 3 June 1988. It includes a "right in common with the other proprietors of said tenement with the backgreen set apart for the houses in the said tenement…" and "free ish and entry to the… said backgreen by the common passage and stair of said tenement". There never was a direct route from the common passage and stair into the back green.

FINDS IN FACT AND IN LAW:

1. That the disposition by the pursuers in favour of themselves recorded in the Register of Sasines on 25 February 1994 is invalid *ex facie*.

2. That the disposition by James Heeps in favour of the first pursuer recorded in the Register of Sasines on 5 December 1990 is not invalid *ex facie*.

3. That the disposition by James Heeps in favour of the first pursuer recorded in the Register of Sasines on 5 December 1990 is sufficient in respect of its terms to constitute in favour of the first pursuer a real right of exclusive ownership of the back green of the tenement comprising 25, 27, 29 and 31 Barony Street and 2 Albany Lane, Edinburgh.

4. That the first pursuer's possession of the back green of the tenement comprising 25, 27, 29, and 31 Barony Street and 2 Albany Lane, Edinburgh was founded on and followed the recording of the disposition by James Heeps in favour of the first pursuer recorded in the Register of Sasines on 5 December 1990.

5. That the back green of the tenement comprising 25, 27, 29, and 31 Barony Street and 2 Albany Lane, Edinburgh has not been possessed by the first pursuer as exclusive owner for a continuous period of ten years openly, peaceably and without any judicial interruption.

THEREFORE:

1. Repels the pursuers' first to seventh pleas-in-law and the defenders' first, second, sixth, eighth and ninth pleas-in-law;

2. Sustains the defenders' third, fourth, fifth, seventh and tenth pleas-in-law;

3. Assoilzies the defenders from the craves in the principal action;

4. Grants the crave in the counterclaim and declares that the green behind the tenement at 25 to 31 (odd numbers) Barony Street and 2 Albany Lane, Edinburgh, including the solum

of the conservatory to the rear of 2 Albany Lane, forms part of the common property of the whole proprietors of that said tenement which includes the pursuers and the first to thirteenth defenders to this action, and that the pursuers have no exclusive right of property to any part thereto; and

5. Finds the pursuers liable to the defenders in the expenses of the action and the counterclaim, allows an account of expenses to be handed in and remits same, when lodged, to the Auditor to tax and to report.

NOTE

Introduction

[1] This is an action about the ownership of a back green of a tenement at Barony Street and Albany Lane in Edinburgh. The pursuers, who are the proprietors of a flat on the ground and first floors, seek declarator that they have a real right of exclusive ownership in the whole of the back green through the operation of positive prescription under section 1 of the Prescription and Limitation (Scotland) Act 1973. They seek to interdict the first to thirteenth defenders, who are the proprietors of the other flats in the tenement block, from carrying out any work to reinstate the door in the back wall behind the back green. The pursuers blocked up that door in 2014. The tenth to thirteenth defenders counter claim and seek declarator that the back green, including the solum of a conservatory built by the pursuers' predecessors in title in 1990, forms part of the common property of the tenement, and that the pursuers have no exclusive right of property to any part thereto. The Lord Advocate was called as representing the Keeper of the Registers of Scotland, but did not enter the process.

[2] The action was warranted on 13 October 2021. A caveat hearing was proposed but not insisted upon, presumably because of the undertaking offered. At an options hearing on 7 June 2022 the sheriff closed the record and allowed parties' a three day proof before answer, both parties having preliminary pleas supported by rule 22 notes. On 4 October 2022 dates were assigned for 19, 20 and 21 December 2022 for an in-person proof before answer. On 22 November 2022 certain witnesses were allowed to give their evidence remotely because of their geographical location or infirmity.

[3] On 19, 20 and 21 December 2022 the cause called before me for the proof before answer.

[4] The first pursuer gave evidence in person herself, and spoke to both her witness statements. The pursuers also led in-person evidence from Albany Wallace-Martinez and David Alves, both of whom spoke to their witness statements. They relied on an affidavit from James Heeps. They relied on witness statements from Patrick Gallacher, Derek Kilok Tang, Michael Mortazavi, Angela Josephine Rule, Dawn Matthew, Keith Jeffs, Nicholas Burke Cuthbertson, Ian Block and Josh Koh.

[5] The defenders led evidence from Alan Bathgate (by remote link), Paul Andrew Taylor (by remote link), Susan Richardson (in court), Janice Nisbet (in court) and Brian Yates (in court), all of whom adopted their written statements and all except Brian Yates expanded upon them in oral evidence. They relied on witness statements from Ewen McPherson and Arabella Graham.

[6] On 21 December 2022 the evidence concluded, and 25 January 2023 was identified as a hearing on submissions. I required written submissions to be lodged and exchanged by 18 January 2023, and for the submissions to be prefaced by a one page executive summary of the written submissions. Both sets of submissions were lengthy and detailed and

undoubtedly saved at least one more day of court time. I am grateful to both representatives for the time they took to prepare their written submissions.

[7] On 25 January 2023, having heard oral submissions I made *avizandum*.

Witnesses

[8] Parties in their written submissions addressed me on the credibility and reliability of various witnesses and what should be made of their evidence. The solicitor for the defender also responded to the pursuers' written submissions at the hearing on submissions. I have taken full account of all those submissions.

Pursuers' witnesses

The first pursuer

[9] The first pursuer adopted both her written statements and gave oral evidence in court.

[10] I have made findings in fact from her evidence on matters which were not controversial. Where there were conflicts between her evidence and that of other witnesses, I have tended to prefer the evidence of those witnesses. I found some of them to be very good witnesses. There was a stark conflict between her evidence and that of Alan Bathgate regarding the pursuers having removed his railings in 2004, and I prefer his evidence: he is no longer the owner of 25 – 27 Barony Street and does not have an interest in the outcome of this litigation. By contrast the pursuers have a significant interest in the outcome. The first pursuer was keen to emphasise that access was always taken with her consent and that she was always available. That conflicts with the evidence of several of the witnesses who tried to contact her and found she was unavailable, and some of them then took access over the

back wall or via Alan Bathgate's property. Her claims about the extent to which she used the back green were exaggerated. I preferred the evidence of Arabella Graham who said she had not seen the pursuer in the garden often, and of Janice Nisbet who has barely seen the pursuers in the garden. I do not accept the first pursuer's evidence that the scaffolding was within the decking area and only three planks wide. I do not accept her claim that residents could see the back door when it was being blocked up on the lane side in 2014.

[11] The first pursuer has a vested interest in this litigation which appears to be greater than that of any of the other witnesses. It is clear from David Alves's evidence that the first pursuer knew there were problems with her title to the back green right from the start. The 1990 disposition from James Heeps only granted her fact and deed warrandice in respect of the back green, though he granted absolute warrandice for 2 Albany Lane. She knew that she would have to possess the back green for 10 years. While bad faith is irrelevant for establishing positive prescription, it may have a bearing on an individual's credibility and reliability. The first pursuer at times came across as somewhat guarded in her evidence.

Albany Wallace-Martinez

[12] Albany Wallace-Martinez adopted her written statement and gave oral evidence in court. She is the daughter of the pursuers. She lived at 2 Albany Lane from birth in December 1994 until late September 2022.

[13] She said that she had always thought the back green belonged to her family until the legal dispute arose in 2021. She gave evidence to the effect that it was only her family who used the back green and that they used it extensively. She and her family used it every day unless there was torrential rain or snow. The neighbours saw them using the garden and

were happy about it. She used to jump on her trampoline and could see into the second floor flat where there was a hamster running in its wheel. On one occasion her family were having a party and playing music. One of the residents opened their window to say they enjoyed the music and left their window open so that they could listen to it. If other residents needed access, the pursuers usually provided it if they had been given advance notice.

[14] I have reservations about her claim that neighbours called out of the window because they liked the music (it would be more usual for neighbours to ask others in a back green to turn it down), and also about her claim to be able to see a hamster in a wheel. I do not accept her claim that Alan Bathgate thought that the back green was theirs and that he never questioned it. I formed the impression that she exaggerated the extent to which her family used the back green in order to support the pursuers' case. I felt that her evidence was rehearsed and that she had decided what message she wanted to get across, for example about access always having been granted when it was sought in advance and that it was their own private garden. I am not prepared to attach much weight to her evidence.

David Alves

[15] David Alves is the former business partner of James Heeps. They are also life partners' and entered into a civil partnership in September 2022. David Alves was initially expected to give his evidence remotely, but there were connection problems. It also transpired that David Alves was at James Heeps's bedside and their understanding may have been that they sat together to give their evidence, which I was not prepared to allow. David Alves then came to court to give his evidence.

[16] David Alves's evidence was confusing and contradictory, and there is little I can rely on. Some of that may be due to the passage of time, and to his significant recent health issues. He was apologetic about the contradictions.

[17] His written statement is full of errors in the addresses of properties, dates of transfer and who owned what property and when. He categorically denied in examination in chief ever owning 2 Albany Lane himself (although his written statement says he did, and that he had bought it from James Heeps because David Alves's mother was living in it, paragraph 13), only to have to concede that he did own it in cross-examination when shown the search sheet which recorded a disposition from James Heeps to him on 1 March 1982. However he could remember nothing about the transactions.

[18] David Alves and James Heeps have been friends with the first pursuer since before 1990. The first pursuer had a restaurant on Howe Street, and David Alves and James Heeps had lunch there almost every day. It was conveniently close to their estate agency, Stewart & Saunders. They had known the first pursuer for about 10 years at the time of the 1990 transfer. It was a sale to a friend, rather than a sale on the open market. It was an investment for her. The inference I draw from David Alves's evidence about his friendship with the first pursuer is that she knew there were problems with the title.

[19] Counsel for the pursuer had objected to David Alves being asked to look at the search sheet relating to 2 Albany Lane on the basis that David Alves was not an expert and the pre-1990 position was irrelevant if prescription were established. I allowed that evidence under reservation. Counsel maintained his objection on that basis in his written submissions. I now repel that objection. The solicitor for the defender had made it clear at the stage the objection was made that he was only referring to the search sheet to challenge

David Alves's credibility and reliability and not for any other purpose. That was a legitimate use of the search sheet.

James Heeps

[20] James Heeps prepared a written statement and it was expected that he would give evidence to the court remotely. On the first day of the proof I was presented with a soul and conscience certificate from Inveresk Medical Practice dated 19 January 2022 saying that he was unable to attend Edinburgh Sheriff Court due to various medical conditions affecting his physical health. I was concerned about the date on the letter and also about the letter not having appreciated that his evidence was to be taken remotely. The solicitor for the defender indicated that he required to cross-examine James Heeps. I indicated that I was not prepared to rely on an unsigned written statement, and that an affidavit should be obtained if the pursuers wished to rely on his evidence. I also indicated that in considering the weight of any affidavit, I would have regard to the fact that James Heeps had not been cross-examined.

[21] On 20 December 2022 James Heeps's affidavit was lodged.

[22] While I accept that he has been very good friends with the first pursuer for many years, I cannot rely on anything else in the affidavit. He claims to have purchased 2 Albany Lane in 1980 and to identify the disposition in his favour as pursuer's production 5/1/1. This is just wrong. Production 5/1/1 is not a disposition: it is simply a note about the existence of a disposition which may have sought to convey the back green with a date of entry in 1989 (not 1980). It does not show ownership of the back green. The purpose of the note at 5/1/1 is unknown. The search sheet for this entry shows that it was an *a non domino* disposition (6/5/24/2).

Patrick Gallacher

[23] Patrick Gallacher lived at 21/2 Barony Street between 1960 and 2018. This is the tenement adjoining the tenement block at 29 Barony Street. There was no direct access from the tenement at 21 Barony Street into the back green of that tenement either, and occupiers had to go via Albany Lane and Albany Street Lane and through the back door of the wall to get into the back green. He did not see anyone using the back green to 29 Barony Street other than the pursuers and their family.

Derek Kilok Tang

[24] Derek Kilok Tang is a friend of the pursuers and has visited them at 2 Albany Lane about three times a year for 30 years. He has never seen any of their neighbours asking to use the garden or asking for access.

Michael Mortazavi

[25] Michael Mortazavi is a very close friend of the first pursuer. They met through James Heeps in 1986. He has visited the pursuers at 2 Albany Lane monthly since they purchased it, and he visited it when it was owned by James Heeps. They have socialised in the garden. He has not witnessed the other occupiers asking for access, or questioning the use of the back green.

