OUTER HOUSE, COURT OF SESSION

[2020] CSOH 103

A138/18

OPINION OF LADY CARMICHAEL

In the cause

MAJOR DOUGLAS BOWRING SOULSBY

Pursuer

against

RICHARD JAMES JONES and KIRSTEN NATALIE JONES

Defenders

Pursuer: Sandison QC, Reid; Shepherd & Wedderburn LLP
Defenders: D Thomson QC, Massaro; DLA Piper Scotland LLP

17 December 2020

Introduction

[1] The pursuer is the heritable proprietor of Seven Gables, South Street, Elie. The defenders are the heritable proprietors of Seafort, South Street, Elie. Both properties are bounded to the north by South Street, Elie, and to the south by the sea wall. Seafort lies immediately to the west of Seven Gables, so that it is bounded to the east by Seven Gables, and Seven Gables is bounded to the west by Seafort. They are both very old properties. Seafort is about 400 years old, and Seven Gables is about 350 years old.

[2] There is a passage which runs from South Street between the buildings towards the sea wall. It is owned in common by the pursuer and the defenders ("the common passage"),

and both the pursuer and the defenders have the right to use it. It does not extend all the way from South Street to the sea wall. It comes to an end at a point very approximately halfway along the western wall, where the western wall becomes thicker and its lower part juts out further than in does at its northern end forming a structure that witnesses referred to as a buttress. The top of the buttress is tiled. The extent of the common passage is shown in blue on the title sheet for Seafort (Title number FFE69789). At a section roughly halfway along its length its full width is 791mm, which is narrowed to 610mm at the location of a rainwater pipe. That measurement is the subject of agreement.

[3] The western wall of Seven Gables is built right up to the boundary with Seafort all the way to the sea wall. The southern elevation of Seven Gables extends part of the way over the sea wall in a bay window configuration.

[4] The central dispute in this case is whether the pursuer has a servitude right of access over a strip of land owned by the defenders within the curtilage of the defenders' property, Seafort. The strip of land runs along the western boundary of the pursuer's property, Seven Gables, from the end of the common passage to the sea wall. The pursuer contends that the servitude was constituted either by prescription, in terms of section 3(2) of the Prescription and Limitation (Scotland) Act 1973, or by virtue of being a servitude of necessity. I refer to the strip of land as "the disputed area".

[5] Seven Gables is part of a complex of buildings facing on to South Street, Elie. The other part of the complex is known as Easter Gables. What is presently known as Seven Gables includes property acquired by the pursuer's grandmother in 1966, and by his mother in 1983. The pursuer's grandmother, Mary Bowring Jameson, purchased what was then called Seven Gables in 1966. The property Mrs Jameson acquired in 1966 includes the building which lies along the eastern boundary of Seafort. Mrs Jameson disposed of it to the

pursuer's mother, Mrs Ann Bowring Jameson or Soulsby or Robertson (now known as Robertson), in 1968. The latter purchased another two rooms from the proprietor of Easter Gables – Margaret Oliver – in 1983. She disponed those two parts of Seven Gables to the pursuer in, respectively, 1983 and 1993.

[6] In 1966 the proprietor of Seafort was a Mrs Robertson. She was mentioned on a number of occasions in the course of the evidence. To avoid confusion I will refer to the pursuer's mother as Mrs Ann Robertson, and to the former proprietor of Seafort as Mrs Mary Robertson, unless it is obvious from the context to which of them I am referring.

[7] In about 2004 Linda Smith purchased Seafort from the executors of Mrs Mary Robertson. She had a conservatory built in the garden of Seafort. The layout of the garden after the conservatory was built left a passageway between the side of the conservatory and the western wall of Seven Gables. When Ms Smith put Seafort on the market, a single survey was prepared. In the property questionnaire, the question "As far as you are aware, do any of your neighbours have the right to walk over your property, for example to put out their rubbish bins or to maintain their boundaries?" was answered in the negative.

[8] In 2016 Ms Smith sold Seafort to the defenders, who became its heritable proprietors on 6 July 2016. The defenders demolished the conservatory and built a new extension. There is now very little space indeed between the eastern wall of the extension and the western wall of Seven Gables. The pursuer contends that the location of the extension prevents him from exercising a servitude right of access over part of the land.

[9] The extension becomes broader as it extends towards the sea wall. At a point about two thirds of the way along its length, its eastern wall, which otherwise runs more or less north to south, turns 90 degrees and runs east to west for a short distance, before forming another corner and running north to south again. That means that the gap between the two

properties is, very broadly speaking, in the shape of two right angled triangles, with two points at which the extension comes particularly close to the western wall of Seven Gables. Those are at the northern end of the extension, and at about two thirds of the way along its length as it runs north to south. The latter point was at times referred to in the evidence as "the pinch point".

[10] The western wall of Seven Gables where it runs close to the extension is not plumb. Along its buttress section it is widest at ground level. As a result, the gap between the two buildings, looked at from top to bottom, is narrowest at ground level and wider at the level of the roof of the extension. The ground within the gap is now covered by pebbles. The roof of the extension includes a glass roof light. The roof otherwise includes insulation, and then a plastic waterproof membrane which has been covered with large pebbles.

[11] There are three painted timber windows at first floor level on the western wall of Seven Gables. The edge of the roof runs along the length of the western wall, with a timber fascia and cast iron guttering. There are two downpipe connections from the gutter on that wall. The western elevation also includes a chimney stack.

