SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY
AT HAMILTON

[2025] SC HAM 55

HAM-A529-23

JUDGMENT OF SHERIFF MUNGO BOVEY KC

in the cause

WALTER SIM MALCOLM and DOCTOR SUSAN JENNIFER MALCOLM
residing at 7 Gadwall Grove, Motherwell, ML1 2FQ
JOHN JOSEPH HEENAN and KATRINA HEENAN
residing at 12 Gadwell Grove, Motherwell, ML1 2FQ and
ERIK JAN VAN DER MAREL and KIRSTY ANN VAN DER MAREL
both residing at 16 Gadwall Grove, Motherwell, ML1 2FQ

Pursuers

against

KEVIN WILLIAM PATON and ANN MARIE MARION PATON
residing at 18 Gadwall Grove, Motherwell ML1 2FQ

Defenders

Pursuer: Boffey, advocate; Mellicks, solicitors, Glasgow
Defender: Breen, advocate; BTO, solicitors, Glasgow

HAMILTON, 4 June 2025

The Sheriff, having resumed consideration of the case, interdicts the defenders and anyone acting on their behalf or on their instruction from erecting a boundary wall at 18 Gadwall Grove, Motherwell, ML1 2FQ, for such time as Rule 9.1 of the Deed of Real Burdens by Cala Management Limited registered in the Land Register of Scotland on 15 December 2010 under title number LAN213998 subsists and is not discharged or otherwise varied by the Lands Tribunal of Scotland**;** finds the defenders liable to the pursuers in the expenses of the action as taxed.

[1] This case is about whether the defenders should be stopped from putting up a wall round their front garden in the face of a Rule of a deed of real burdens. This judgment gives reasons why I have decided to grant decree in favour of the pursuers.

[2] I heard evidence in this case on 31 March and 3 April 2025. Counsel for both parties lodged written submissions in good time and I heard their oral submissions on 27 May 2025.

[3] Following discussions at the hearing on 27 May 2025, a revised record was tendered. This contained a proposed amendment to crave 1 agreed between parties' respective Counsel which limited the interdict sought to take account of the possibility of discharge or variation of the relevant Rule ("the burden"). The first crave accordingly became:

> "To interdict the Defenders or anyone acting on their behalf or on their instruction from erecting a boundary wall at 18 Gadwall Grove, Motherwell, ML1 2FQ, for such time as Rule 9.1 of the Deed of Real Burdens by Cala Management Limited registered in the Land Register of Scotland on 15th December 2010 under title number LAN213998 subsists and is not discharged or otherwise varied by the Lands Tribunal of Scotland; and to grant interdict ad interim;"

[4] An extensive joint minute was lodged and forms the greatest part of my findings in fact which are necessary reading at this stage.

[5] **Findings in fact**

a) The first pursuer is Walter Sim Malcolm. The second pursuer is Doctor Susan Jennifer Malcolm. They reside together at 7 Gadwall Grove, Motherwell, ML1 2FQ The first and second pursuers are spouses residing there with their child aged 12 years.

b) The third pursuer is John Joseph Heenan. The fourth pursuer is Katrina Heenan. They reside together at 12 Gadwall Grove, Motherwell, ML1 2FQ.

The third and fourth pursuers are spouses residing there with their child aged 12 years.

c) The fifth pursuer is Erik Jan Van Der Marel. The sixth pursuer is Kirsty Ann Van Der Marel. They reside together at 16 Gadwall Grove, Motherwell, ML1 2FQ. The fifth and sixth pursuers are spouses residing there with their children aged 4 years and 2 years.

d) The defenders are Kevin William Paton and Ann Marie Marion Paton who are spouses. They reside together at 18 Gadwall Grove, Motherwell, ML1 2FQ.

e) Title for 18 Gadwall Grove, Motherwell, ML1 2FQ is recorded in the Land Register of Scotland under title number LAN213998. The defenders are the heritable proprietors of 18 Gadwall Grove. The defenders acquired their title to 18 Gadwall Grove in January 2013 for the sum of £469,000.

f) 18 Gadwall Grove forms part of the Baron's Grange development in Motherwell, ("the development" and "the estate") designed by the housebuilder CALA. The development consists of approximately 70 properties.