Angela Josephine Rule

[26] Angela Josephine Rule has known the pursuers since the mid to late 1980s. They are very good friends. She has visited 2 Albany Lane at least once a year for the past 30 years and socialised in the back green. She has not seen any other occupiers in the back green.

Dawn Matthew

[27] Dawn Matthew has been friends with the first pursuer since she was 17 years old. She was good friends with James Heeps and David Alves too. They offered the first pursuer the chance to buy 2 Albany Lane. She visited the property on many occasions over the years including with her own children, sat in the back green and did not see other occupiers using it.

Keith Jeffs

[28] Keith Jeffs has known the pursuers for about 23 years. They met through their daughters'. They have been to 2 Albany Lane on several occasions. He never saw any other occupiers in the back green.

Nicholas Burke Cuthbertson

[29] Nicholas Burke Cuthbertson has known the first pursuer since 1976. He has visited 2 Albany Lane once a year or once every 2 years since 1990. He was in the back green every time. He never saw any neighbours using it. The first pursuer has explained some of the rules of positive prescription to him.

Ian Block

[30] Ian Block has known the pursuers for over 30 years. He visited them monthly in the 1990s, sometimes staying for long periods of time. He knew the previous owners too. He has used the back green with the pursuers. Neighbours asked the pursuers for access to the back green during the scaffolding works.

Josh Koh

[31] Josh Koh has known the pursuers since 2005. He has carried out gardening work in the back green for the pursuers every couple of months since about 2006. He has house-sat for the pursuers for periods of 2 to 3 weeks a year, a couple of times a year and looked after their dog. He has not seen any other people using the back green, other than during the scaffolding work. No one has asked him for access.

Defenders' witnesses

Alan Bathgate (oral evidence by remote link)

[32] Alan Bathgate was an impressive witness. He worked at 25 – 27 Barony Street throughout the period from 1987 to 2020, which is longer than the pursuers' residence there. He is a knowledgeable witness. He was a careful witness, with a good memory, and able to give a lot of detail about the tenement and doing his best to assist the court. He was cross-examined at length. Having sold his property, he has no interest in the tenement and nothing to gain by telling anything other than the truth.

[33] I prefer his evidence to that of the first pursuer regarding the extent to which the scaffolding was situated on the back green. His evidence was clear, and his office windows were right next to the decking which would have given him a very good view. Having

regard to the photographs, it is obvious that the scaffolding would have extended beyond the small wall. If it had been confined to the decking area as the first pursuer said, it would have been a very narrow platform and dangerous for men working at height.

[34] Alan Bathgate said the windows were cleaned five or six times a year. The window cleaner Ewen McPherson said he cleaned them around every 3 months. This potential discrepancy about frequency does not cause me to doubt either witness. It is clear that the windows were cleaned at least four times a year.

[35] Alan Bathgate adopted his written statement subject to two points of clarification. In paragraph 5 he did not leave the window open overnight and did not leave the keys in the office overnight. The paragraph should have said that if he was working on Saturday and went out at lunchtime leaving his keys in the office and the window open, then the only way he could get back into his office was by climbing over the back wall, because his staff did not work on Saturdays. He used the back wall and the window to access his office on about five occasions in 1995. In paragraph 6 there is confusion over 29 Barony Street. Number 29 Barony Street was owned by the second pursuer but it was on the first floor of the tenement and it was connected internally to 2 Albany Lane, with access through Albany Lane.

[36] Alan Bathgate worked at 25 - 27 Barony Street from 1987 until 2020. He bought the property in 1995. He understood that he had a right in common with the other proprietors in the tenement to the back green. He knew this because he had worked with the previous owner since 1987, and when he bought the property in 1995 he saw the title deeds and fully discussed them with his solicitor. Because his property was not residential, he had no need to use the back green as a garden.

[37] Alan Bathgate did not recall the previous owner ever using the back of the property other than for painting windows once in the period 1987 to 1995 and tidying up the small pavement area outside the windows. The pavement area was cleared every year. The pavement area is directly behind 25 – 27 Barony Street and extends about 10 metres along the tenement and about 1 metre into the back green to a small wall on top of which there had been railings. Window cleaners washed the office windows 5 - 6 times a year by going out of the office windows and standing in the back green. They did this throughout the period from 1987 to 2020.

[38] No neighbours took issue with him using the back green.

[39] Alan Bathgate discussed ownership of the back green with the second pursuer. The first occasion was when the railings were being removed from the wall. Alan Bathgate had not been aware that this was being done and he stopped work and called for the second pursuer. The second pursuer told Alan Bathgate that the second pursuer was making alterations to the second pursuer's garden and that they would benefit Alan Bathgate. Alan Bathgate explained to him that it was not the second pursuer's garden, and that it was a communal one belonging to 25 – 31 Barony Street and 2 Albany Lane. The second pursuer told Alan Bathgate that he had got the garden by prescription and it was now his. Alan Bathgate said that he did not understand and needed it in writing for his solicitor to check. It was not a heated conversation. He was never given any paperwork. Alan Bathgate told the second pursuer that the railings were part of the historic listing and should not have been removed. The second pursuer said that he was going to store them in the cellar of his shop, but the railings were never reinstated. The second pursuer raised the level of the pavement area, and decking was placed on it. Alan Bathgate did not object

because the work done greatly improved his outlook. There were subsequently significant problems caused by the decking.

[40] There were further conversations between Alan Bathgate and the second pursuer about title to the back green. The second pursuer was fully aware of Alan Bathgate's understanding. The final conversation was in October or November 2020 when Alan Bathgate decided to sell his property. He had agreed to give the second pursuer an option to purchase, but the pursuers decided not to proceed. Alan Bathgate suggested that they reconsidered the matter because it would help with their title to the back green, which could cause problems with the new owner.

[41] Scaffolding was put up to the side and rear of the tenement during the roof repair. The decking was removed and the legs of the scaffolding were placed on the lower pavement. The scaffolding extended beyond the decking area and into the rear green beyond the small wall. The inner feet were in the middle of that area, there was a gap between the scaffolding and the rear elevation, and the outer feet were in the planted border or on the back green. He could see it from his window. The roof repair was part of a communal repair through the Edinburgh Stair Partnership, which also included repair of the skylights and general repair to the internal stair.

[42] Alan Bathgate had his windows painted on two occasions once in about 1996 or 1997 and once in about 2012 to 2014, with access being taken via the windows and into the back green.

[43] He also used the back green when the drains blocked. There was an ongoing problem with the drains, occurring about 6 times a year during his ownership and there had been problems even before then. The plumber took access via his window, or through the door at 2 Albany Lane. The plumber would advise if the decking had to be removed to clear

a particular blockage, and if so, he would return the following day and Alan Bathgate would contact the second pursuer. It was only if the problem was with a toilet drain that the decking needed lifted and all the rods had to come through the Albany Lane door. The decking had first had to be lifted within a few months of being put down. Alan Bathgate had warned the second pursuer at the time that the decking would cause a problem when the drains needed repairs, but the second pursuer said that he would lift the decking. Alan Bathgate would not need to contact the pursuers for access if the plumbers were able to clear sink drains from his office or if they only had to lift one section of the decking.

[44] Alan Bathgate had a clear view of the doorway in the back wall once the fence came down. He had tried to open the back door to the green but it did not open. He was not aware it had been blocked up on the outside of the garden. He was aware that the gate had been blocked on the inside with a bench.

[45] He had had no real view of the garden until the fence and the railings came down. It was a 2 metre wicker fence. He did not know when the conservatory was built because he did not have a clear view of the green due to the fence. When the fence came down the conservatory was already there.

[46] The pursuers had better access to the back green than he did and they lived there, and therefore they used it more than he did. He was in commercial premises. He took no issue with their use of the back green.

Paul Andrew Taylor (oral evidence by remote link)

[47] Paul Andrew Taylor adopted his written statement and gave supplementary evidence via a remote link. He gave his evidence in a straightforward manner and was cross-examined. I accept him as a credible and reliable witness.

[48] He bought the flat 29/7 Barony Street in about July 1997. He lived in it until 2007 and then rented it out.

[49] In 1997 when he was buying the flat he asked his solicitor about access to the back green. His solicitor made inquiries and said that he thought it was owned by the flat at 2 Albany Lane. His solicitor challenged the pursuers' title in correspondence. Although in cross-examination Paul Taylor agreed with counsel for the pursuers that the challenge would have been to the sellers of the flat rather than to the pursuers, I do not accept his answer. It would not have made sense for his conveyancing solicitors to assert in their letter that his querying the position in 1997 constituted a challenge to the running of the prescriptive period unless the challenge had been to the pursuers. My reading of the letter from the conveyancing solicitors is that the challenge was to the pursuers. I formed the view at the time that the witness had been persuaded by counsel to agree with him.

[50] Paul Taylor remained curious about how 2 Albany Lane had title. He asked the second pursuer about it and whether he could prove ownership. The second pursuer referred to having access for over 10 years without challenge, but he did not offer any evidence and he was brusque in his manner. Paul Taylor made further inquiries. On 21 July 2004 his solicitor wrote to the pursuers' solicitor. That solicitor responded by letter dated 3 August 2004, referring to the description in the 1990 disposition and 14 years possession of the back green.

[51] Paul Taylor has never been in the back green because he could not access it. He used to be able to clean his windows from inside his flat, but a change in regulations means that he will now need to arrange for window cleaners to clean them from the back green. He did not need work done on his flat such that workmen would need to go into the back green. He has paid his share of communal works such as the unblocking of the drains.

[52] He was not aware that the back door to the green had been blocked up until 2021.

Susan Richardson (oral evidence in court)

[53] Susan Richardson adopted her written statement and gave evidence in court. She was cross-examined at length. She accepted that it was difficult to remember the exact dates when things changed. She was mistaken about the date for the construction of the conservatory, but that does not cause me to doubt the rest of her evidence. She could only see it with difficulty from her own windows, and there was reference elsewhere to there perhaps having been a smaller structure such as a porch there. I thought she was a good witness, considering the questions she was asked carefully and giving precise answers based on a good knowledge of the property over many decades.

[54] Susan Richardson is a retired social worker. She inherited the flat at 29/1 Barony Street in 1998 from her late mother, who had owned it since 1990. She transferred a half share to her husband in 2021. Both she and her late mother generally rented it out.

[55] In the 1990s Susan Richardson assisted her mother in getting the flat ready for new tenants on at least two occasions. Her mother had instructed contractors who gained access to the back green to carry out work such as repainting the outside of the back window frames, but Susan Richardson did not know when this was, and it might have been before 1990. She had not realised that her father had owned the flat since 1970. She did not think her mother's contractors would have sought access through the door at 2 Albany Lane. It was much easier for contractors to get building materials through Albany Street Lane because that was directly opposite the back of the tenement. There were obstructions including the wash house and the conservatory to be negotiated if the door at 2 Albany Lane was used.

[56] She has visited the flat every year, and at the end of each tenancy to check the flat. She has stayed at the flat during the Edinburgh Festival and at other times, sometimes between tenancies if she was doing jobs in the flat. Occasionally she allowed her adult children to stay there during the Festival or at New Year. Her son has been living in the flat since March 2018.

[57] The door in the back wall was a heavy wooden door, bolted from the inside, but it still opened in 1998 when she inherited the flat. It was not obstructed from the inside. In about the early 2000s Susan Richardson instructed tradesmen to paint the outside of her back window frames. She was with them. They needed access to the back green. They went round to Albany Street Lane, put a ladder over the back wall and came into the back green. They unbolted the door from the inside and took access through the door until they were finished. She saw the door when it was open. The door still opened in 2006 - 2008 when the work under the Edinburgh Stair Partnership was being done.

[58] She did not notice that the door was blocked up until about July 2017 when she realised there was a trellis over the back door and she became aware that it had been sealed up with stone on the lane side. She was planning work on the flat. She spoke to the second pursuer about access, and he told her to call the pursuers at their shop in Canonmills and he would drive up and let people in. She was concerned about the delay that would cause.

[59] Between July and November 2017 work was done on Susan Richardson's flat. A toilet was formed and an extractor fan had to be installed with a pipe going out through the back wall. The contractors needed to be in the back green to do the work. The pursuers were not at home and the contractors were eager to get finished. They used a ladder to get over the back wall into the back green.