[12] Parties helpfully provided a bundle of core productions. References to documents are to their numbers in the joint bundle ("JB"), rather than the original production numbers, with the exception of some references in Mr Allan's evidence. His evidence was taken on commission before the joint bundle was prepared.

[13] The pursuer seeks a declarator that he has a heritable and irredeemable servitude right of access:

> "… over that strip of ground bounded on or towards the north by the outer face of the southern exterior wall of the dwelling house known as Seafort; on the northeast by the common passageway lying between the dwellinghouses Seven Gables and Seafort; on or towards the east part by the said common passageway and partly by the outer face of the western exterior wall of the dwelling house known as Seven

> Gables; on or towards the south by the seawall; and on or towards the west by an undefined boundary along which it extends 0.9m west of the western exterior wall of Seven Gables; … for the purposes of (I) inspecting, cleaning, maintaining, repairing and renewing all of those parts of Seven Gables which form part of, or are attached to, that part of the western exterior wall of Seven Gables which abuts the maintenance strip; and inspecting, maintaining repairing and renewing the south western section of the roof of Seven Gables."

[14] He seeks also declarators that the defenders are not entitled to build on the strip of land just described; and that the erection by the defenders of any structure which occupies or otherwise obstructs full and free access by the pursuer or those acting for him for the purposes specified constitutes a nuisance at common law. He concludes, fourth, for the court to ordain the defenders to remove "all structures which obstruct such full and free access", and, fifth, for interdict against the defenders from obstructing the pursuer's exercise of that access.

Summary of issues and conclusions

[15] The issues are these.

1. Has the pursuer acquired a servitude right of access for the purpose of maintaining his property by virtue of prescription?
2. Is there a servitude right of access (of that character) of necessity?
3. If a servitude right of access exists, are the defenders entitled to vary it to the extent that necessarily follows from the construction of the extension?
4. Is the pursuer barred from seeking the remedies that he does by reason of mora, taciturnity and acquiescence?
5. Has the construction of the extension given rise to a nuisance?

6. If there is a servitude right of access, or the construction of the extension has given rise to a nuisance, ought the court to exercise its discretion to grant a remedy requiring that the extension be taken down?

[16] For the reasons which I set out fully below, I have answered questions 1-5 in the negative, and 6 in the affirmative.

Evidence

Pursuer

[17] The pursuer gave evidence, and led evidence from Mrs Ann Robertson, Andrew Simpson, David Vince, John Tulloch, Fraser Mitchell, Stephanie Hepburn, Michael Delaney, Paul Oliver and David Allan. The evidence of David Allan was taken on commission in October 2019. Mr Oliver's evidence was interposed in the defender's case, of consent, as he was thought not to be available to give evidence during the earlier part of the proof.

The pursuer

[18] The pursuer is aged 46 and holds the rank of major in the Armed Forces. He was born in 1973. He spent his early childhood at Seven Gables – from infancy until the age of about 5 years. It has not been his principal residence since 1979. In 1979 he moved with his mother to Perthshire. He continued to spend holiday periods at Seven Gables. He estimated that he would spend a week or 10 days there at Christmas, 2 weeks at Easter and 8 weeks in the summer. He sometimes visited at half terms. After he left school, he attended Oxford Brookes University, and continued to visit Seven Gables during vacations. He then joined the Armed Forces. His evidence was that the extent of his visits had varied

depending on where he was based. Earlier in his career he had visited less frequently, but during the 10 years preceding the proof he had visited for 1 or 2 weeks in the summer and odd periods, perhaps weekends, at other times. Other members of the family, including his cousins, stayed from time to time. At other times Seven Gables has been let as holiday accommodation. It had been let in this way since 1991. The management of the letting was carried out by a letting agent, but Mrs Ann Robertson had been, and continued to be, actively involved in the arrangements. In particular she usually carried out the necessary cleaning between lets.

[19] Speaking about the time when Mrs Mary Robertson was the proprietor of Seafort, the pursuer described a black, wooden gate positioned at the buttress, and south of that open space running down to the sea wall. He was familiar with the layout at that time because he used regularly to visit Mrs Mary Robertson. Her granddaughters were 2 or 3 years older than he, and he used to play with them. He described the area south of the common passageway as roughly paved. The gate was not locked. A dwarf wall ran from north to south through the garden parallel to the western wall of Seven Gables, and about 1.5 metres from it, nearly all the way to the sea wall.

[20] When Ms Smith moved in, the dwarf wall was demolished to make way for the conservatory. The footprint of the conservatory was such as to narrow the space between it and Seven Gables. The space was, however, sufficient that it could be walked down freely, and that ladders could be erected against the wall of Seven Gables. The pursuer was referred in the course of his evidence to various photographs which showed the space as it was when the conservatory was in place.

[21] The pursuer explained that the western wall was harled and painted. He described the harling as thick Fife harling. It had quite large pieces of stone embedded in it. The

harling required painting approximately every 10 years. It had two storeys – a ground floor and a first floor. At ground level there was a kitchen window. At first floor level there were two windows. There was guttering at the roof, and down pipes on the face of the wall. The guttering was of cast iron. The windows were washed regularly when there were tenants, and less regularly in the winter. The windows were wooden, and required to be painted every 6 to 10 years. One of the windows at first floor level was a set that was in two parts, divided vertically and opening outwards on hinges like double doors. The other was a sash window.