g) Title to the parties' properties in Gadwall Grove is subject both to (i) a Deed of Conditions by Cala Management Limited and Bellway Homes Limited registered 10 December 2010 as specified in Entry 1 of the Burdens Section of LAN213998 and (ii) a Deed of Real Burdens by Cala Management Limited registered 15 December 2010 as specified in Entry 2 of the Burdens Section of LAN213998 (the "Deed of Real Burdens").

h) The Deed of Real Burdens provides, at clause 9:

> "Rule 9 – Boundary walls and fences
>
> "9.1 No additional boundary walls, fences, hedges, trellis work, ornamental fencing or draught boarding fencing shall be erected anywhere on a Plot, nor shall boundary walls or fences be used as a support or strengthening for such trellis work, ornamental fencing or draught boarding fencing except in each case with Neighbour Consent.
>
> "9.2 Once erected, no such walls or fencing shall be added to or increased in height except with Neighbour Consent."

i) The Deed of Real Burdens defines "Neighbour Consent" as "… when CALA no longer own any Plot, the prior written consent of the Proprietors of all Plots any part of which is situated within thirty metres of the relevant Plot".

j) The pursuers are the proprietors of plots, parts of which are all situated within thirty metres of 18 Gadwall Grove.

k) On 15 December 2021, the defenders were granted planning permission by North Lanarkshire Council *inter alia* to construct a front boundary wall and electric gate at 18 Gadwall Grove.

l) On 22 September 2023 the Sheriff interdicted *ad interim* the defenders or anyone acting on their behalf or on their instruction from erecting a front boundary wall at 18 Gadwall Grove. That interdict remains in place.

m) The defenders did not seek prior written consent of the pursuers for the construction of the intended boundary wall at 18 Gadwall Grove. The pursuers do not consent to the erection of the intended boundary wall at 18 Gadwall Grove.

n) Unless they are prohibited from doing so by a court order, the defenders intend to proceed with the erection of their intended boundary wall at 18 Gadwall Grove, notwithstanding the pursuers' lack of consent.

o) The defenders' home is on a corner site which the wall and gate would curve round. The wall and gate would be 900 mm high with 1.2 metre high piers. It would be similar to other walls in the estate and would match the stone of the lowest part of the house. The gate would open in two to five seconds after detecting the defenders' vehicles.

p) As a corner site, the defenders' front garden is to some extent used as a thoroughfare by pedestrians some of whom allow their dogs to foul the ground.

q) There are a number of walls, hedges and the like in the estate but no front boundary walls of the kind proposed.

r) The Deed of Real Burdens regulates the maintenance of the common areas of the estate and servitude rights. Part 2 sets out Rules imposed on the CALA site as "Community Burdens" in which the community is Baron's Grange. Most of these Rules can be varied or discharged by a deed or variation or discharge granted by the owners of at least two-thirds of the plots. No application may be made to the Lands Tribunal to discharge or vary the burden within 5 years of the registration of the Deed of Real Burdens, a restriction now passed.

s) Rule 3 allows a single dwelling house and "ancillary buildings … including a garage, a car port, a greenhouse, a garden shed and a conservatory, provided always that Neighbour Consent has been first obtained."

t) Other Rules are not dispensable even with Neighbour Consent:

- Rule 4.3: colour of external paintwork not to be changed;
- Rule 4.4: external paintwork to be repainted every year;
- Rule 5: each plot to be garden or ornamental ground as far as not occupied by an approved list of features;

- Rule 6: no trade or business to be carried on; no advertising boards; private cars only; no livestock; no more than one television aerial; no rubbish bins or bags;
- Rule 7: maintenance in good repair;
- Rule 8: duty to insure and rebuild;
- Rule 9.3 and 9.4: walls, fences and hedges to be not more than 1.8 metres high and maintained in good condition;
- Rules 10 & 11: duty to maintain drains and common property;
- Rules 12 & 13: no obstruction of visibility splays or wayleaves;

Common parts of the development are protected under Rules 14 and 16 to 19 while Rule 15 makes provision for the management of the development after CALA.

u) The development, particularly Gadwall Grove, is markedly open in its layout. There are no walls round the front gardens in Gadwall Grove.

v) In the circumstances of this case, failure to comply with the burden will result in material detriment to the pursuers' enjoyment of their ownership of their homes.