[60] In the period 1998 to 2022 tradesmen were in the back green on many more than two occasions. On each occasion Susan Richardson or her tradesmen have rung the bell at 2 Albany Lane. They were never in when she needed access, and access was taken over the back wall by her contractors.

[61] In cross-examination she said that the occupiers should have had access through the door at 2 Albany Lane, but they had to ask the pursuers to let them in. Access was by arrangement with the pursuers, which was not always convenient. They used the back green as their private garden despite it being commonly owned. They prevented others from using it for leisure or drying clothes. They took it over.

Janice Nisbet (oral evidence in court)

[62] Janice Nisbet adopted her statement and gave oral evidence in court. She was cross-examined. Janice Nisbet was a very impressive witness. As a conveyancing solicitor she was knowledgeable about all the issues which arose in the case, including things like listed building consent, drainage rights and health and safety. She gave a lot of useful detail in her answers. It is clear from the documentary evidence that she had tried to resolve matters without the need for court. I accept her evidence.

[63] Janice Nisbet qualified as a solicitor in 2006, and has worked in private client and general conveyancing since then. She is the sole trader of Fergusson Law which was established in 2013. She practises from 25 – 27 Barony Street, which she bought in December 2020. Until recently she also did health and safety legal work, having worked in regulatory enforcement for the Health and Safety Executive for nearly 20 years as one of HM Inspectors of Health and Safety. She is qualified in England too, and does some English property transfer work.

[64] When she viewed the property with Alan Bathgate, they went into the back green by climbing through the office window. Alan Bathgate told her that the pursuers thought they had managed to get rights over the back green. Her solicitor checked her title and those of the other flats which had been registered in the Land Register, and they all showed rights in common to the back green. In her experience, it is standard for properties like this to have common ownership of the back green. She purchased the property and it was registered in the Land Register with common rights to the back green.

[65] Extensive refurbishment was required, for which access was needed to the back green. The door in the back wall to the rear of the tenement was blocked with stone on the lane side, but that was not visible from the back green.

[66] It is a very old tenement building and predates later tenements which have a means of access through the tenement building.

[67] The only other access to the back green was through the door at 2 Albany Lane. Janice Nisbet tried knocking on their door a couple of times during the day but no one answered. She and her contractors used her back window for access to the back green to carry out the refurbishment.

[68] Janice Nisbet's plumber required to lift the decking to inspect the drain pipe. The first pursuer told the plumber that he could not do that because she was having a garden party and he would make a mess of the green. He said that he would not make a mess and she went away. The second pursuer arrived and told the plumber to get out of the green, but the plumber kept on working. The plumber contacted Janice Nisbet, but when she arrived the second pursuer had left.

[69] The plumber found that excess concrete had been poured over part of the line of the drain pipe under the decking. Scotdrain, who are specialist drain cleaners, had to be

employed to remove the concrete. They had to access the back green through the window to the offices at 25 – 27 Barony Street, taking some large heavy equipment out and removing a lot of spoil. One of the back windows had to be repaired, again with access with difficulty through the back window.

[70] There is an ongoing problem with the drains. There were four incidents between December 2020 and November 2022 when specialist drain cleaners had to be instructed. These incidents are always an emergency. Access has had to be taken through the back window. An architect instructed to look at the drain thought that the diameter of the common drain was too narrow and below the current statutory requirement. It is 2 inches shorter in diameter than it should be. A long term solution is needed. Scotdrain have advised that the drain takes a right turn at the conservatory and goes underneath the pursuers' property and connects with the sewer in Barony Street. The right turn contributes to the blockages. The right turn is unusual and suggests that someone changed the line of the drain in the past. One way to solve the problem in full is to run a new foul drain straight along the back wall of the tenement to the sewer in Albany Lane, but the conservatory is in the way. Another solution is to replace the drain *in situ*, which would involve going underneath the tenement building. The current drain runs under one of the pursuers' rooms and then passes through the passageway with the stair to the front door at 29 Barony Street. The first solution is simpler and much cheaper than digging up the whole of the pursuers' floor and the passageway. It would be difficult to find a less direct route to Albany Lane because the lane is on a slope and there is a need to organise the drain so that it is not running uphill.

[71] There is also a problem with lead pipes.

[72] Janice Nisbet's contractors have gone through her window to get access to the back green. On one occasion the contractors had to put items over the back wall because they were too bulky to go through the window. She has also allowed tradesmen for two other properties to gain access through her window, including a BT engineer in early November 2022. Access by clambering out of a window was not good in health and safety terms. On occasion the pursuers have told tradesmen in the back green to go away, but the tradesmen have carried on. Janice Nisbet has gone out in the back garden to enjoy the weather, take photographs and look at the building and has never been challenged by the pursuers.

[73] On 29 April 2021 Janice Nisbet wrote to the pursuers about the drains, advising that she had a right in common to the back green and that included a right of access for work on her property. She attached her registered title. The pursuers' responded claiming ownership. Janice Nisbet responded challenging their title and indicated that she intended to reinstate the back door. Listed Building consent would have been required to block it up, and the pursuers did not have that. Janice Nisbet made proposals to resolve the matter amicably, including by a joint application to the Lands Tribunal. The pursuers' claim to sole ownership presents a number of legal challenges including rights of access to the back wall of the tenement, the ownership of that wall *ad medium filum* by the pursuers with an impact on insurance and maintenance, the drain being under the pursuers' property with no clarity about whose responsibility it is to update it to current standards, and the need to get out to Albany Street Lane in the event of a fire. The pursuers responded by raising an action for interdict.

[74] Janice Nisbet suggested the Lands Tribunal because she recognised that "the whole issue was a complete mess". The Lands Tribunal agreed to resolve both the issue of access and of ownership. Her intention was to get the pursuers to talk about the issues.

[75] Janice Nisbet is often in her premises, including most weekends, and the pursuers do not appear to make use of the back green. She has seen the second pursuer putting out sprinklers occasionally in the summer. She has only seen the first pursuer sitting out in the back green once, and that was close to the pursuers' own flat.

[76] In cross-examination she said that it was extremely uncommon for the back green of a tenement to be conveyed to the ground floor proprietor. She had never seen this done before. The ground and garden flats referred to by counsel were where there was subdivision of a house into flats, and not a tenement. Her property had always been a tenement building, originally with ten flats and now with eight. Counsel also sought to ask her questions about the law, which are not material. The legal challenges she had referred to were based on what Professor George Gretton had told her, namely if the pursuers were sole owners of the back green the Tenements (Scotland) Act 2004 might not apply.

Brian Yates (oral evidence in court)

[77] Brian Yates came to court and adopted his written statement. There was no further examination in chief, and there was no cross-examination.

[78] Brian Yates and Janice Nisbet have been friends and business partners for around 15 years. They own 25 – 27 Barony Street.

[79] Much of what he said had already been covered by Janice Nisbet. He took many of the photos referred to by others in evidence. Photograph 6/17 showed the concrete dumped on top of the drain. He wrote to the pursuers on 18 June 2021 about reinstating the

doorway, and he asked if they wanted the stones returned to them. He advised them that the new door would be locked for security reasons and that all owners wishing to use it would be given a key.

Ewen McPherson

[80] Ewen McPherson is a window cleaner. He cleaned the windows, both inside and out, at 25 - 27 Barony Street around every 3 months from when Mr Todd and Mr Trotter were still working [Alan Bathgate's written statement notes that Mr Trotter died in 1987] to date. He always cleaned the outside of the windows at the back of the office by standing outside the office behind the building. He stood on the paved path at first. When it was replaced with decking, he stood on the decking. He took access to the paved path and decking by climbing out the office window. No one ever challenged his being in the back green.

Arabella Graham

[81] Arabella Graham has owned and live at 29/3 Barony Street, Edinburgh since April 2012.

[82] The estate agent who sold the property to her told her that because the back green had not been used for so long, the downstairs neighbours had acquired rights. She did not ask her solicitor about it. She has never been in the back green. She has not seen the pursuers in it often. She has seen washing on the line.

[83] At about the beginning of 2019 she required to arrange access for a contractor to do something on her external wall related to the replacement of her boiler. The contractors asked the second pursuer for access but he refused saying he was unwell. Arabella Graham

took him a bottle of wine that night and he agreed to give the contractor access the following day.

[84] She did not know she had rights until Brian Yates told her.

Joint minutes

[85] Parties entered into two joint minutes. I have made findings in fact where appropriate. I have not made findings in fact in relation to paragraphs 1 to 3, for example, because the position stated there is not correct. That agreement seems to undermine the whole "A to A" disposition argument, which I find to be well founded. Evidence to the contrary having been led, I am not bound by the joint minute: *B* v *Authority Reporter for Edinburgh* [2011] CSIH 39, 2012 SC 23.

Submissions

[86] Both parties prepared written submissions, with a one page summary of their position.

[87] In summary the pursuers' position is that they hold an *ex facie* valid title of exclusive ownership of the back green. They have possessed the back green openly, peaceably and without judicial interruption as their own private garden since 1990, and their title is now exempt from challenge through the operation of prescription. The incidents of use of the back green by the defenders or on their behalf, viewed in the context of the pursuers' possession over the relevant period, did not stop the operation of prescription. The defenders have lost the rights they once held in the back green. The action was prompted by the defenders' intimation that they intended to reinstate the doorway in the wall so that they could exercise their purported ownership rights in the back green. Having lost those rights,

they are not entitled to reinstate the doorway, and their continued assertion that they are gives rise to a reasonable apprehension that they will attempt to do so such that interdict is justified.

[88] In summary the defenders' position is that the 1994 disposition is an "A to A" disposition, and as such *ex facie* invalid. That disposition interrupted any prescriptive progress on the 1990 disposition. In any event the pursuers had failed to exert exclusive possession of the back green for a continuous period of 10 years since either the 1990 or the 1994 disposition. All possession by the pursuers prior to 2014 (when they blocked up the door in the back wall to the garden) was commensurate only with common ownership rights. The other proprietors continued to use the back green from 1990 onwards, which constituted material adverse possession. Furthermore owners who obtained title to their flats between 1994 and 2000 and thereafter took possession of the back green have permanently interrupted any prescriptive progress by the pursuers under either the 1990 or the 1994 disposition. Finally, regardless of the decision on declarator, interdict should be refused because owners of the majority of the flats had access rights to the back green in their titles and those access rights were not altered by ownership of the back green.

[89] The solicitor for the defenders made submissions under four headings. I propose to use the same headings.

Issue 1: Is the 1994 disposition a valid disposition on which prescription may run?

[90] Parties were agreed that both the 1990 disposition and the 1994 disposition had been validly executed.

The pursuers' written submissions

[91] The pursuers submitted that the 1994 disposition was not an "A to A" disposition. While the pursuers were both granters and grantees, what they gave and what they received were different. The first pursuer conveyed away ownership of the ground floor flat and the second pursuer conveyed away ownership of the first floor flat. Both pursuers each then received a different property interest from the one they had conveyed: a one half *pro indiviso* share of the combined property. In the case of the back green, the 1994 disposition conveyed title from the first pursuer alone to both pursuers *pro indiviso*. The 1994 disposition had a real conveyancing effect. The ownership of the two properties was different after that disposition from ownership before. It was not invalid for prescription.

[92] The 1994 disposition did not interrupt prescription under the 1990 disposition. While both dispositions conveyed different property, both conveyed the back green in materially identical terms. Insofar as it conveyed the back green, the 1994 disposition was founded on the 1990 disposition. Both deeds formed part of the prescriptive progress of the back green. Possession of the back green founded on and followed both dispositions.

[93] Reference was made to *Board of Management of Aberdeen College* v *Youngson* 2005 1 SC 335 and *Ardnamurchan Estates* Ltd v Macgregor 2020 SCLR 1 paragraphs 11 - 14, 18 and 23 - 24.

The defenders' written submissions

[94] The defenders submitted in their written submissions that the 1994 disposition was not a valid disposition on which prescription could run. It was an "A to A disposition", because the same persons were disponer and disponee, and such a disposition did not bear

to be a transfer and so could not found prescription. The first pursuer and the second pursuer were both granters and grantees.