[22] Before the defenders' extension was constructed, the gutters were checked every year and cleaned out. There was a chimney stack at the western wall. The roof was tiled. It would be checked at the same time the gutters were checked. The salt and sea air took a toll on the exterior decoration. During the period when Mrs Mary Robertson and then Ms Smith owned Seafort, tradesmen would go down the "alley" beyond the end of the common passage to maintain the exterior paintwork. Michael Walls, who died in 2016, used the disputed area to clear the gutters for the last 15 years of his life. A Mr Clunie would use the disputed area "from time to time" to check the roof. He had done so on a number of occasions, as had his father before him. The pursuer recalled the arrangements with Mr Clunie going back to the 1970s. He understood that Mr Clunie's father did work for Mrs Jameson in the late 1960s.

[23] The pursuer or his mother would use the disputed area to carry out visual inspections of the exterior in order to see whether it needed painting. The pursuer himself would do so three times a year. Window cleaning was done every month to 6 weeks between Easter and September when the property was let. If there was a Christmas let they would be cleaned for that as well. He did not recall family members other than himself and

his mother using the area. As a child he had washed the windows himself when he was aged between 8 and 12 years.

[24] Painting of the first floor windows was undertaken using ladders. Both before and after the conservatory was built, there was room for ladders to lean against the wall. He thought that a roller would not be effective for painting the harling. The nature of the harling was such that a roller would not distribute paint adequately in between the pieces of stone in the masonry. The western gable wall had been painted on a cycle of about 8 to 10 years. They had been painted in recent times by David Allan. The guttering and downpipes were painted on a similar cycle, but more frequently if required. Mr Allan painted them in 2010. They had needed painting at that time, and Mr Cordwell-Smith (Ms Smith's husband) had been keen that they should be painted, as they were unsightly and he could see them from Seafort's conservatory. When the masonry needed painting, that was done from ladders sited on the disputed area.

[25] The roof required minor repairs every 2 to 3 years, when a tile blew off. The window woodwork was painted more frequently than the walls, but less frequently than the guttering.

[26] The pursuer had never asked permission for himself or any tradesman to carry out these activities. He was not aware of any tradesmen asking for permission. As far as he was aware, the owners of Seafort were aware that the work was being done by means of access achieved from their land. The work was done openly.

[27] After the defenders acquired Seafort, he became aware of their application for planning permission. He was serving abroad at the time, and his mother told him about it. It transpired that the extension would be very close to the western elevation of the house. He was concerned that it would prevent him from maintaining the western elevation of

Seven Gables. It would be too close to allow maintenance at ground floor level, and would also prevent access by means of ladder to the first floor and roof. He instructed his solicitors, Shepherd and Wedderburn, to object to planning permission. They did so by letter dated 1 May 2017, the terms of which are more fully set out in the part of this opinion recording Mr Fraser Mitchell's evidence.

[28] He became aware in January 2018 that work was about to commence. He had instructed his solicitors to write to the defenders. The first communication, a letter addressed to the owners, and dated 8 November 2017 had been returned undelivered. A second, in identical terms, was sent in early January 2018. Their terms, again, appear in the part of this opinion relating to the evidence of Mr Mitchell.

[29] He first met the defenders shortly after New Year 2018. He was at the front door of his house. They walked past, and he and they exchanged a "good afternoon" salutation. It was obvious to him that they were the new owners. He met the first defender that evening. The pursuer knocked on the door to introduce himself properly, but also with a view to speaking about the proposed extension. Work had not started at that stage. The pursuer expressed concerns that if the extension were to go ahead in the format planned so close to the house, tradesmen would not be able to access it, and would not be able even to get down the lane to look at it. Even if access to the upper storey would be possible from the roof of the extension, the ground floor would be inaccessible. He formed the impression that the first defender was not necessarily "that keen to talk about it". The first defender brought the conversation to a halt. He did not do that rudely, but it was clear that he was bringing the conversation to an end.

[30] The pursuer spoke by phone to Fraser Mitchell, a solicitor employed by Shepherd and Wedderburn on 19 January. At that point nothing had happened on site. A file note

made by Mr Mitchell of the conversation referred to his practical concerns regarding the upkeep of the gable wall, the gutters and the roof, and the need to tackle any issues regarding damp from inside the property. The pursuer confirmed in his evidence that those were his concerns at the time.

[31] The pursuer obtained expert advice from David Vince: JB10. That report did not assuage his concerns regarding the maintenance of the ground floor of the western elevation. He was in frequent communication with his solicitors, and attempted to reach a compromise. There had been discussion of a "ventilated cavity" between the buildings. Shepherd and Wedderburn had written to the defenders on the pursuer's behalf on 10 April 2018. The letter contained the following:

> "We are advised that access has been exercised as of right for a continuous period in excess of 20 years and that it has been exercised openly, peaceably and without judicial interruption."

It related that the pursuer was prepared not to raise proceedings for declarator and interdict provided that certain conditions were met including the grant of a deed of servitude, and the undertaking of work by the defenders to minimise the risk of deterioration of the wall of Seven Gables, and of maintenance at that time required of the wall, windows and rainwater goods.

[32] The pursuer became aware that a form of guttering extending from the extension eastwards had been attached to the western wall of Seven Gables. He was surprised. The defenders had not sought permission to attach any structure to Seven Gables. It became clear in the course of the evidence that this extended broad gutter had been intended to be the "roof" over the "ventilated cavity" between the two properties. The pursuer was concerned that by drilling into the wall the defenders had breached the harled weatherproofing of the wall and had created a point of vulnerability in the weatherproofing.