The evidence

[6] The oral evidence came entirely from the parties who all live in Gadwall Grove. They all have good jobs. At my suggestion, the other pursuers remained outwith the court from the start of Mr Malcolm's evidence until the start of their own while Mrs Paton remained outwith the court during her husband's evidence.

Walter Sim Malcolm

[7] The first pursuer is 56 years old and has worked for Scottish Enterprise for 33 years. He lives at number 7 which is just across the road from the defenders. He and his wife bought their house from CALA 12 years ago as a new-build. He regards it as a lovely house in a wide open-plan estate. Like the others, his is a large detached house with a driveway to an integrated garage. It has an enclosed garden to the rear and an area in front of the house. The defenders' house is across the road and this action is about their proposal to enclose their front garden with a wall and a vehicular gate. To the right of the defenders' house is that of the van der Merels who are the fifth and sixth pursuers who are immediate neighbours to the defenders.

[8] The proposed wall and gate would wrap around the whole frontage of number 18. None of the other houses in Gadwall Grove have such an arrangement.

[9] When the Malcolms bought their house from CALA they dealt with Pamela French who gave them an artist's impression in which the landscaping very much impressed them as to how it would look after a few years with mature plants. Mr Malcolm made adverse comment about another development which looked awful after everyone had started to put up a mix of boundaries. She assured him that would not happen as there were very strict title deeds. And so they bought and moved in in November 2012. The title deeds were part of the sales pack once they had agreed to buy. The burden was one of the specific conditions they looked at.

[10] Mr Malcolm thought that CALA had provided for neighbour consent so that people were aware of the right and proper thing to do – talking and getting consent if required as he had in relation to changes he made to his rear fence and to put people off from doing what they liked. It was what they had all signed up to.

[11] He and his wife had been shocked when they learned of the defenders' application for planning permission: "… we bought it open plan, not a gated community." The defenders did not seek their consent which would have been refused. The witness expressed a concern that the delay in the electric gate opening would cause traffic to obstruct the road on a busy corner. He said there were sixty to eighty children in the eighty houses in the estate, some of them very small. He expressed the concern that such children would be concealed behind the 900 mm wall proposed.

[12] As well as the aesthetic impact on the street of the wall, the witness was concerned that it would lead to others doing the same. Mr Malcolm was referred to the wall erected by the owner at 9 Lapwing Crescent which is a nearby part of the development. He pointed out that the walls are a dividing and retaining walls that do not front the plot. He had spoken to the owner who told him he had had neighbour consent.

[13] As regards the suggestion that people cut across the front of the defenders' property, Mr Malcolm pointed to the lack of any well-trodden paths across the defenders' grass.

[14] In cross-examination Mr Malcolm disagreed with the proposition that the proposed development would not be to material detriment of his enjoyment of his home and did not know if it would have a material effect on the value of his home.

Dr Susan Jennifer Malcolm

[15] The second pursuer is a GP. She really likes living on the estate where everyone is really friendly. She mentioned the reasonably wide roads and the spacious open feel. It was marketed by CALA as an open plan estate. The proposal goes against that feeling. If the defenders' wall is built opposite her home, it will make it more difficult for her to reverse her car out as she normally does.

[16] The second pursuer expressed the concern that the erection of the wall might adversely affect the value of their property; given the choice between properties opposite walled plots and properties not in such a vicinity, people might choose the latter.

John Joseph Heenan

[17] The Heenans also bought from CALA in 2012 and were the first owners of their homes. The third pursuer liked the American open plan style and the feeling of openness – a lot of modern builds don't give a lot of space. They would not have bought their property if people could build walls. He regarded neighbour consent as meaning neighbour permission.

[18] Mr Heenan had commissioned a professional drone company to take footage of the estate which had been taken between 10 and 11am in December 2024. Lodged as production 5/4, this was agreed to be video footage showing aerial and street views of aspects of the Baron's Grange development (joint minute paragraph 9).

[19] He too had spoken to the owner of 9 Lapwing Crescent who had told him he had neighbour consent for the erection of the side walls there.