[95] Prior to the 1994 disposition the first pursuer held title to the ground floor property known as 2 Albany Lane and was a few years into seeking prescriptive possession of the back green. The second pursuer held title to the first floor flat then known as the southwest flat on the first floor at 29 Barony Street, which was immediately above the first pursuer's property. Works were done to combine their properties by means of an internal staircase. The pursuers married. With the 1994 disposition the pursuers sought a unitary title to their two properties, although there was no legal requirement for them to do so. The 1994 disposition created a different legal title, forming a single title from the two flats and the challengeable back green. The disponers were A & B and the disponees were A & B. They were acting as individuals and not in any special capacity such as trustees or a partnership amounting to a separate legal persona. The disposition did not proceed on the basis of a legal obligation, and it was not a transfer. The pursuers' interests after the 1994 disposition, compared to before it, were not sufficiently different to fall within any of the *obiter* examples given in *Board of Management of Aberdeen College* v *Youngson* 2005 1 SC 335 (paragraphs 10 and 11) or *Ardnamurchan Estates Ltd* v *Macgregor* 2020 SCLR 1 (paragraph 14). Rather it fell within *Board of Management of Aberdeen College* v *Youngson* paragraph 12.

[96] Furthermore because it was a new title that was being created (of two flats plus the garden ground), it cut across any prescriptive possession that could otherwise have continued under the 1990 disposition. The 1994 disposition rendered the 1990 disposition irrelevant as it sought to start anew prescription of the garden ground as now appended to the two flats, and not just the ground floor disponed in 1990. If the 1994 disposition cannot be used to found prescription then it must interrupt prescriptive progress under the

1990 disposition. The change of nature of the landholding caused by the 1994 disposition rendered any consideration of the 1990 disposition irrelevant.

Oral submissions

[97] In oral submissions I asked to be addressed on whether in the 1994 disposition the first pursuer was transferring a one half *pro indiviso* share of her ground floor flat and garden to herself and the other one half *pro indiviso* share to the second pursuer. Although her transfer to herself was *ex facie* invalid, because a person cannot contract with themselves or convey property to themselves (*Board of Management of Aberdeen College* v *Youngson* 2005 1 SC 335, *Ardnamurchan Estates Ltd* v *Macgregor* 2020 SCLR 1), she could transfer a one half *pro indiviso* share to the second pursuer. The same applied to the transfer of the first floor flat by the second pursuer to himself and the first pursuer. I also asked to be addressed on whether the 1994 disposition might be partially invalid, and whether partial invalidity would mean that the whole deed was invalid *ex facie* such that prescription could not run on it. I asked about whether in those circumstances the foundation writ for the first pursuer might be the 1990 disposition and the foundation writ for the second pursuer might be the 1994 disposition.

[98] Counsel for the pursuer maintained his position that a whole new property had been created. The combined title had never existed on the register, and it was a new property. The pursuers had denuded themselves of a half share in their own property and replaced it with a *pro indiviso* right in the whole. There was a real conveyancing effect. Any partial invalidity would not make the whole 1994 disposition *ex facie* invalid. Each pursuer could have transferred their half share of their own original property to the other, but that would have been two separate estates of property, rather than the single title which came into effect

for the first time in 1994. The 1994 deed did not interrupt prescription under the 1990 disposition. Both dispositions dealt with the back green in the same terms and both were relevant. Reference was made to Gordon, *Scottish Land Law* 3rd ed (2009) paragraph 12-44 (continuity of possession by more than one person where there are linked titles).

[99] The solicitor for the defenders responded to counsel's submissions on the "A to A" argument. Counsel's argument that the pursuers were sole owners prior to the 1994 disposition and thereafter joint owners was not a difference in capacity recognised in the case law. In the case law the differences in capacity related to capacities such as trustees, executors and the like. Where A and B were individuals as disponers and individuals as dispones, the capacity was the same on both sides of the transaction ie they were individual owners. What the pursuers sought to achieve could have been done properly, for example by each pursuer disponing only a half share in their own property, but that does not mean that the 1994 disposition is to be treated as such. There was no need for it to be done in the one deed.

[100] There might be an argument about the first pursuer's claim being founded on the 1990 deed and the second pursuer's claim being founded on the 1994 deed, but there was a real issue about what happened in 1994. If the 1994 disposition is an "A to A" disposition, then the second pursuer did not get title to the land. That does not mean the 1994 disposition should be ignored. It was still an attempt to consolidate the title and tainted any attempt by the first pursuer to rely on the 1990 disposition. If there were transfers of two half shares, then the second pursuer got a *pro indiviso* share of a garden that the first pursuer had no title to. If the 1994 disposition is held to be "A to A", it stops prescription running for the first pursuer, the first pursuer cannot revert to the

1990 disposition because she seeks to rely on the 1994 one, and the second pursuer cannot get a half share in the property. The pursuers had chosen to roll all the titles into one, and they had disponed it to themselves.

Decision on the validity of the 1994 disposition

[101] The language of section 1 of the Prescription and Limitation (Scotland) Act 1973 has changed over the period relative to this dispute but the differences are of no significance in this action. I propose to use the version applicable where the 10 year prescriptive period would expire after 27 November 2004 simply because the language is easier to follow (although ultimately I found that the prescriptive period had not expired before that date in any event). It is in the following terms:

> "1(1) If land has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption and the possession was founded on, and followed -
> (a) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in -
> (i) that land; or
> (ii) land of a description habile to include that land; …
> then, as from the expiry of that period, the real right so far as relating to that land shall be exempt from challenge.
> (2) Subsection (1) above shall not apply where -
> (a) possession was founded on the recording of a deed which is invalid *ex facie* or was forged …
> (3) In subsection (1) above, the reference to a real right is to a real right which is registrable in the Land Register of Scotland or a deed relating to which can competently be recorded".

[102] The terms of the 1994 disposition are as follows:

> "I, MRS JACQUELINE MURIEL WALLACE or MARTINEZ (formerly MISS JACQUELINE MURIEL WALLACE) residing at Two Albany Lane, Edinburgh heritable proprietrix of the subjects formerly known as Two Albany Lane, Edinburgh being the subjects more particularly described (In the First Place) and (In the Second Place) hereafter and I JOSEPH LUIS MARTINEZ residing formerly at Twenty Craiglockhart Park, Edinburgh and now at Two Albany Lane, Edinburgh heritable proprietor of the subjects comprising the southwestmost dwellinghouse on the first

flat entering by the common passage and stair Number Twenty Nine Barony Street, Edinburgh and being the subjects more particularly described (In the Third Place) hereinafter CONSIDERING that the said two subjects comprising the said property at Two Albany Lane, Edinburgh and the first flat entering by the common passage and stair Number Twenty Nine Barony Street, Edinburgh have now been altered so as to form one self-contained property and that we have both resolved that the Title to the said united property shall be taken in our favour jointly without any consideration being paid by either of us in respect of same Therefore we the said Mrs Jacqueline Muriel Wallace or Martinez and Joseph Luis Martinez with the consent of each other for any interests which we may have by virtue of the Matrimonial Homes (Family Protection)(Scotland) Act 1981 as amended do hereby dispone to and in favour of us the said Mrs Jacqueline Muriel Wallace or Martinez and Joseph Luis Martinez and to our respective executors and assignees whomsoever heritably and irredeemably ALL and WHOLE the unified flat on two floors now known as Two Albany Lane, Edinburgh in the County of Midlothian and comprising the former subjects known as 2 Albany Lane, Edinburgh and the southwestmost dwellinghouse on the first flat entering by the common passage and stair Number Twenty Nine Barony Street, Edinburgh as said former subjects are more particularly described as (In the First Place) ALL and WHOLE that dwelling house known as Two Albany Lane, Edinburgh consisting of three rooms being the southmost half of the two houses on the corner of Barony Street and Albany Lane in the City of Edinburgh and County of Midlothian together with the outside bathroom at the junction of Albany Lane and the Mews Lane running from Albany Street northwards the garden ground pertaining thereto and all rights common mutual and otherwise pertaining thereto and described in the Disposition by the Trustees of Robert McGill with consent therein mentioned in favour of the Clydesdale and North of Scotland Bank Limited dated Eighteenth Nineteenth and Twenty Ninth and recorded in the Division of the General Register of Sasines for the County of Midlothian (formerly Edinburgh) on Thirtieth all days of October Nineteen Hundred and Sixty Two (In the Second Place) ALL and WHOLE that area or piece of ground lying directly to the rear and to the south of the subjects (In the First Place) hereby disponed and which subjects form the former back green of the tenement of which the subjects (In the First Place) hereby disponed form part and all lying within the City of Edinburgh and County of Midlothian and are bounded generally on or towards the west by Albany Lane aforesaid generally on or towards the south by the mews lane known as Albany Street Lane and generally on or towards the east by the garden ground belonging to the adjoining property lying to the east of the subjects (In the First place) hereby disponed and (In the Third Place) ALL and WHOLE the southmost dwelling house on the first flat immediately above the ground or shop flat and entering by the common passage and stair Number Twenty Nine Barony Street, Edinburgh in the County of Midlothian and being part and portion of the subjects described in and disponed by the Disposition Assignation and Deed of Restriction granted by the Trustees of John Wilson in favour of Robert McGill dated Fourteenth and Fifteenth and recorded in the Division of the General Register of Sasines for the County of Edinburgh (now Midlothian) on Twentieth all days of February Eighteen Hundred and Ninety Five Together with the whole rights common and mutual

> pertaining thereto the fittings and fixtures therein and thereon and our whole right title and interest in and to the same".

[103] The dispositive clause is clear and unequivocal:

> "we the said Mrs Jacqueline Muriel Wallace or Martinez and Joseph Luis Martinez … do hereby dispone to and in favour of us the said Mrs Jacqueline Muriel Wallace or Martinez and Joseph Luis Martinez … heritably and irredeemably ALL and WHOLE [the unified flat known as 2 Albany Lane and comprising the former subjects known as 2 Albany Lane, the garden and 29 Barony Street]".

This is the clause which has the effect of transferring ownership to the disponees on the recording of the disposition. The pursuers are transferring the unified flat to themselves.

[104] It is an "A to A" disposition and is *ex facie* invalid for the purposes of section 1 of the Prescription and Limitation (Scotland) Act 1973. Transfer of property is essential for an effective conveyance of land. A person cannot dispone a piece of land from himself to himself: *Board of Management of Aberdeen College* v *Youngson* 2005 1 SC 335 (paragraphs 10 - 15); *Ardnamurchan Estates Ltd* v *MacGregor* 2020 SC (SAC) 1 (paragraph 18, and approving *Board of Management of Aberdeen College* v *Youngson*, paragraphs 21, 22).

[105] Both cases are directly in point: in *Board of Management of Aberdeen College* the disposition was by A, B, C and D to A, B, C and D. In *Ardnamurchan Estates Ltd* v *MacGregor* the disposition was by A and B to A and B.

[106] The parties were not acting in any special capacity on one side of the transfer, such as trustees. There was no difference in the property transferred, unlike in an A and B to B disposition to evacuate a survivorship destination where, following the transfer, B receives land which is not burdened by the destination. The granting of a new right such as a servitude right of access does not make an A to A disposition valid: *Ardnamurchan Estates Ltd* v *MacGregor* (paragraph 22).

[107] Counsel for the pursuers submitted that although both pursuers were both granters and grantees, what they gave and what they received were different. The first pursuer conveyed away ownership of the ground floor flat, the second pursuer conveyed away ownership of the first floor flat and they both obtained a one half *pro indiviso* share of the combined property. A whole new property was being created.

[108] I do not accept this. The terms of the dispositive clause are clear: it is a purported transfer of "the unified flat" by the pursuers to themselves. The narrative clause narrates that the "consideration" for the conveyance is that the properties have been altered so as to form one self-contained property and the pursuers resolved that the title to the united property should be taken in their favour jointly without any consideration being paid. This is not the creation of a new property. It is simply a desire to tidy up the title deeds and to give the two flats the same name.

[109] The narrative clause recites the pursuers' respective titles and it would have been open to the pursuers to transfer half shares of their respective properties to each other, but they did not do this. It is the dispositive clause which effects the transfer: Gretton & Reid *Conveyancing* 5th ed paragraph 11-12. The dispositive clause is the ruling clause and prevails over the narrative clause in respect of the transfer: Halliday, *Conveyancing Law and Practice in Scotland* 2nd ed (1997), paragraph 32 - 08; *Cooper Scott* v *Gill Scott* 1924 SC 309.