His solicitors wrote to the defenders' solicitors on 25 April requiring that the structures be removed. The pursuer visited the property at the bank holiday weekend in May. The offers made in the letter of 10 April were withdrawn in an email of 16 May. A letter of 25 June contained an offer to pay £40,000 towards the cost of moving the extension further from Seven Gables, and in exchange for a deed of servitude. He explained in evidence that he had initially offered £14,000 for the eastern wall of the extension to be moved 0.9 metres from the wall of Seven Gables. He had then received advice that the cost would be £23,600, and the defenders had contended that it would be £50,000. He had therefore offered £40,000 as he saw that as a sensible and reasonable compromise. After the offer of £40,000 the defenders' estimates of the costs involved had increased, and the counter-offer was that the pursuer should pay "whatever it cost". He was not able to undertake to do that.

[33] In cross examination the pursuer accepted that there had been a good relationship between his family and that of Mrs Mary Robertson. He accepted that in the decade preceding the proof he had had 7 weeks of leave, and had spent 1 or 2 weeks at Seven Gables in the summer, and odd days at other times during the year. He accepted that the common passageway was narrower than the area over which he asserted a servitude right of access, and also that the dimensions of the common passageway had been sufficient to permit necessary maintenance. His mother had been responsible principally for engaging tradespeople to maintain and repair Seven Gables. His understanding was that tradespeople had not asked permission to use the disputed area. He had spoken to Mr Clunie, a builder, who told him he would just go down. The area was invariably unoccupied and he would use it without asking any form of permission. The window cleaner had given the pursuer a similar account. He had never asked Mr Clunie about whether he had used the disputed area when Seafort was occupied.

[34] He did not know whether anyone other than the window cleaner had used the disputed area since the defenders' took entry to Seafort in 2016. He agreed that the defenders, before building the extension, used the disputed area to store canoes and ladders. The pursuer accepted that the cycle of maintenance that he had described in evidence in chief was in some respects less frequent than that recommended by Mr Vince: JB 10; 4,6. He did not accept that the guttering was badly rusted when the defenders took entry to Seafort. The wall quickly became unsightly because of rust staining from the guttering on to the painted wall, but the guttering itself was in good and serviceable condition.

[35] The pursuer had never discussed rights of access with Ms Smith or her husband. Seafort was used by them as a holiday home, and was not let out commercially. He did not think that his mother had ever discussed rights of access with Ms Smith or her husband, Mr Cordwell-Smith, because it was always understood that the pursuer, his mother, and their tradespeople went down onto the disputed area as they needed to. As far as he knew there had been no such discussion between his mother and Ms Smith and Mr Cordwell-Smith. Mr Cordwell-Smith had arranged for the western wall of Seven Gables to be painted in 2004. There had been a further episode of work in 2011 with painting to rhones and downpipes. The pursuer initially thought it had taken place in 2010, but under reference to JB 144 gave evidence that it had been done in the following year. He had no specific knowledge of any other major works during the time Ms Smith owned Seafort.

[36] He was unable to comment on why the question in the property questionnaire had been answered in the way that it had. He accepted that Ms Smith might not have seen the wall being painted, although he said that she would have noticed afterwards that it had been painted. Shown JB 147, an invoice dated 18 June 2014, he accepted that it might not relate to the western wall.

[37] He did not accept the position advanced by Mr Allan in evidence that the chimney had only been painted once in 20 years. If the wall had been painted, the chimney would have been also. An Ian Howie had also been involved in painting the property, although the pursuer could not confirm precisely when. In relation to the proposition that Mr Allan may have asked permission to access the disputed area, the pursuer suggested that there might be a difference between telling someone that you are about to carry out work and asking their permission to do so. The information might be by way of a safety warning that a ladder was to be erected with work being done overhead. Mr Walls had checked the guttering once a year. The pursuer had not seen that happening, but his mother had told him that it had happened. He had no knowledge as to whether any pipework had been replaced. He had never witnessed a tradesman going on to the roof from the western side of Seven Gables. Mr Clunie had told him that he had taken access to the roof from the disputed area.

[38] He did not know how long it took to clean the windows on the western elevation of Seafort. He did not see the extent to which access had been taken to the disputed area for the purpose of maintaining Seven Gables as being any real hardship to the proprietor of Seafort. Counsel asked a number of questions predicated on the notion that access might have been afforded on the basis that it was not unduly intrusive and was therefore tolerated by Mrs Mary Robertson and not objected to by her. The pursuer said that that possibility had not entered his mind. He pointed out that painting the wall would take much longer than would washing the windows.

[39] The pursuer accepted that his concern that debris would accumulate in the space between the two buildings had not yet been realised.

[40] When the planning application was made, he was concerned about the reduction in space between the properties, but did not think that the extension would come as close to Seven Gables as it had done when built. Part of his objection to planning permission had been on the basis that the extension would harm the character of the conservation area. That concern did not now motivate him in pursuing the litigation.

[41] Asked about the letters sent in November 2017 and January 2018, he explained that he had not been aware at the time they were written that there was a "split" between the common passage and the disputed area. He accepted that it appeared that his solicitors were aware from their conversation with the first defender in January that work was to start 2 weeks later.

[42] The pursuer was generally a credible witness. His ability to speak with reliability and precision about the work done to Seven Gables over the years was inevitability limited by the circumstance that he was away from it for extended periods over the years and that Mrs Ann Robertson rather than he was principally responsible for its maintenance.