[20] He thought the development would lead to others doing the same and change the aesthetic of the area and could adversely affect the value of the area.

Katrina Heenan

[21] The fourth defender said that when they bought from CALA almost 13 years ago, she had been immediately impressed at the distances between the houses and the spacious layout of houses in the estate with big wide gardens. They share a driveway with the house next door and she had been concerned about this and had checked the title deeds to be sure

that a wall could not be built there without neighbour consent. She might not have been so concerned if buying a plot without the shared drive. She doesn't understand the need for a wall given that they all signed up for no walls.

[22] The aesthetic is their concern; one wall can open the floodgates. She also thought that value might be affected in that small differences might put potential buyers off the neighbouring properties.

Erik Jan van der Marel

[23] The fifth pursuer bought 16 Gadwall Grove in October 2019 from the first owners. The van der Marels moved from elsewhere in the development. They liked the open plan of the estate including the nice playground. He lives next door to the defenders. At the front, their drives are undivided, the boundary marked by a narrow row of white tiles.

[24] The Hamiltons, from whom they bought, told them that the Patons were intent on building a wall. His reaction had been that he would only buy as long as they had control over whether a wall was built. He had been satisfied that they did not have to allow it. This had been important because of the open plan of the estate. The van der Marels and the Patons use each other's drives – not regularly but might walk over each other's drives taking the bins out or the like. He accepted that he has no right to be on the defenders' driveway.

[25] The van der Marels would not enjoy their home as much with the wall.

[26] He had objected to the planning application and was referred to the Council's record of the objections (6/2/10 of process) which included the effect on the open character of the estate and lack of neighbour consent.

[27] The whole process has lasted years and takes the joy out of it; he is really disappointed to be keeping the children to their side of the drive and it's had an impact

mentally as well. He has brought the action and given evidence in court for the first time because he feels strongly about the title deeds and his kids' safety. They are aged two and four and therefore just the age to be concealed behind the proposed wall.

[28] In cross-examination, Mr van der Marel was asked about the campervan he parks in his driveway which is 212 cm high and about 4.5 metres long.

Kirsty Ann van der Marel

[29] The sixth pursuer could not understand why the defenders would want such a wall in such an estate. It would definitely be an eyesore and could discourage potential purchasers.

[30] She too was concerned at the safety of her children. Mr Paton used to use their drive when he was washing his car. She would be very angry if it went ahead without their agreement.

Kevin William Paton

[31] The first defender works eight weeks in ten in Saudi Arabia and only spends two weeks in that period in his home in 18 with his family. This currently consists of his wife and younger daughter, his older daughter being away at university during term time.

[32] The Patons bought number 18 from CALA in January 2013. It was one of only three examples of the type of house they wanted and the other two were taken. No document from CALA or the sales agents mentioned the development being open plan or American in design.

[33] It was currently "slightly not as nice living in the vicinity of the pursuers". Mr Paton referred to photograph 6/2/6 which he took from his back garden showing an erection in the

van der Marel's garden he said was not an awning but a glass-walled extension that should have had neighbour consent but did not.

[34] The Patons had first thought of building a wall in 2018. There were three reasons for this (1) to secure their premises against people cutting the corner; (2) to prevent dogs fouling their grass which makes it impossible to landscape the area; and (3) to stop the next door neighbours using their driveway.

[35] Mr Paton thought one or two people a day cut the corner and dogs fouled the area once a day. The Christmas lights he put on the lawn had been damaged by passers-by kicking the equipment, this being a result of use rather than deliberate damage.

[36] He had no idea that he required neighbour consent when he applied for planning permission. When the interdict came in, he discussed the possibility of applying to the Lands Tribunal but had been advised that it would be better to follow the interdict route first. He had discussed the wall with the fifth and sixth pursuers and the previous owners of their house and they had no objection if the wall was on the Patons' land which it would be.

[37] There are quite a number of walls, hedges and the like round the estate. The defenders' wall would be the same as other walls round the estate and would match the stone of the lowest part of his home. The gate would open in two to five seconds after detecting the defenders' vehicles and there would be no significant delay.