[110] The 1994 disposition transfers nothing.

[111] Furthermore it is clear from the narrative clause that the first pursuer is <u>not</u> the heritable proprietor of 29 Barony Street which she purports to transfer in the dispositive clause and that the second pursuer is <u>not</u> the heritable proprietor of 2 Albany Lane or the back green which he purports to transfer. There are two *a non domino* transfers on the face of

the disposition. This is a further reason why the 1994 disposition is not a good foundation writ (*Board of Management of Aberdeen College* v *Youngson* paragraph 14).

[112] While I accept the defenders' submissions that the 1994 disposition is invalid because it is an "A to A" disposition, I do not accept that it cut across the 1990 disposition or that the attempt to consolidate title tainted any attempt by the first pursuer to rely on it. The 1994 disposition is not a good foundation writ. More importantly, it did not effect transfer. That means that the first pursuer's title is as set out in the 1990 disposition and the second pursuer is not the owner of 2 Albany Lane at all. He is the owner of the southwest flat on the first floor at 29 Barony Street, which is the flat directly above the flat at 2 Albany Lane. The 1990 disposition is the foundation writ, it is not *ex facie* invalid and it has the potential to lead to a title which is exempt from challenge after 10 years' possession.

[113] The first pursuer alone has a title granting her exclusive ownership of the back green on which prescription may run. The second pursuer does not have a title on which prescription could run: he is the owner of a first floor flat with common rights in the back green. If the first pursuer were to be successful in this action, she could transfer a half share of her property to him. As a matter of fact the second pursuer has <u>not</u> been possessing the back green as exclusive owner. However he might be regarded as possessing it as exclusive owner on behalf of, or with the permission of, the first pursuer. When considering the question of possession, I will consider the second pursuer's actions <u>as if</u> he were the owner.

Issue 2: Have the pursuers possessed the back green for a continuous period of 10 years openly, peaceably and without any judicial interruption?

Pursuers' written submissions on possession

[114] Counsel for the pursuers submitted that the evidence as a whole showed possession of the back green by the pursuers of sufficient quantity and quality to indicate that they were asserting an exclusive right of ownership in it. The pursuers controlled access to the back green through the locked doorway on Albany Lane. Other tenement proprietors asked the pursuers for access when they needed it. The only means of access for the other proprietors was to climb over the wall or climb out the windows. The pursuers used the back green as their own garden, but none of the other proprietors did. The pursuers landscaped it, whitewashed the walls and paid for it themselves. Their possession was conducted openly: the other proprietors were aware that the pursuers were using it as their own garden. The conservatory was constructed before the first pursuer took ownership in 1990. Their possession was peaceable. Until the first and second defenders took ownership in 2021 none of the proprietors sought to disturb or prevent the pursuers' use of the back green as their own garden. Although Mr Taylor had queried ownership and Mr Bathgate had spoken to the second pursuer about it, the conversations were civil and they did not take steps to interfere with the pursuers' use of the back green or by raising proceedings to stop it. There was no judicial interruption until 2 December 2021 at the earliest when the defenders intimated their defences and counterclaim.

[115] The evidence relating to access on behalf of the defenders by means other than the door to Albany Lane did not alter the fact that control of access to the back green remained with the pursuers and that they were using it as their own garden. Such access was infrequent and sporadic. That access was not inconsistent with the pursuers' possessing the

back green as its owners, tolerating access by others for maintenance to the tenement building. Access was primarily by arrangement with the pursuers, which amounted to a practical acknowledgement that the garden was under their control. The defenders' actions regarding access were not assertions of ownership against the pursuers. They did not seek to reinstate the Albany Street Lane doorway until 2021 when it was too late. Some of the events relied on by the defenders fell outwith the 10 year period to 2 December 2021. The pursuers' exclusive possession of the conservatory for 32 years is undisputed and their ownership of that is exempt from challenge.

[116] Counsel for the pursuers referred to Johnston, *Prescription and Limitation* 2nd ed 2012, paragraphs 18.02, 18.04, 18.14 - 18.16, 18.20 - 18.24, 18.26 - 18.27, Gordon, *Scottish Land Law,* 3rd ed paragraph 12-45, *Hamilton* v *McIntosh Donald Ltd* 1994 SC 304 at 321H, 322E - 323E, 329C, 332B, *Aberdeen City Council* v *Wanchoo* 2008 SC 278 paragraphs 14, 15 and 18, *Fletcher* v *Kirkhope,* Lands Tribunal for Scotland, 14 August 2019, paragraphs 14 - 17, 57 - 58; and *Strathclyde (Hyndland) Housing Society Ltd* v *Cowie* 1983 SLT 61 at pages 62, 65, 66.

Defenders' written submissions on possession

[117] The pursuers have failed to establish continuous, open and uninterrupted possession.

[118] The defenders' principal arguments related to the nature of the pursuers' possession and the repeated interruption of possession by the common proprietors.

[119] The nature of the pursuers' possession has not been one that exerts <u>exclusive</u> possession (at least prior to 2014 and the blocking up of the doorway). Throughout, their use of the land has been no greater than that which could have been enjoyed by a common proprietor, and their enjoyment and maintenance of the back green is due to their greater

ease of access and desire to maintain the amenity of the land outside their front door. They have never sought to interdict the access of others, and took no steps (prior to 2014) to restrict access further. They never publicised (except in very limited correspondence with Paul Taylor's solicitor) their claimed title and failed to provide copies of their alleged title to those challenging title such as Mr Bathgate. Any purported intention to possess exclusively was not open possession.

[120] There has been repeated interruption of possession by the access taken by the common proprietors, both with the consent of the pursuers and without consent. Each such act of possession has been an act of adverse possession by the common proprietors and has interrupted the continuity of any claims of exclusive possession.

[121] The land in question was a back green which had always had limited direct access from within the tenement, there being no access from the common close. Access to the back green from the outside was also limited. There were two doors in the walls of the back green: the door at 2 Albany Lane which has been used as the main door to the pursuers' property, and the doorway in the rear wall at Albany Street Lane which was blocked up on the lane side by the pursuers in 2014. The back green was not easy for proprietors above the ground floor to reach. It was effectively land-locked. This arose from the nature of the land and not from any restriction imposed by the pursuers, who allowed access through the 2 Albany Lane door. Possession by the defenders should be commensurate with the back green not being convenient in the first place.

[122] There is a difference in the types of use made by the pursuers and by the defenders, but this is explained by the pursuers' far greater ease of access to the back green and it being their main home. All use by any of the parties amounted to acts of possession but all of those acts were consistent with common ownership of a back green (prior to the blocking up

of the rear doorway in 2014). It was not convenient for most of the proprietors to enter the back green except when necessary for a reason such as cleaning or maintenance, and such access was regularly taken. The pursuers' gardening was not inconsistent with common ownership (other than the removal of iron railings in 2004, which were challenged), and they chose not to ask anyone else to help or to share the costs. The pursuers' use of the garden to site a trampoline and a swing, for social events and for exercising their dog was not inconsistent with common ownership. Nothing that was done by the pursuers (other than the removal of the railings) was inconsistent with common ownership until the 2014 work to block up the rear doorway.

[123] The solicitor for the defenders referred to each of the principles in *Hamilton* v *McIntosh Donald Ltd* 1994 SC 304 at 321F - 324E in turn.

[124] In regard to continuous possession, each act of possession by the defenders or their contractors interrupts exclusive possession by the pursuers. Reference was made to the Appendix to the submissions where a chronology of individual acts of possession and interruptions to prescription was set out, and where a separate chronology set out the repeating acts of possession by the defenders as common proprietors.

[125] In regard to open possession, other owners took no issue with the pursuers using the back green as they believed they were all common proprietors and entitled to use it. Open possession by the pursuers would require them to exert possession as exclusive owners but they did not do so. The first pursuer granted all requests for access without demur. The pursuers provided no evidence of disputing the title with others except Paul Taylor in 2004. Mr Bathgate was never provided by the pursuers with evidence of their title, despite him having challenged the second pursuer as to exclusive ownership, after Mr Bathgate had exerted common ownership. If the letter sent on behalf of Paul Taylor had been sent to the

pursuers' solicitor, it was a further interruption. The blocking up of the doorway in 2014 was undertaken surreptitiously. The second pursuer was aware that the pursuers' title to the back green was disputed but no material steps were taken by the pursuers to challenge any possessory acts undertaken by the other owners. The pursuers took no steps to insist on specific arrangements for permission or to discourage informal access which, at least in the case of access via the office window at 25/27 Barony Street, they knew was regularly occurring.

[126] The pursuers' possession required to be unequivocally referable to an assertion of ownership of the land: *Houston* v *Barr* 1911 SC 134 at 142, 143. No matter what possession was taken by the pursuers, until 2014 it was not possession as exclusive owners but only as common proprietors. They made no attempt to be "open" as to their intention of exclusively possessing the back green (whether positively such as by publicising their title to the other owners, or seeking voluntary registration in the Land Register). Nor did they dispute possession by others. Nothing done by the pursuers prior to the lead up to the court action was a material act of open, exclusive possession.

[127] The defenders accept the pursuers possessed the back green regularly through the period since 1990, but all such possession was commensurate only with common ownership and with regular adverse possession by other common owners.

[128] There was only prescription insofar as there was possession: *tantum praescriptum quantum possessum*. The distinction was made "between cases where … prescription is relied upon to enable a new right to be acquired, and cases where prescription is relied on for the purpose of establishing the extent of a right which the claimant already has": *Hamilton* v *McIntosh Donald Ltd* 1994 SC 304 at 323E - 324. In the current action the distinction existed between the pursuers' attempt to exert prescriptive possession, and the

defenders' adverse possession (as well as the positive possession following on the titles registered by some of the defenders between 1990 and 2000: argued at issue 3). In *Hamilton* v *McIntosh Donald Ltd* the Inner House quoted *Lord Advocate* v *Wemyss* (1899) 2 F (HL) 1 at pp 9 - 10:

> "There is, in my apprehension, or ought to be, a practical distinction recognised between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits, for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance. In the first case the rule obtains *tantum praescriptum quantum possessum*. In the second, it appears to me that a much more liberal effect has been given to partial acts of possession as evidencing proprietary possession of the whole, in cases where the subject of controversy has been in itself a distinct and definite tenement." …

[129] In *Lord Advocate* v *Wemyss* the question of possession was not just whether the land was possessed but whether the specific minerals were worked. In the current action it was not just a question of whether the back green was possessed commensurate with common ownership, but whether it was also possessed commensurate with exclusive ownership. The pursuers' acts attract a less liberal consideration than any "partial acts of possession … evidencing proprietary possession" of the defenders.

[130] Along with the pursuers requiring to prove sufficient possession, the defenders' evidence on adverse possession was most relevant. Few cases considered it except *Houston* v *Barr* 1911 SC 134. The adverse possession by the defenders set out in the Appendix was overwhelming. It repeatedly interrupted any attempts by the pursuer to effect the necessary possession throughout the period from 1990 to 2 December 2021. There is no 10 year period with sufficient possession.

[131] The solicitor for the defenders referred to Gordon, *Scottish Land Law* 3rd ed (2009) paragraphs 12-43 to 12-47, *Hamilton* v *McIntosh Donald Ltd* 1994 SC 304 at 321F - 324E, *Fletcher* v *Kirkhope*, Lands Tribunal for Scotland, 14 August 2019, paragraphs 54 - 56,

Buchanan & Geils v *Lord Advocate* (1882) 9R 1218 at 1230, *Houston* v *Barr* 1911 SC 134 at 142, 143 and *Lord Advocate* v *Wemyss* (1899) 2 F (HL) 1 at pp 9 - 10.

Pursuers' oral submissions

[132] Counsel for the pursuers submitted that *Houston* v *Barr* should be distinguished. In that case those claiming prescriptive possession were both owners of the feu and tenants of the land in dispute. By contrast neither the 1990 disposition nor the 1994 disposition granted common ownership of the back green: the pursuers' only title was as exclusive owners of the back green. Common ownership was ruled out as a reason for possession because of the titles.

[133] If counsel's submissions in respect of *Houston* v *Barr* were not accepted, the test in *Aberdeen City Council* v*Wanchoo* applied.