Mrs Ann Robertson

[43] Mrs Ann Robertson is aged 78 years and is the mother of the pursuer. Her mother owned Seven Gables from 1966 until 1983. Mrs Robertson began living in Seven Gables with the pursuer in July 1973. Before her marriage in January 1972 she visited Seven Gables every year. In 1983 she acquired two rooms from Dr Oliver, the proprietor of the adjoining property to the east, Easter Gables. She believed that the two houses had formed one property until around the time her mother had purchased Seven Gables. She and the pursuer had left the property in 1978 or 1979 and moved to Comrie in Perthshire at around the time of her second marriage, which took place in May 1979. Her husband liked Seven

Gables and they went there "quite a bit". They spent 3 weeks in the summer. Her husband became ill in September 1979, and they spent time at Seven Gables when he was ill. She continued to live in Comrie after his death in 1980. Thereafter she visited Seven Gables for most of the summer, and also spent time there at Easter.

[44] The property was let during the summer from 1991. It was available for let all year round. When it was not let she continued to visit it every 2 or 3 weeks. A Ms Patullo of Elie Letting organised the lets. The witness, however, if she saw that something needed done regarding the property, organised that herself. She always did the cleaning of the property after a let. Lets were usually for a week, but sometimes for 2 or 3 weeks.

[45] When she first became associated with Seven Gables an older person called Jess was the owner of Seafort. Jess died about 6 years later, and was succeeded by Mrs Mary Robertson in about 1972, who may have been Jess's daughter. Mrs Mary Robertson lived there until Ms Smith purchased the property. Over the years her family had been friendly with the families who from time to time owned Seafort and enjoyed good neighbourly relations with them. She had not known Ms Smith well, but Mr Cordwell-Smith seemed "perfectly nice". She had not met the defenders.

[46] Asked about the layout to the rear of Seafort at the time Mrs Mary Robertson was the owner, she described a little wall along "the alley". The area she described as the alley was the disputed area. After the conservatory was erected during the period of Ms Smith's ownership, it "encroached into the alley", but there was still room, perhaps about 2.5 feet, in which to manoeuvre ladders.

[47] Being near the sea, Seven Gables needed a lot of maintenance, but the harling was very durable. She had never had to repair the harling, just to paint it. The gutters tended to rust because they were cast iron. She and other family members would use the disputed

area to look to see what maintenance was required, about two or three times each year. The windows had probably been painted every 5 to 6 years. The painter would take a ladder and put it in Mrs Mary Robertson's garden in order to paint the bedroom window. She had used Mr David Allan's services for painting for a long time. Before that, when she and the pursuer lived there, there was a "whole gang of painters" who would come. They used ladders in the alley (ie the disputed area) to access the western wall to paint it, including the part of the western wall nearest the sea. There was no other way to paint the windows. She remembered seeing Mr Allan putting his ladders in the garden.

[48] The harling was painted about every 10 years. She had arranged for that to be done. In the very recent past the pursuer and some friends had painted the exterior of the property, apart from the western wall, which they were unable to access because of the defenders' extension. Before Mr Allan, Mr Ian Howie had done the painting. He was now dead.

[49] The rhones and drains were cast iron. They were probably painted at the same time as the windows. Mr Allan had painted the gutters, and she thought that Mr Howie might also have done so, before him. The harling on the chimney was treated in the same way as the harling of the wall.

[50] The roof had been renewed when Mrs Jameson bought the property. It had given no problems. Michael Walls, the gardener from Comrie, had checked the roof, as had Mr Clunie, and also a Mr Melville. Mr Walls had attended to it for about 20 years, but had died in 2016. All of the activities of painting and of checking the roof had been carried out by the tradespeople going "down the alley".

[51] She had been using the same window cleaner, a Mr Delaney, for a long time. He cleaned only the outsides of the windows, by going up a ladder. He would go all the way

down "the alley" to the sea wall. When she lived in Seven Gables a man and his wife, whose names she could not remember, cleaned the windows. She thought she had had the windows cleaned less frequently before the property was let. The frequency of cleaning the windows was maintained for the benefit of the holiday tenants. JB 127, a letting statement from Elie Lettings, included entries for window cleaning by a Mr Baker dated May and June. There were two entries for June, one of which bore to relate to window cleaning from Easter. It also contained an entry regarding a payment to D Purvis, window cleaner, dated 12 July 2005. Elie Lettings had sometimes arranged window cleaning. It was in more recent times that Mrs Robertson had arranged it herself. JB 128 again was a letting statement, and contained entries for window cleaning dated 7 April 2007, and 28 June 2007.

[52] JB 129-136 were all documents issued by Elie Letting relative to Seven Gables, and addressed to Mrs Robertson. They showed window cleaning costs incurred to Squeaky Clean – which Mrs Robertson explained was a trading name of Mike Delaney. They showed charges for window cleaning from Squeaky Clean in May and June 2011; April, May, June, and July 2012; April, May, June, July, September and November 2013; May, June, July, August, September, October, November and December 2015; March, April, May, June, July, August, September, October, November and December 2016; January, February, March, April (two – one described as window cleaning and other as additional work), May, June, August, September, October and December 2017. The documents relative to 2015 to 2018 are in tabular form and appeared to set out comprehensively the income and outgoings handled by Elie Lettings, whereas those relating to 2011-2013 were in the form of statements of account for particular periods.

[53] JB 137 was a receipted invoice from Squeaky Clean relating to work carried out on 28 May 2010. Mrs Robertson's evidence was that it was vouching returned by Elie Letting

for use in preparing a tax return. Mrs Robertson said she forwarded documents to Shepherd and Wedderburn every year for that purpose. She did not think that she got them all back.