[38] Mr Paton was taken through 6/2/7 of process, 18 pages of photographs of the development showing various walls and hedges. Under reference to photograph 18 of 6/2/7 Mr Paton pointed to numbers 56 and 58 Heron view which are within sight of his house; both these corner sites have put in hedges to prevent people from cutting across their frontages.

[39] The first defender rejected the proposition that the estate is open plan. In particular, numbers 5 and 12 have walls right up the fronts of their properties. He thought hedges and walls added character without changing the aesthetic of the estate. He rejected the safety arguments, holding that the wall would prompt cars to slow round the corner.

[40] He rejected the idea that the wall would adversely affect the enjoyment of any of the pursuers' properties. He had no idea about any effect on values. If his neighbours at number 16 (the fifth and sixth defenders) had had a wall of this kind when he moved his reaction would have been to seek to add his wall to theirs.

[41] The materials for the wall have been in storage at a cost of £250 a month since interdict was granted.

[42] Cross-examined, he accepted that he knew of the need for neighbour consent when the objections to his planning permission came in in 2021. He had not then sought it "…like everyone else decided not to follow…" the requirement. He got planning permission which he assumed was the necessary consent though he did not check this. He was of the view that the burdens were "…pivotal in any estate…" to prevent major things. His was not major.

Q Part of the attraction of the scheme is that you can't do what you want?

A The pursuers seem to do what they want.

Q Part of the attraction of the scheme is that you can't do what you want?

A Yes

Q If built, it will be different from what CALA provided

A So is the hedge and the van and…

[43] The defender denied that the wall would be in a prominent position. While conceding that no one else on the street has a wall, he referred again to hedges. The Rules had been equal for all at the outset but, today, were not fair.

Ann Marie Marion Paton

[44] The second defender spoke of persecution by the pursuers; taking photos and asking her to move. They had conspired against the defenders. Mr Malcolm took a photograph of her and someone took a photo of their back garden. Someone had complained to the police in November 2024 when her landscape gardener had a trailer parked in the road over one night though she did not know who.

[45] The defenders are not going to build the 1.8 piers for which they have planning permission. As well as the electric gate for the garage, there will be an aluminium gate to the front door with a latch. The wall will match the bricks on the lower part of the house. The planning permission expired in December 2024. If not interdicted, they will either build a 900 mm wall under the permitted-development Rules or apply for fresh planning permission to include the 1.2 metre piers.

[46] Mrs Paton wanted to build the wall because they are a corner site with a lot of people cutting through and letting their dogs foul their garden. She estimated twenty people using it as a thoroughfare over the last three years and dog fouling quite a few times a year.

[47] Mrs Paton complained that the van der Marels at number 16 next door have a six foot campervan which they park very close to the third of the three cars the defenders park on their drive so that one has to climb over the passenger seat to get out.

[48] The defenders had chosen not to seek neighbour consent; Planning had told twelve neighbours and there had been an aggressive response from the pursuers' solicitor so they did not want to escalate matters any further.

[49] Mrs Paton did not think the estate is open plan; it has already got walls including two built since they moved in. 41 Heron View has high gates. 12 and 125 Heron View have also built because a lot of cars cut the corner. As regards children, parents should make sure they are supervised and educate them on road safety; her children were five and six when they moved in. There is a path they should use.

[50] The works would have no impact on the value of the pursuers' property or their views. Nothing was changing to affect the enjoyment of the pursuers' properties. It was not the start of a gated community but if people want to build, they should be allowed to. It was not sold as an open-plan estate – they should be allowed to enhance their property. Other new estates have built fences and hedges; there would not be a detriment.

[51] It was a bit hypocritical of neighbours who were also in breach of title conditions to challenge the defenders.

[52] In cross-examination she accepted that no other property on Gadwall Grove has a wall and an electric gate and that others might follow the defenders.

[53] The owners of 9 Lapwing did not have written consent from all the neighbours within 30 metres.

[54] **Findings in fact and law**

a) The burden is a real burden for the purposes of the Act.

b) It would be competent for the defenders to apply to the Lands Tribunal for Scotland to vary or discharge the burden.

c) The burden is imposed under a common scheme on two or more units and each of those units is, in relation to the burden, both a benefited property and a burdened property and the burden is, accordingly, a community burden.