[134] Possession should be judged objectively, with regard to what the parties did and not what they thought. The pursuers' possession, control and use of the back green was so extensive that viewed objectively it was as of right. The defenders' possession was so infrequent and non-controlling that viewed objectively it was access with the pursuers' tolerance. The requirement for 10 years' continuous possession should be judged on a common sense basis. It was not necessary to show that the possessor had completely excluded others from ever entering the ground. The impartial observer would say that it was the pursuers' garden, they occupied it as such and they controlled access to it. The impartial observer would regard the occasional incursions by others as those others going into the pursuers' garden. The impartial observer would not say that they were sharing the garden: they had no key, could not access it unless the pursuers opened the door, were not involved in the gardening and did not share the cost.

[135] Any suggestion by the defenders that the garden was difficult to access such that the standard of possession required should be lowered should be rejected. There had previously been an access right in the titles, and the defenders could have re-established that access.

[136] The maxim *tantum praescriptum quantum possessum* had no application: neither party had created a right in favour of the other.

Defenders' oral submissions

[137] Before 5 December 2000 the pursuers were not the exclusive owners of the back green. They were common owners under the 1962 and 1895 deeds. They still retain those rights. In the 1994 disposition the pursuers ended up as both common owners and exclusive owners. If the right under the *a non domino* disposition were not perfected, then the pursuers still had their common rights to the garden. From 1990 until at least 5 December 2000 the position was identical to *Houston* v *Barr*. In that case the tenant claimed to be the owner, and in the present case the common owner claims to be the exclusive owner.

[138] The correct analysis was to be found in the cases on prescription such as *Hamilton* v *McIntosh Donald Ltd*. The servitude analogy from *Aberdeen City Council* v *Wanchoo* was not as relevant as the Inner House decision in *Hamilton* v *McIntosh Donald Ltd*.

[139] There should be no like for like comparison between the pursuers' possession and the defenders' possession. There were two issues: possession acting as adverse possession interrupting the pursuers' possession (which was issue 2); and possession perfecting the titles in the period 1994 to 2000, such as Mr Bathgate's 1995 title, Mr Taylor's 1997 title and Mrs Richardson's title in 1998 (which was issue 3, addressed later).

[140] *Hamilton* v *McIntosh Donald Ltd* is binding. Reference was made to point (7) at page 323E-H. In the present case the pursuers were relying on prescription to enable a new right to be established.

[141] Counsel for the pursuers sought to analyse *Lord Advocate* v *Wemyss* to suggest that it only applied if the dispute was with the disponer, but that is not what it says (pages 9 - 10), referred to in *Hamilton* v *McIntosh Donald Ltd* at page 323 G-H.

[142] *Tantum praescriptum quantum possessum*: the pursuers have to prove that they have possession as exclusive owners. They had failed to do so.

[143] In the second part of the maxim, the level of possession to show that a person had correctly possessed a longstanding good title was subject to a more liberal test. The pursuers gave access through the door to people whose title said they had common rights.

[144] The acts by the pursuers purporting to be acts of exclusive ownership in the period to 5 December 2000 were not: they were only common owners, and acting as such. Their possession was indistinguishable from possession as common owners until 2014 when they blocked up the back wall. The back green was a nice back green and the defenders were happy with the way it was used, including the siting of the trampoline.

[145] Generally the pursuers' possession was peaceable, but not entirely: reference was made to Mr Bathgate's objection to the removal of the railings and to him challenging the second pursuer's claim to exclusive ownership and asserting his own rights of common ownership, to the challenges made by Paul Taylor's solicitors, to Susan Richardson's challenge and to the challenges made by the first and second defenders. The unhappiness and the dispute there meant that possession was not peaceable. Reference was made to Gordon *Scottish Land Law*, 3rd ed (2009) paragraph 12 - 45 and *Strathclyde (Hyndland) Housing Society Ltd* v *Cowie*.

[146] The defenders' adverse possession was clearly peaceable. No one objected to what they did.

[147] It was not just a question of balancing the quantity of usage by the pursuers and the defenders: the back green was hard for the defenders to access and they took the access they needed, but the pursuers could come and go as they pleased.

Decision on whether the pursuers have possessed the back green for a continuous period of 10 years openly, peaceably and without any judicial interruption

a) Legal principles

[148] For the purposes of prescription, the land must be possessed by any person, or by any person and his successors, for a continuous period of 10 years openly, peaceably and without any judicial interruption. The possession must be founded on and follow the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a real right in that land.

[149] Parties are agreed that the property descriptions in both the 1990 and the 1994 dispositions are capable of being construed to include the back green and the boundary wall. The 1990 disposition was recorded on 5 December 1990.

[150] *Hamilton* v *McIntosh Donald Ltd* 1994 SC 304 is the leading case on the nature of possession required for prescription. The pursuer sought declarator that he was the heritable proprietor of an area of land which comprised rough peat moss. The defenders argued that, by virtue of their holding an *a non domino* disposition followed by prescription they had acquired title in preference to the pursuer. The Lord Justice Clerk (Ross) agreed with the pursuer that evidence led by the defenders to establish prescriptive possession was fairly sparse, although that may have been because of the nature of the subjects involved.

The Lord Justice Clerk said that, because the evidence was sparse it was particularly important to identify the principles which had to be applied. These were as follows (pp321E - 324F):

> "(1) For the operation of the positive prescription, there must be a habile title followed by prescriptive possession ...
> (2) As is clear from sec. 1(1) of the Prescription and Limitation (Scotland) Act 1973, there must in any case where prescriptive possession is being asserted be possession, for a continuous period, openly, peaceably and without judicial interruption …
> (3) So far as possession is concerned it is clearly established that possession may be natural or civil. Thus there may be acts of possession exercised by the claimant personally, or the acts may have been carried out on the claimant's behalf by servants, employees or persons licensed by him …
> (4) Whether particular acts constitute possession for the purposes of prescription depends upon the nature of the subjects claimed ...
> (5) It is also well-established that before possession can instruct a right of property it must be unequivocally referable to an assertion of ownership of the land. In Houston v. Barr 1911 S.C. 134 at p. 143 Lord Dundas said: 'The possession, to avail the defender, must have been not only continuous, but clearly and unequivocally referable to his title of ownership.' In Napier on Prescription, at p. 168, it is stated: 'Prescriptive possession must not only connect and be consistent with the title which it is to qualify, but it must be specifically and definitely applied, without any dubiety, to the subject or right that is to be prescribed.'
> (6) It is of the essence of prescription that the possession has taken place over a continuous period. … Of course, there may be interruptions during the prescriptive period, and yet it may still be possible to conclude that the possession has extended over the whole prescriptive period. … I am satisfied that in every case it is a question of degree …
> (7) It is a cardinal rule that there is only prescription insofar as there has been possession - *tantum praescriptum quantum possessum*. In this connection it is important to distinguish between cases where, as here, prescription is relied upon to enable a new right to be acquired, and cases where prescription is relied on for the purposes of establishing the extent of a right which the claimant already has. In *Lord Advocate v Wemyss* (1899) 2 F. (H.L.) 1 at p. 9 Lord Watson said: 'There is, in my apprehension, or ought to be, a practical distinction recognised between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits, for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance. In the first case the rule obtains *tantum praescriptum quantum possessum*. In the second, it appears to me that a much more liberal effect has been given to partial acts of possession as evidencing proprietary possession of the whole, in cases where the subject of controversy has been in itself a distinct and definite tenement.' …
> (8) … the matters [of possession] raised … are capable of being established by circumstantial evidence provided always that it is understood that the defenders

> must establish what is the fact in issue, namely, whether there was the requisite possession to instruct the right of ownership which they claim ...
> (9) … although the onus is on the party alleging prescriptive possession, it is always a material consideration whether there has been any adverse possession."

[151] In *Houston* v *Barr* 1911 SC 134 the issue was the capacity in which the defender possessed the contested land. The defender was the owner of a feu and the pursuer was his superior and also the owner of a neighbouring field. The defender claimed ownership of a strip of ground in front of certain cottages on his feu which *inter alia* was used as an access to the field. He claimed possession of the strip for upwards of the prescriptive period on a title *ex facie* valid and irredeemable. The defender had also leased the field from the pursuer throughout the period founded on.

[152] At page 143 Lord Dundas said:

> " it seems to me that all the alleged acts of possession were at least quite as referable to the right of tenancy of the fields as to that of ownership in the feu, and in that view cannot, I think, be pleaded by the defender as amounting to the adverse possession which would be necessary to exclude the pursuer, who might justly claim to regard his tenants' possession as his own. The possession, to avail the defender, must have been not only continuous, but clearly and unequivocally referable to his title of ownership. Now, there was never, so far as appears, any exclusion or any challenge of the pursuer or his servants as regards access to the disputed area. On the contrary, it seems that, on the occasions (naturally not frequent) when they desired to pass over it, they did so unchecked and unchallenged …"

[153] The court found in law that the acts of possession founded upon by the defender were referable at least as well to the right of tenancy as to that of feu, and were not sufficient in law to import a right of property in the defender in the piece of ground in dispute, or any part of it (page 144).

[154] The planting of "some flowers and a few bushes" next to the cottage front and beside the retaining wall were in themselves of little importance or significance towards establishing possession.

[155] Gordon *Scottish Land Law* 3rd ed (2009) at paragraph 12-46 states:

> "The 1973 Act refers to the absence of judicial interruption, which might imply that any interruption must be judicial to be effective, but as the possession must also be 'continuous', it seems clear that a physical interruption would equally end the running of prescription."

[156] The meaning of "peaceably" and whether possession which is not "peaceable" interrupts the running of prescription was considered in *Strathclyde (Hyndland) Housing Society Ltd* v *Cowie* 1983 SLT 61. The pursuers sought declarator that there was a public right of access over a meuse lane which ran over the defender's property. Although the case was decided on a different matter, Sheriff Younger concluded that "peaceably" envisaged the prescriptive period ceasing to run if possession against the indicated opposition of the heritable proprietor short of judicial interruption was established (page 65). He found in fact that the defender had erected bollards in the lane to prevent vehicular use or possession of the lane insofar as on his heritable property. The placing of the bollards in the lane resulted in an altercation between the defender and two users of the lane, which ended with the users removing the bollards (page 62). The sheriff held that the prescriptive period would have been interrupted by these acts (namely the bollards and the altercation) because possession of the lane could not be regarded as "peaceable" (page 66).

[157] In *Fletcher* v *Kirkhope*, Lands Tribunal for Scotland (RA Smith KC, CC Marwick FRICS), 14 August 2019, similar issues were considered. The disputed area was a triangular area lying between the boundary of the applicants' property and the carriageway of the public road. The Lands Tribunal held that it was the acts of possession which required to be "peaceful" (*sic*), in other words without force (*nec vi*), and there was no question of the applicants ever requiring to use force to maintain the disputed area. Although the relations between the parties were generally not "peaceful" this did not stop prescription from

running (paragraph 58). Having regard to the nature of the subjects as a verge beside a road, the planting of shrubs, bushes and the like and regular maintenance of the area by cutting the grass, trimming the bushes and clearing litter were the sort of acts of possession which might improve the setting and could be described as acts of possession. The actings were overt, regular and could be said to be continuous. Occasional intrusions by the respondents were objected to. The respondents' letter suggesting that they were now the true owners caused the appellants to stop work temporarily but did not interrupt possession (paragraphs 54 - 57).

[158] There was some dispute between the parties in relation to the law. I preferred the submissions of the solicitor for the defenders to the submissions of counsel for the pursuers.

[159] In particular I do not accept counsel for the pursuers' submission that *Houston* v *Barr* should be distinguished. The pursuers' only title was not as exclusive owners of the back green. Both the 1990 and the 1994 dispositions were vulnerable and the pursuers retained their individual common rights of ownership in the back green under earlier deeds such as the 1895 and 1962 deeds during the prescriptive period. Until at least 5 December 2000 the position was the same as in *Houston* v *Barr*: in that case the tenant claimed to be the owner, and in the case before me the common owner claims to be the exclusive owner. The reference to Napier on *Prescription* referred to in *Hamilton* v *McIntosh Donald Ltd* is also important: "prescriptive possession … must be specifically and definitely applied, without any dubiety, to the subject or right that is to be prescribed".