[54] JB 142 was a receipted invoice from January 2008 from David Allan which included the following description of work:

> "Front door to wash down prepare, u/coat and gloss, rear of garden to prepare, red oxide, u/coat and gloss to rhones and downpipe, also windows, fascia boards, and prepare, u/coat and gloss."

Mrs Robertson said that she paid the painting bills directly. The reference to rhones and windows would be to those features all around the building. JB 144 was another receipted invoice from Mr Allan, dated 4 November 2011 and relating to "rhones and downpipes, side windows, back rhones and front rhones". The reference to side windows would have been to the windows on the western elevation. Mrs Robertson said that she had not kept all invoices of this sort, as she would have forwarded them to advisers for the production of tax returns.

[55] JB 139 was a receipted invoice from Clunie and Melville, plasterers and slaters, dated 1 February 2011 and relating to "roof repairs in December and January on Seven Gables, Elie". Mrs Robertson did not really remember the matter in question. Some invoices from Clunie and Melville went to her directly, others to Elie Lettings. A further invoice from them dated 17 July 2012 related to "refixing blown up lead flashing". Mrs Robertson thought it related to flashing on or near the balcony, which is on the southern elevation of the property. She had sometimes paid Mr Allan in cash. She had also occasionally paid handymen in cash, but that related to minor work inside the property.

[56] Mrs Robertson imagined that the owners of Seafort were aware of the work being done by tradesmen to the western wall of Seven Gables. They had "possibly" seen her using the disputed area. She did not know whether Ms Smith and her family had lived in Seafort

all the time. She did not think they had, although in cross examination she suggested that Seafort might, at least at one point, have been their main home. She became aware of the defenders' plans somewhat belatedly, as the neighbour notification had "got lost". She was concerned because it appeared the extension was very close to Seven Gables. She telephoned her solicitors, Shepherd and Wedderburn. She wrote a letter of objection to the planning department. It included the following:

> "There is a mutually-owned alley which runs between Seven Gables and Seafort. This alley is very narrow and the proposed plans are to extend the building nearer to Seven Gables, thus encroaching on the alley. This would result in any tradesmen needing to do remedial work, ie, painting gutters, windows etc would be unable to put up their ladders as the alley space would be too narrow."

[57] Since 2018 she had continued to visit the property regularly, particularly during the holiday season. She had seen what the defenders had constructed and she still had the concerns she had expressed in the letter objecting to planning permission.

[58] In cross examination, she agreed that she had had good, friendly and neighbourly relations from the early 1970s onwards with Mrs Mary Robertson. Mrs Mary Robertson had lived in Seafort until her death. She knew the Oliver family quite well. Asked about the layout of Seafort's garden during the time Mrs Mary Robertson owned it, she did not recall there being a gate, other than a gate erected by the Smiths at the street end of the common passage. She accepted that the common passage was of sufficient width to permit maintenance of the part of the western wall of Seven Gables with which it was coterminous. When Ms Smith had erected a conservatory in the garden of Seafort, there had been sufficient space between it and Seven Gables to permit maintenance. The witness, rather than the pursuer, had mainly been responsible for instructing tradesmen, because the pursuer was in the Army. Some work, such as window cleaning, had been arranged by the letting agency. She had not watched tradesmen doing work, but had sometimes initially

gone onto the disputed area with them to see what needed to be done. Sometimes she was not personally present, as she knew the tradesmen in question well. She had never personally witnessed anyone within Seafort looking out to see the tradesmen at work. She thought Mr Allan would have gone ahead with work without asking the proprietors of Seafort, as "it was a communal area". So far as other tradesmen were concerned, she said, "It was just a communal area. They could not ask every time." As far as she knew they had not had discussions with the proprietors of Seafort.

[59] When asked whether she knew if the Smiths had seen work, which had been instructed by her, being done in the disputed area, she referred to the occasion on which Mr Cordwell-Smith had made arrangements for Seven Gables to be painted. She went on to say that Mr Cordwell-Smith had thought that the gutters of Seven Gables were rusty and had suggested to her that she should replace them. She had responded that she would get her painter to come and have a look. Mr Cordwell-Smith had the western wall painted. She had the gutters and windows painted. One of the windows had become jammed with paint and Mr Cordwell-Smith had unjammed it by going up a ladder "in the alley".

[60] Mrs Robertson was asked about an occasion in 2011 when Mr Cordwell-Smith was concerned about the condition of the gutters, and said that that was the occasion to which she was referring. In re-examination, however, she said that the discussion about the gutters and windows could have been at the same time that he painted the wall, or slightly after. She timed the painting of the wall by Mr Cordwell-Smith and the attendance of her own painter to paint the guttering and windows as being shortly after the construction of the conservatory.

[61] Asked about Mr Allan's invoice from 2008 (JB 142), she said she did not have an exact recollection as to the work he carried out at that time. Normally painting would be to

the downpipes and gutters around the whole house. She could not say for sure whether that was the work he did in 2008, but thought it was. There was a small downpipe on the western elevation. In re-examination she said that the 2008 invoice related to an occasion separate from that following from Mr Cordwell-Smith's concern about the guttering. Asked about an invoice dated 2014, she confirmed that it related to interior painting.

[62] As to the painting of the chimney, she had left the frequency of that to the painter. She would not have asked specifically for the chimney stack to be painted. On one occasion when painting the chimney stack the painter had noticed a missing slate. She had not witnessed anyone climbing on to the roof to paint the chimney stack. The western wall had been painted between 1974 and 1979. Counsel suggested that Mr Allan had painted it twice in 25 years. She was not sure whether that was correct, and referred to the possibility that work had been done by Mr Howie, now deceased, during that period.