Discussion and decision

Title Conditions (Scotland) Act 2003 ("the Act")

[55] Section 1 of the Act provides that a real burden is an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land. The encumbered land is known as the "burdened property"; and the other land is known as the "benefited property".

[56] Section 8 provides that:

> "(1) A real burden is enforceable by any person who has both title and interest to enforce it.
> "(2) A person has such title if an owner of the benefited property...
> "(3) A person has such interest if –
> "(a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of or right in, the benefited property."

[57] Section 25 of the Act provides that "community burdens" arise where— (a) real burdens are imposed under a common scheme on two or more units; and (b) each of those units is, in relation to some or all of those burdens, both a benefited property and a burdened property.

[58] Section 90 of the Act provides:

> "Powers of Lands Tribunal as respects title conditions
>
> "(1) … the Lands Tribunal may by order, on the application of— (a) an owner of a burdened property or any other person against whom a title condition (or purported title condition) is enforceable (or bears to be enforceable) — (i) discharge it, or vary it, in relation to that property; …"

[59] Section 91 of the Act includes:

> "Special provision as to variation or discharge of community burdens
>
> "(1)Without prejudice to section 90(1)(a)(i) of this Act, an application may be made to the Lands Tribunal under this section by owners of at least one quarter of the units in a community for the variation ('variation' including imposition) or discharge of a community burden as it affects, or as the case maybe would affect, all or some of the units in the community."

[60] Section 95 provides that the persons entitled to make representations as respects an application under section 90(1) or 91(1) of this Act are—

> (a) any person who has title to enforce the title condition;
>
> (b) any person against whom the title condition is enforceable;

[61] In terms of section 97, an application for discharge of a real burden is granted as of right where there are no representations in opposition.

[62] Section 98 provides that, unless unopposed, an application for the variation or discharge of a title condition such as that with which we are concerned is to be granted by the Lands Tribunal only if they are satisfied, having regard to the factors set out in section 100 of the Act, that it is reasonable to grant the application.

[63] Section 100 sets out the factors to which the Lands Tribunal are to have regard in determining applications including:

> "(a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
> (b) the extent to which the condition—
> (i) confers benefit on the benefited property; or
> (ii) where there is no benefited property, confers benefit on the public;
> (c) the extent to which the condition impedes enjoyment of the burdened property;
> …
> (e) the length of time which has elapsed since the condition was created;
> (f) the purpose of the title condition;

(g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents; …
(j) any other factor which the Lands Tribunal consider to be material."

The oral evidence

[64] As the key matters are agreed in the joint minute, the scope for disagreement between the parties in their oral evidence was very limited. Most of their evidence was opinions which were held in good faith.

[65] I deal with the important concerns below.

[66] All the pursuers spoke warmly of life in Gadwall Grove; the defenders less so indeed, Mrs Paton regarded the pursuers as having conspired against the defenders. I do not regard going round to gather support for their opposition to the proposal as conspiring but her evidence is measure of the damage the dispute is doing to neighbour relations. My impression, having heard all the pursuers give evidence, is that they were all strongly motivated in their own ways. There was no particular feeling of a leader and followers.

[67] I do not accept that the first defender had no idea that he required neighbour consent when he applied for planning permission. I am sure that any conversation with any of his neighbours would have mentioned it. He certainly knew about it after getting planning permission on 15 December 2021 but went ahead and ordered the materials he has had in storage since interdict was granted on 22 September 2023.

[68] The vexed question of whether the owner of 9 Lapwing Crescent had neighbour consent does not require to be decided. I heard only hearsay of the man himself and do not regard the building of walls down the side of his property as of assistance in making my decision.

Submissions

[69] Both counsel lodged and adopted helpful written submissions.

[70] Both were agreed that the case turned on whether the pursuers have interest to pursue the current action; it is accepted that the erection of the wall will be contrary to the burden and that the pursuers have title to sue. Further, it is common ground that interdict falls to be granted if the pursuers have interest to sue.

[71] It was also common ground that expenses should follow success.