[160] Nor do I accept counsel's submission that the test in *Aberdeen City Council* v *Wanchoo* should be applied. *Wanchoo* is a servitude case and concepts such as toleration by the servient proprietor are not relevant. In the present case, at least until 5 December 2000, the other proprietors used the back green in their capacity as owners under recorded titles.

Furthermore, at that point the pursuers did not have good title to exclusive ownership of the back green.

[161] Nor do I accept counsel's submission under reference to *Lord Advocate* v *Wemyss* (1899) 2 F (HL) 1 (quoted above as part of *Hamilton* v *McIntosh Donald Ltd* at principle (7) for ease of reference) that the maxim *tantum praescriptum quantum possessum* does not apply because neither party created a right in favour of the other. It is clear from the whole of principle (7) and the reference there to *Lord Advocate* v *Cathcart* in particular that the maxim is not limited to cases where one party to an action has granted a right to the other.

[162] In many cases prescription will be relied on where there is no dispute between the granter and the grantee of a deed: an *a non domino* disposition is perhaps the classic example. In such a case the maxim applies in full, and it applies in the present case. In other cases there may be a dispute between the granter and the grantee, for example in relation to the granting of a servitude right. In such a case prescriptive possession by the grantee may be relied on to establish the extent of that right. The test in this situation is a more liberal one, and partial acts of possession may evidence proprietory possession of the whole. In *Lord Advocate* v *Wemyss* one of the issues under consideration was whether possession of coal workings under the sea bed *ex adverso* West Wemyss sufficed to establish a title in respect of the coal *ex adverso* the entire barony of Wemyss (ie whether East Wemyss and Methil, which were also part of the barony title, were also included). This is why the House of Lords was considering "partial acts of possession as evidencing proprietory possession of the whole". The solicitor for the defenders in submissions sought to distinguish between what the pursuers had to prove to enable a new right of exclusive ownership in the back green to be established (*tantum praescriptum quantum possessum*) and the liberal approach to

be applied to possession by the defenders of their right of common ownership within their good titles. I accept his analysis.

[163] Neither *Strathclyde (Hyndland) Housing Society Ltd* v *Cowie* nor *Fletcher* v *Kirkhope* is binding on me but they provide useful examples of where prescription might be interrupted.

b) Application of the law to the facts found

[164] I have made findings in fact relating to the nature of the back green. The pursuers had to go through part of the back green to get into their property, and they probably used the back green every day except when they were away on holiday. By contrast the back green had always been difficult for the owners of all the flats other than 2 Albany Lane and the commercial premises at 25 - 27 Barony Street to access. 25 - 27 Barony Street was used as an office, and the proprietors would have less need than the other proprietors to use the back green for leisure purposes. The possession and use of the back green by those owners has to be considered in light of its relative inaccessibility: *Hamilton* v *McIntosh Donald Ltd* principle 4.

[165] I have made findings in fact about the pursuers' use of the back green. From about 1991 to date they have looked after the back green, weeding, replacing plants, pruning and cutting the grass as the previous owners of 2 Albany Street (who had been common owners of the back green) had done. From time to time they alone paid for works to improve the amenity of the back green such as white washing the walls surrounding the back green. They, their children and their dog all used the back green for recreation. They put up a swing and a trampoline. They hung their washing in the back green. They did not involve the other proprietors in the decision-making or in carrying out works in the back

green. There were no objections by other proprietors to what they were doing. All of this is at least as consistent with common ownership as it is with exclusive ownership: *Hamilton* v *McIntosh Donald Ltd* principle 5.

[166] In 2004 the pursuers carried out more substantial works to the back green, removing the railings and the fence in front of Alan Bathgate's windows, raising the level of the pavement area there, and putting decking on it. The first pursuer said that this was done for a party for the second pursuer's 60th birthday. Alan Bathgate challenged the second pursuer about the removal of the railings and told him that it was common property. Alan Bathgate did not object to the other work done, which greatly improved his outlook.

[167] The works carried out in 2004 might be construed as the first attempt by the pursuers to assert exclusive ownership of the back green. It was not peaceable. The forcible removal of the railings and the objection from Alan Bathgate is comparable to the circumstances in *Strathclyde (Hyndland) Housing Society Ltd* v *Cowie*. They appear to have waited until 10 years after the 1994 disposition before asserting exclusive ownership.

[168] In 2014 the pursuers arranged for a stone mason to block up the back door to the back green by filling it in from the Albany Street Lane side. They concealed the back door on back green side by placing a trellis, large gardening ornaments and large plants in front of it. The work appears to be another attempt to assert exclusive ownership of the back green. It was not done openly. The pursuers did not consult the other proprietors. The defenders did not know about it at the time. They could not see what had been done behind the wall. Susan Richardson only realised that it had been sealed up in about July 2017. Paul Taylor only found out in 2021. "The importance of the possession being open is so that anyone with a competing title has an opportunity to challenge the possession": *Hamilton* v *McIntosh Donald Ltd* principle 2.

[169] Because the pursuers are claiming exclusive ownership as opposed to common ownership, they require to prove that their possession of the back green was as exclusive owners. Over the years various defenders challenged the pursuers' claim to exclusive ownership of the back green but the pursuers did not provide evidence to support their title. In 2004 when the second pursuer was removing the railings, Alan Bathgate challenged his title and told him that the back green was common property. The second pursuer claimed he owned it through prescription but did not produce any paperwork. There were other claims made by both men over the years, the final one being in October or November 2020. In April 2021 Janice Nisbet wrote to the pursuers advising that she had a right in common to the back green. (Although Paul Taylor's solicitor wrote to the pursuers' solicitor questioning ownership of the back green in 2004 and was sent a copy of the pursuers' title and an explanation that ownership was on the basis of prescription, there was no evidence that the other owners were shown this.) While letters from solicitors may not interrupt possession (*Fletcher* v *Kirkhope*) they are significant in this particular action because the pursuers require to show open possession as exclusive owners in the face of challenges from the other common proprietors. At the same time the pursuers were not challenging people using the back green on behalf of the defenders or attempting to regulate access. They occasionally told contractors instructed by other owners to stop what they were doing, but the contractors carried on with their work. They were not openly possessing as exclusive owners: *Hamilton* v *McIntosh Donald Ltd* principle 2.

[170] The pursuers did not control access to the back green. Access through that door was usually the easiest, but it was not the only way in and Susan Richardson gave evidence that that route was not necessarily the easiest when heavy building materials were being carried because of the number of turns required to negotiate past the conservatory. Although the

pursuers usually facilitated access through the door at 2 Albany Lane, they were often absent and the occupiers of the other flats took access over the back wall of the tenement or asked the owners of 25 - 27 Barony Street if they could take access through their back window.

[171] The pursuers have the onus of proving their possession was as exclusive owners and not as common proprietors: *Hamilton* v *McIntosh Donald Ltd* principle 9. The facts that I have found in support of the pursuers' claim are limited. Principle 9 also recognises the potential importance of any adverse possession.

[172] I have made finding in fact regarding the defenders' continued use of the back green from 1990 to date. Possession may be natural or civil, and so the acts of possession exercised by the defenders' contractors are relevant: *Hamilton* v *McIntosh Donald Ltd* principle 3.

[173] The back green has been used by at least some of the defenders over the period from 1990 to date. In doing so they have been asserting their right of common ownership of the back green to use the back green for reason connected with their flat. There were a number of acts of repeated possession. Throughout the period from 1987 until at least December 2020 the windows at 25 – 27 Barony Street were washed at least four times a year by the window cleaner going out of the office windows and standing in the back green. No one ever challenged his being in the back green. Every year in the period from 1987 to 1995 the owner of 25 - 27 Barony Street cleared the small pavement area outside the windows and on one occasion during that period he used the back of the property for painting windows. From at least 1995 to date there has been a problem with the tenement drains, with plumbers attending about six times a year and taking access via the back window of 25 - 27 Barony Street, or through the door at 2 Albany Lane. They frequently have to lift the decking laid by the pursuers.

[174] There have also been other incidents of possession by individual defenders. In about 1995 Alan Bathgate used the back wall of the back green and the back window of his commercial premises at 25-27 Barony Street to access his office on about five Saturdays when he had left the office at lunchtime and forgotten to take his keys. In about 1996 or 1997 and again between 2012 and 2014 Alan Bathgate had his windows painted, with access being taken via the windows and into the back green. In about the early 2000s tradesmen instructed by Susan Richardson to paint the outside of her back window frames took access through the back green by using a ladder to climb over the back wall at Albany Street Lane and unbolting the back door from inside, and they then used that door for access until the work was completed. In the period from 1998 to 2022 her tradesmen were in the back green on many other occasions, taking access over the back wall because the pursuers were not around. During the communal repairs to the tenement between 2006 and 2008 scaffolding was erected on part of the back green. In 2017 contractors instructed by Susan Richardson used a ladder to get over the back wall into the back green, the pursuers being absent. From December 2020 to November 2022 during refurbishment of 25 - 27 Barony Street, Janice Nisbet and her contractors used her back window for access because the pursuers were not available to open the door. On one occasion contractors put items over the back wall. Janice Nisbet allowed tradesmen for two other properties to gain access through her window, including a BT engineer in early November 2022.

[175] Janice Nisbet has gone out in the back garden to enjoy the weather, take photographs and look at the building and has never been challenged by the pursuers.

[176] The defenders' actions of possession were virtually unchallenged by the pursuers, although on a few occasions there was a challenge for example with reference to an imminent garden party.

[177] Each such action has been taken as of right. It possession adverse to the pursuers' claim to exclusive ownership. It interrupts possession. There has been no 10 year period without such an action. Reference is made to *Hamilton* v *McIntosh Donald Ltd* principles 6, 7 and 9.

[178] Looking at the evidence as a whole, until 2004 the pursuers' use of the back green amounted to using it for access from their flat to the street probably on a daily basis and tending the back green, and there was no difference between what they did and what the previous proprietors had done as common owners. That was insufficient possession in a competition with the other common owners. In 2004 they unilaterally removed Alan Bathgate's railings, which he objected to, and matters continued largely as before. The work done in 2004 did not significant change the situation, such that the pursuers' possession was unequivocally referable to an assertion of exclusive ownership. The blocking up of the back door in 2014 was more in keeping with an assertion of exclusive ownership and total control of the means of access to the back green, but it was not done openly and several of the defenders were not aware of it for years. That event was only eight years ago, and insufficient to establish prescription.

[179] Throughout the period of the pursuers' ownership there was adverse possession by the other proprietors. There was regular and frequent access taken by and on behalf of the owners of 25 - 27 Barony Street. There were also numerous occasions where the other owners took access to and possession of parts of the back green as of right in order to work on their own properties. Even if prescription had started to run in 2004 (which it did not), all of those actions by the defenders interrupted the prescriptive period. There was no other significant event until the blocking up of the back door in 2014 which could trigger the start of a new period of prescription. The pursuers have not possessed the back green as

exclusive owners for a continuous period of 10 years, openly, peaceably and without judicial interruption.

Possession of the conservatory alone

[180] This issue was not explored in detail. In the pursuers' written submissions there is simply an assertion that their ownership of it is now exempt from challenge.

[181] The solicitor for the defenders in oral submissions referred to the level of possession required for common land. He referred to practice. He said that it is not uncommon in new builds where there may be 20 flats and everything else to be held in common but with formal allocation between the owners. Numbered car parking spaces may be allocated to a particular flat. All the proprietors own all the land in common, as a unitary area, but they use a particular car parking space. In the present case the back green is a unitary area and the defenders use what they need to use of it, including the airspace over the conservatory during the building works. There was no basis for dividing up the back green.

[182] The law of common property, the use that may be made of the whole of the common property by each individual co-owner and the rules against exclusive possession being taken by one *pro indiviso* owner against the wishes of the rest seem to me to create difficulties for the pursuers, but I was not addressed properly on this issue on their behalf.

[183] This action has been presented on the basis that it is the whole of the back green that is in issue. The pursuers crave declarator that they have "a real right of exclusive ownership in the whole of the garden ground to the rear of the tenement". The defenders crave declarator that:

> "the green behind the tenement … including the solum of the conservatory constructed by the pursuers to the rear of 2 Albany Lane, ('the back green') forms part of the common property of the whole proprietors of that said tenement which

> includes the pursuers and first to thirteenth defenders to this action; and that the pursuers have no exclusive right of property to any part thereto".