[63] She had no recollection as to the nature of the work to which the invoices from Clunie and Melville related beyond the description given in the invoices themselves. She was not sure whether or not access had been taken from the disputed area to do that work. Asked about window cleaning, and whether she had personal knowledge that the windows on the western elevation had been cleaned, she responded that the window cleaner was always conscientious and the windows were cleaned well. Elie Lettings had until comparatively recently organised the window cleaning. If she herself noticed that windows were dirty, she would ring up Mr Delaney and organise for him to clean them.

[64] She had never had discussions with any proprietor of Seafort about taking access all the way down to the sea wall. Her family had used the "alley" as Seafort had used the alley. She thought it was understood that it was a communal space. She did not know why the dwarf wall had been constructed, by whom or when.

[65] She confirmed that there were three windows at first floor level in the western wall of Seven Gables.

[66] Mrs Robertson was a credible witness. She was not, however, able to give evidence with precision as to the nature or date of painting work that may have been carried out from the disputed area. She was not able to say precisely to what the various invoices regarding painting referred to in evidence related.

Andrew James Simpson

[67] Mr Simpson is a painting contractor based in Glenrothes. He has been involved in painting and decorating for 28 years. His company is Scott and Simpson Painters Limited. The company has 45 employees and an annual turnover of about £1,750,000. It undertakes work in Fife, Tayside, Stirling, Edinburgh and the Lothians. Mr Simpson visited Seven Gables the week before the proof along with one of his supervisors.

[68] He was familiar with painting the type of harling present on Seven Gables. Normally it required to be washed down before painting. Sometimes fungicide would have to be applied. Sometimes a wire brush would need to be used for cleaning, and sometimes a sealant or stabilising primer would be needed. At least two coats of masonry paint would then be applied. He had observed the gap between the extension to Seafort and the western wall of Seven Gables. He had not been able to enter the gap, and nor had his supervisor, because neither had fitted into it. He had attempted to do so from the northern end but not the southern end. The supervisor had attempted to enter the gap from the roof of the extension, but had been unable to do so. He had reached a point on the ladder where his waist was about level with the roof of the extension, but was unable to go further. Video recordings of their attempts to enter and work in the gap were played in the course of

Mr Simpson's evidence. They had used a dry roller on a pole to see whether it would be possible to use it to paint the wall. They could not access the lowest part of the wall. That part would normally be painted with a brush, as would the interfaces between different contours and different sections of the wall. A roller could get into "a lot" of the area, but not all of it. Although it would be possible to reach nearer to the bottom of the wall with a longer pole, it would be difficult to exert sufficient pressure on the roller by that means to ensure that paint was applied adequately to the harling. The practice of using a brush at the lower edge and on certain other areas was known as "cutting in", and was used where a roller did not access the area in question properly. Without cutting in, the finish would be left untidy and incomplete.

[69] It would not be possible to carry out the preparatory work for painting in the space. Work could only be done from the roof of the extension, so it would not be possible to use wire brushes directly on the surface to remove friable material, or to cut away any defective areas of render in order to reapply render before painting. Direct access to the wall surface would be needed for work of that sort. Mr Simpson would not be happy, from the point of view of a person with responsibility for providing a safe working environment, with sending a person into the space, even if that could be achieved. It was a confined space. It would be very difficult to work in the space.

[70] It would also be impossible to protect adjacent surfaces (such as the wall of the extension) from paint droplets spraying or spattering from the roller. If he were pricing the job, Mr Simpson would ask a scaffolding contractor to accompany him and assess the feasibility of the job and advise as to what scaffolding should be provided. One option might be to access the space using ropes, but that would be a matter for a specialist contractor.

[71] Mr Simpson had provided a report in the form of a letter, which was appendix B in a report by Hardies Property and Construction Consultants, and which reflected the content of his oral evidence.

[72] In cross examination Mr Simpson confirmed that he and his colleague had tried to get into the gap at ground level, although they had not video recorded their attempt to do so. When he referred to a confined space, he had in mind the difficulty of removing someone from the space. If the extension had not been in place, he would have preferred to erect scaffolding to paint the wall, rather than using ladders. In re-examination he said that in a "desperate scenario" he could work with a ladder. When he was instructed, it was not suggested to him that he could get into the gap. He was simply asked to meet a surveyor and to advise how he would carry out the work of painting the wall.

[73] He had not heard of contractors called Darroch and Allan. He was asked what he made of their opinion that the work could be done, and shown video recordings showing a man inside the gap and emerging from it. He remained of the view that it would be extremely difficult to work within the gap, particularly at the narrowest part. Harling repairs were beyond his expertise. It would be impossible to use spray painting in the space.

[74] In re-examination he indicated that the scaffold required to paint without the extension in place would be less complex and expensive than the scaffold required with the extension in place.

[75] I formed the view that while Mr Simpson was a credible witness, his opinion as to the feasibility of carrying out work in the space was coloured by his initial belief that it was not possible to gain access to the gap in order to work within it.

David Vince

[76] David Vince is a partner in Hardies Property and Construction Consultants. He is a building surveyor. He is a chartered member of the Royal Institute of Chartered Surveyors. He gave evidence that he was experienced in the Construction (Design and Management) Regulations 2015, and in particular in the health and safety responsibilities of a principal designer. He holds a construction skills certification scheme professional person card. He had provided a number of reports, the content of which he adopted.