[72] For the pursuers, Ms Boffey focussed on the test of material detriment to enjoyment, quoting Sheriff Principal R A Dunlop in *Barker* v *Lewis* 2008 SLT (Sh Ct) 17 at paragraph 23:

> "To say that there is a threshold however does not take one very far in identifying precisely where that threshold lies and in my view the best that can be said is that it will depend on the particular circumstances of the case. Indeed s 8(3)(a) specifically relates the question of material detriment to the circumstances of the case. Burdens are of many and varied kinds and the breach of a burden will not necessarily affect all benefited properties in the same way. It will always be a matter of judgment therefore whether the particular facts and circumstances of the case add up to a detriment of such a degree as to amount to material detriment and it is perhaps because of the variety of circumstances which may be found to exist that s 8(3)(a) of the 2003 Act is expressed in such general terms."
>
> "[24] … Were it not for the fact that the sheriff has done just that, aided and abetted by the parties, I would have thought it unnecessary and unhelpful to go beyond the words used."
>
> "[25] In defence of the sheriff however it might be argued that one can at least test the true meaning of 'material' by reference to a variety of synonyms provided always that one remembers the context in which the word is used. On that approach I think there is a difficulty in the sheriff's use of the word 'substantial'... The sense in which the sheriff has used that word seems to be 'of ample or considerable amount' but it is difficult to see what justification there could be for setting the threshold at that level in the context of qualifying an interest to enforce. If that is what the sheriff has done, in my view he has set the threshold too high."

[73] At paragraph [27] the Sheriff Principal said that if one has to resort to synonyms at all, a better reflection of the true meaning of "material" in this context would be found in words such as "significant", "of consequence".

[74] In *Franklin* v *Lawson* 2013 SLT (Lands Tr) 81, the Lands Tribunal for Scotland, at paragraph [23] said:

> "It is enough to say that we are satisfied that he does have an interest to enforce. As will appear from the discussion below, we have no doubt that the extension would have a material adverse impact on the respondent's enjoyment of his property within the meaning of s.8 . In that context we see no reason to exclude the special attraction the view has for the respondent himself as an aspect of enjoyment of the property but, in any event, where there is an identifiable element of detriment which cannot be disregarded as insignificant or of no consequence, it seems to us that the test of materiality can be met. We think this is in accord with the substantive views expressed by the sheriff principal in Barker v Lewis at 2008 S.L.T. (Sh Ct), p.20 , para.27… It can properly be seen to have a primary meaning as simply the opposite of 'immaterial'... Where an adverse element of detriment can be identified as something more than fanciful or insignificant it can properly be described as material. We are not yet persuaded that Parliament intended a higher test. Section 8 must be construed in the context of the Act as a whole. The Act makes express provision for burdens to be varied when it is reasonable to do so. If a burdened proprietor considers that the interest of the benefited proprietor is of no great weight he can apply to the tribunal under s.90(1)(a)(i) . The Tribunal will then require to balance the interests of one against the other in terms of s.100 , factors (b) and (c). When Parliament has provided for such a balancing exercise, there is no good reason to assume that it intended a preliminary test under which a real identifiable interest would have to be of some special weight before being allowed to be enforceable."

[75] Ms Breen was resolutely against the use of words explicatory of "material" – even "not immaterial"; her approach seemed to be that I would know materiality when I saw it.

[76] In disagreement with that approach, I find the words both the Lands Tribunal and Sheriff Principal Dunlop have used to elucidate the term of assistance. What I draw from their words is that the test of interest is relatively low, simply the gatekeeping one for access to the Tribunal for it to exercise its very widely expressed jurisdiction.

Title to enforce the burden

[77] Although counsel for the defenders made no submissions in this regard, the tenor of the defenders' proof makes it appropriate for me to say that I do not accept that the burdens have been so widely breached in Baron's Grange so as to make it unfair or unreasonable to

enforce the burden in this case. Nor do I accept that any of the pursuers is habitually in breach of the burdens to an extent that s/he does not come to court with clean hands.

Interest to enforce the burden

[78] In the foregoing circumstances, the issue is whether failure to comply with the burden will result in material detriment to the pursuers' enjoyment of their ownership of their homes.