The 1990 and 1994 dispositions both seek to convey the whole of the back green, not just the conservatory. Any attempt by the pursuers now to claim only that part of the back green would not be in accordance with the titles they rely on in either the 1990 or 1994 disposition. It would require a detailed plan, a proper conveyancing description and significant amendment of the pursuers' crave. I would not be prepared entertain such a substantial amendment at this late stage.

[184] I heard evidence about the significant problems with the drains which appear to have been caused by a re-routing of the drain to include a sharp bend in it. That may have happened at the time the conservatory was constructed, which appears to have been when concrete was poured on the drains. The cheapest way to correct the problem with the drains may be to go under the conservatory or to remove it. The solicitor for the defenders also referred to the use of the airspace over the conservatory by the other proprietors at the time of the scaffolding works between 2006 and 2008. The solum of the conservatory remains common property, and there are practical reasons why it should be accessible to all the proprietors in the tenement.

Issue 3: Was prescription permanently interrupted by the transfers of title to other flats between 1994 and 2000 where the owners of those flats took possession?

The defenders' written submissions

[185] The defenders submitted in their written submissions that, in taking title under an *a non domino* disposition recorded in the Sasine Register, the first pursuer could at best hold good title under the 1990 disposition by 5 December 2000. If that disposition had never

existed, the defenders could at best hold good title by 25 February 2004. During that time a "race to the Registers" of a party with a better title could occur. Provided that party held good title and possessed the back green, then that title would be a good title prior to the pursuers holding good title. That would make it impossible for the pursuers to obtain good title under the *a non domino* dispositions.

[186] This "race to the Registers" occurred at least three times: Alan Bathgate took title to the office at 25 - 27 Barony Street in 1995, Paul Taylor took title to flat 29/7 Barony Street in 1997 and Susan Richardson took title to flat 29/1 in 1998. Furthermore, if all three of them failed to perfect their titles by taking possession and the pursuers' period of prescriptive possession were delayed until after 2000/2004, then any of the later titles would have the same effect (eg the Pitts' purchase of flat 29/4 in February 2000, Arabella Graham's purchase of flat 29/3 in June 2001, and other purchases until the first and second defenders' purchase from Alan Bathgate in 2021).

[187] All of the other defenders had titles that included reference to common rights to the back green. These titles were good titles dating back decades. Each of the transfers of these titles resulted in a title which was immediately good, provided possession occurred:

"It is the great purpose of prescription to support bad titles. Good titles stand in no need of prescription." (Lord Braxfield in *Scott* v *Bruce-Stewart* (1779) 3 Ross's LC (Land Rights) 334, Mor 13519, quoted in Gordon, *Scottish Land Law*, 3rd ed at paragraph 12-39 and in *Hamilton* v *McIntosh Donald Ltd* as part of the first principle at 321G).

[188] As regards the necessary acts of possession by the defenders following those transfers of titles, *tantum praescriptum quantum possessum* and the passages from *Hamilton* v *McIntosh Donald Ltd* and *Lord Advocate* v *Wemyss* applied. The liberal approach to possession applied, because it was possession to exert an existing "good" title. There had been

numerous acts of possession by the defenders or their contractors or by contractors on common works. All means of possession were valid, whether or not they involved the side door. There was no need for repeated and continuous possession because the new purchasers did not need to effect prescription. They merely required to show some act of possession of the back green as common proprietor to effect adequate possession in support of their good title of long standing.

[189] Any prescriptive progress under either the 1990 or the 1994 disposition would cease entirely after such interruption by the recording of a better title. As soon as the "race to the Registers" was won by any of the defenders, then the pursuers' *a non domino* titles would cease to have effect.

The pursuers' submissions

[190] Although in the written submissions the pursuers refer to the defenders' averments in the counterclaim at statement of fact 3(b) and (c) where the issue of interruption of prescription by the recording or registering of subsequent titles is raised, and they also took issue with those averments in their rule 22 note, counsel did not engage with the argument. Counsel simply asserted that none of that is relevant if the pursuers prove the requirements of section 1 of the Act. All that was required by the pursuers' was a sufficient title and possession for the relevant period. Section 1 made no reference to anyone else's title. That was because if prescription were proved, the pursuers' title was exempt from challenge and no other title had any relevance.

[191] Counsel for the pursuers maintained that position in oral submissions and did not address the argument made in the defenders' submission.

The defenders' oral submissions

[192] The factual bedrock of this argument were the dispositions, especially in the period 1994 to 5 December 2000. The three dispositions to Mr Bathgate, Mr Taylor and Mrs Richardson were all "A to B" dispositions which disponed to them the flat and a common interest in the back green.

[193] As regards the legal bedrock, in the period prior to 5 December 2000 the pursuers did not have good title to exclusive ownership of the back green, but they had good title to common ownership.

[194] The solicitor gave the analogy of a field. Assume that A owned the field on an undisputable title to 1990. In 1990 Mr Heeps disponed it to the first pursuer. In 1995 A sells it to Mr Bathgate. There was no dispute that that was a good title because A had used it on and off. Good titles do not need prescription, and so Mr Bathgate immediately had good title to the field provided he possessed it. He needed to possess it to perfect his title prior to the first pursuer perfecting hers. As long as he possessed it before 5 December 2000, he was entitled to the land. His title trumped hers, because hers was built on sand. Her title was only good if she possessed it for 10 years. Mr Bathgate had a good title and possessed it, and so he won. It was trite law.

[195] There was no reason why the same would not work with common ownership. Here there was a transfer of a long established right of common property and Mr Bathgate possessed it. Possession did not need to be as high as set out in *tantum praescriptum quantum possessum*. Very little possession would suffice. Furthermore possession by any common proprietor would establish it for the common proprietorship. Mr Taylor did not go into the back green, but he obtained the benefit of others who did. It was comparable to a new build

development where the common rights were possessed collectively but owners were allocated car parking spaces.

[196] The argument was one of title, rather than possession. The subsequent recorded or registered titles were good titles, cutting away the bad titles of 1990 and 1994. Because they were good titles, prescription could not run on the bad titles.

Decision on the interruption of prescription by later good titles where there was possession

[197] The pursuers' submissions do not engage with the point that good titles do not need prescription or the question of whether a better title could defeat a bad title during the 10 year period of prescription.

[198] The defenders' submissions are well founded. The pursuers' title to the back green was not a good title, and it depended on possession for 10 years before it would become good. During that 10 year period the pursuers' title was vulnerable *inter alia* to the recording of a good title by someone owning the back green either exclusively or in common. If that owner possessed the back green at all, then that title would be a good title prior to the pursuers' obtaining good title. It would not simply interrupt prescription, but it would make it impossible for the pursuers to use that disposition as a basis for prescription. Several owners obtained their flats together with common rights to the back green in the 10 year period after 1990 and their titles were good titles, going back decades. Their titles were immediately good, provided possession occurred. Not much possession was required, because they had good titles and were not seeking to establish a new and adverse right. Alan Bathgate took title to 25 - 27 Barony Street in 1995 and possessed it that summer on five occasions by climbing over the back wall, crossing the back green and entering his open window when he had forgotten his keys. That possession is sufficient to interrupt

prescription permanently on both the 1990 disposition and the 1994 disposition. It cannot be correct to suggest that a new proprietor with a good title would need to keep possessing the property in order to defeat a proprietor with a bad title: such a proprietor would be bound to lose the 10 year race.

[199] Although I did not hear argument about the effect the subsequent titles might have on possession (issue 2, as opposed to issue 3 which relates to title) it seems to me that they have implications for whether the pursuers have openly possessed the back green as exclusive owners. The recording or registering of title in the appropriate register is a public declaration of ownership. Many of the flats were sold in the period since 1990 and it is likely that there would have been "For Sale" signs up advertising flats such as Paul Taylor's flat before he purchased it in 1997. The pursuers would have seen them, and they would have known that the properties were being sold with common rights to the back green because this is what was in the second pursuer's title. They did not challenge these titles or seek reduction or rectification. They should have done something to let new owners know they were claiming exclusive ownership rather than common ownership. By not doing so, they cannot claim that their possession was open.

Issue 4: Should interdict be refused because the majority of the defenders have separate access rights within their titles?

The defenders' written submissions

[200] There are standalone access rights to the back green in the titles of the majority of the flats, many specifying or implying an access route from Albany Street Lane. Such access rights are not altered by ownership of the back green. It is irrelevant as to what rights those owners may have once they exert their access rights into the back green. The first pursuer

accepted in evidence that the other owners' required to access the back green for various purposes. It is appropriate that practical access should be through the restored doorway.

[201] Such access rights have never fallen due to lack of use. The doorway was only sealed up in 2014. Mrs Richardson gave evidence that it was used in the 2000s, and that access by the nearest equivalent route (by ladders over the garden wall) was taken in 2017. Others have taken other forms of access to the back green throughout the period. All such access preserved the standalone rights of access into the back green.

The pursuers' oral submissions

[202] The pursuers did not engage with this argument in their written submissions.

[203] In oral submissions counsel for the pursuers argued that the defenders' argument had no basis in the pleadings and there was no plea in law specifically directed towards it. Their pleadings referred to ownership of the back green. Reference was made to the defenders' pleas in law 4 and 7.

[204] The access rights were part of the defenders' ownership in the back green. If the pursuers' ownership was established, the defenders' access rights fell away. They fell with the ownership right. The defenders have lost their rights to the back green are not entitled to reinstate the doorway.

The defenders' oral submissions

[205] The parties are still entitled to servitude rights and they stand alone. Common ownership of the back green did not necessarily mean that a person can go through the back gate. There was a difference between access and ownership. There was a difference between owning the back green and entering via the gate. The solicitor wondered whether

the specific provision in relation to the back door might have been to distinguish it from the side door at Albany Lane. If the defenders do not have title to the back green, they still need access to it (including as a possible egress in the event of fire) and there was a question about how they would get access.

[206] The solicitor for the defenders referred to answer 14 in the principal action and to plea-in-law 5 in response to counsel's objection to a lack of record.

Decision on whether the defenders' access rights within their titles are separate from their right of common ownership in the back green

[207] I repel the pursuers' objection that the issue of independent access is not on record: the averments in answer 14 of the principal action are sufficient to cover the matter and the defenders' fifth plea in law also refers to it.

[208] The defenders' submissions are well founded. This is clear from the titles to the flats. Flats 29/1, 29/2, 29/3, 29/4, 29/6 and 29/7 all have rights to the back green together with access through the back door. (Flat 29/5 is not referred to in the joint minute or the defenders' written submissions.) The right of access is a standalone right. That is made particularly clear in the title to 31 Barony Street, where the right of access is separately numbered. The defenders have required and will continue to require practical access to the back of the tenement for works to be carried out. Susan Richardson gave evidence that access via the back door was the most direct and practical way, because it avoided the necessity for making numerous turns past the conservatory with building materials.

Decision and disposal

[209] I have found that the 1994 disposition is not a valid disposition on which prescription may run, but that the 1990 disposition is a valid disposition for prescription. I have found that the pursuers have not possessed the back green for a continuous period of 10 years openly, peaceably and without any judicial interruption. I have found that prescription was permanently interrupted by the transfers of titles of other flats after 1994. I have found that interdict should be refused because of the separate access rights within the titles of many of the defenders.

[210] I note that the record has not been prepared in accordance with Ordinary Cause Rule 19.2A and that all the pleas-in-law have been printed at the end of the counterclaim instead of being split up between the principal action and the counterclaim. I have repelled the pursuers' first to seventh pleas-in-law and the defenders' first, second, sixth, eighth and ninth pleas-in-law, and I have sustained the defenders' third, fourth, fifth, seventh and tenth pleas-in-law. I have granted absolvitor in terms of the principal action. I have granted declarator under deletion in the counterclaim. I have deleted the words "constructed by the pursuers" having regard to the evidence led that the conservatory was constructed before the first pursuer purchased the flat.

[211] The solicitor for the defenders addressed the question of expenses in his written submissions, but counsel for the pursuers did not. The defenders having been successful, the usual rule applies and I have found the pursuers liable to the defenders in the expenses of the action and the counterclaim as taxed.

[212] I wish to record my thanks to counsel for the pursuers and the solicitor for the defenders for their conduct of the proof before answer.