[79] Ms Breen submitted that the effect of section 8(3)(a) of the Act is to restrict the enforcement of real burdens to scenarios where the specific actual or anticipated breach of the burden would result in material detriment. The final clause in Rule 9 does not operate to permit close neighbours to enforce a real burden in respect of a breach that would not otherwise be actionable in terms of section 8(3)(a). Rather, it has the contrary effect: it entitles close neighbours to consent to development that may otherwise be actionable by another party with title and interest. Any suggestion that the final clause in Rule 9 operates to lower the statutory threshold for enforcement of a real burden should be rejected. Such an approach is unsupported by authority and runs contrary to the express provisions and intention of the statute, namely to prevent the enforcement of real burdens in respect of breaches which have a non-material effect. The reference to "Neighbour Consent" in the final clause of Rule 9 should have no bearing on the court's application of section 8(3)(a).

[80] I am able to accept this submission.

[81] Of the defenders' reasons for wanting to build the wall, notwithstanding the lack of any well-trodden paths, I accept that people cut across the front of the defenders' property. I also accept that this gives rise to dog mess pollution of the defenders' property. These seem to be perfectly valid reasons for what they want to do. But, having a good reason for

what they want to do is irrelevant to the only issue before me namely the pursuers' enjoyment of their properties. Had the defenders wanted the extent to which the condition impedes enjoyment of the burdened property to be taken into account, they would have applied to the Lands Tribunal.

[82] Mr Paton also wanted to stop the next door neighbours using their driveway. It is, of course, correct to say that the van der Marels have no legal right to walk across the defenders' property. But, were relations between them as neighbours as such relations should be and often are, such technical infringements would operate on a bilateral basis. Mrs Paton objected that the van der Marel's campervan made egress from the third of the defenders' parked cars awkward. The clear implication was that she would appreciate being able to leave her car and cross her neighbours' front garden. The proposed wall would permanently prevent this.

[83] To this extent, there is force in Ms Breen's submission that the pursuers are not all in the same position; the fifth and sixth have the intangible benefit of the prospect of informal use of their neighbours' front area when relations permit. I do not consider this a sufficient distinction to affect the decision.

[84] Some of the pursuers' concerns about the proposal I do not accept:

[85] The first pursuer expressed a concern that the delay in the electric gate would obstruct the road on a busy corner. I was shown a video commissioned by the third pursuer from a drone company. Although I accept that it was taken mid-morning rather than at school time, the strong impression was of a very quiet residential area and the idea of the electric gate causing a buildup of traffic seems fanciful.

[86] The first and second pursuers expressed the concern that children would be concealed behind the 900 mm wall proposed. This is not a major concern for me; the

pursuers' case is not based on obstruction of visibility splays and walls such as that proposed are very common.

[87] The second pursuer expressed the concern that the erection of the wall might adversely affect the value of their property; given the choice between properties opposite walled plots and properties not in such a vicinity, people might choose the latter. I regard the evidence on this matter as rather vague and tentative and would not be prepared to make a finding.

[88] However, I do accept that the erection of the wall and gate would have a significant effect on the appearance of the street. I certainly accept that it would lead to others doing the same. Mr Paton was instructive in his evidence that if his neighbours at number 16 (now the fifth and sixth defenders) had had a wall of this kind when he moved in his reaction would have been to seek to add his wall to theirs.

[89] In that regard, I accept the assessment of the pursuers that the development is markedly open in its layout. The extent to which there are walls and hedges does not affect this overall conclusion, particularly in Gadwall Grove which is the relevant part of the estate.

[90] The pursuers' oral evidence placed strong emphasis on the mutuality of the Rules in the Deed of Real Burdens in the context of the community they find themselves sharing. A second aspect to the community repeatedly relied upon was the certainty that the deed gives in providing Rules to which one subscribes when buying. These features weigh significantly with me in a decision which, on the face of it, concerns a minor matter. The feeling that the regime of Rules on which they all bought is of no effect will also detract from the pursuers' enjoyment.

[91] I conclude that in the circumstances of this case, failure to comply with the burden will result in material detriment to the pursuers' enjoyment of their ownership of their homes. The pursuers therefore have interest as well as title to enforce the burden and it is agreed that interdict falls to be granted.

[92] As parties were agreed, expenses follow success.