[77] He first visited the property on 2 February 2018, when the conservatory was still in place, and formed the view that the space between it and Seven Gables provided adequate room for the purposes of maintaining Seven Gables. He described the common passage as quite narrow, but sufficient for the purposes of maintenance. In his opinion the wall, windows and rainwater goods would all require regular routine maintenance, particularly in the light of the relatively harsh environmental conditions. He thought the external joinery and rainwater goods would require redecoration every 2 to 3 years.

[78] His remit, in February 2018, was to advise as to the implications of the development as planned. It was also to advise as to measures that might be taken to mitigate the impact of losing the access for maintenance afforded by use of the disputed area, so as to minimise deterioration of the lower part of the western wall of Seven Gables, and providing a means to maintain the upper part of it. His February 2018 report related that the plans for the extension indicated that the new external wall would be constructed tight against the elevation of Seven Gables, producing a narrow wedge-shaped void between the two buildings. He formed the view that the proximity of the extension would prevent any future maintenance of the lower part of the western wall of Seven Gables. His understanding was that that part of the wall would be permanently enclosed, so he recommended a number of

measures to minimise the risk of deterioration or defects to its fabric. Once it was enclosed deterioration ought to be minimal. He had suggested a number of measures. The coating of the wall should be analysed. If it was not breathable, it should be removed and a breathable finish applied. Any damaged finish should be removed and reinstated. The capping detail covering the top of the void should be sealed against Seven Gables. In his report, Mr Vince referred to a need for the detail to be dressed into the subject property, that is Seven Gables. Drainage should be incorporated in the void with a means to clear and rod it out. Consideration should be given to departing from the stepped design of the extension and having it built parallel to Seven Gables. The void might be filled rather than vented to prevent it from filling with debris. None of those works were in fact undertaken.

[79] When the extension was complete, Mr Vince measured the gap at the northern end. At ground level it was 120mm, and at 1800mm above ground level it was 295mm. At the southern end he had not been able to take a measurement at ground level, but the gap was approximately 300mm. At 1800mm above ground level it was 420mm. He had not been able to get more than one of his feet into the gap at the northern end. The gap narrowed from there towards the pinch point, and it would not be possible to work in the gap. It would be impossible for a person to raise his hands so as to work on the wall in front of him, and it would be impossible to crouch down. He raised questions particularly as to where any supply of paint (for example, a tray for use with a roller) would be located; how the extension pole for a roller could be manoeuvred in the space; and as to how sufficient pressure could be exerted to allow paint to be applied efficiently.

[80] He had tried and failed to enter the gap from the roof of the extension using a ladder. It might be possible for a person to enter from the southern end, although it would be necessary to climb along the top of the sea wall, or over the sea wall, to do so. Additional

safety equipment would be needed. There was a significant drop from the sea wall to the beach, which in his view meant that edge production or a harness would be required. There was no permanent feature to which a harness could be tethered. Access from the beach would be difficult as it involved crossing rocks which were slippery with seaweed. There was no level surface on which to set a ladder to reach the top of the sea wall from the beach. He accepted, having seen the video recordings produced by the defenders, that it was possible for a person to be within the space, although he described the process of the person leaving the space as "escapology". He thought the Confined Spaces (Regulations) 1997 would apply to work in the space. Work more complicated than painting, including the preparatory works for painting, would be impossible. His evidence about that was in line with that of Mr Simpson.

[81] It was not clear to him how the eastern wall of the extension had been constructed. It was made of prefinished boarding, and he thought a strip might have been applied from the interior with the remainder being slid into place above it. He thought that the boarding might have been used rather than the timber cladding elsewhere on the extension for ease of construction in the limited space available.

[82] In order to use the extension roof as a means of access work would be needed to make it safe. It would be necessary to remove the pebbles and protect the waterproof membrane before putting up scaffolding and edge protection.

[83] He inspected the property on 28 August 2018 and 31 January 2019, and had visited again in February 2020, shortly before the proof. In the course of the inspection in January 2019 Mr Vince reviewed a schedule of damage that had been prepared by the defenders' architect, Mr Fitzgerald. There had been some areas in which he had noticed damage to Seven Gables not recorded in Mr Fitzgerald's schedule.

[84] Mr Vince explained that the harling or render was a form of waterproofing designed to keep water from the stone structure of the house. The painting on it was not simply for decoration. Because the render was cement-based, it would break down if left exposed and become porous. He accepted that the proximity of the extension would provide a degree of shelter to the lower part of the western wall of Seven Gables. The confined nature of the space, however, meant that when the wall became wet, as it inevitably would, it would take longer to dry out. In February 2020 he had thought that the wall was darker in places and showed more mould and mildew staining than previously, and his impression had been confirmed by comparing its condition with that recorded in photographs taken on an earlier occasion. The earlier photographs had been taken during the month of August. In cross examination he accepted that he could not say definitively whether the inevitable deterioration in the fabric of Seven Gables over time was better, worse, or the same as it would have been had the extension not been constructed.

[85] His opinion was that the condition of the tiling on the top of the buttress would deteriorate. Damage to it would allow water in from the top surface, which would percolate into the structure of the wall. In February 2020 he observed some damage to the tiled finish, and saw that tiles had fallen into the gap between the buildings. He was concerned also about the potential for there to be a build-up of airborne debris in the gap. Any damp material sitting in contact with the wall would be likely to lead to damp penetrating into it. He considered that access would be required to monitor the position and clear out any debris. He did not think that the flow of air into the gap would be sufficient to dry out the wall. His view was that, because the buildings were so close, a breeze would have to be "virtually polarised" in order to blow through the gap. Even if there were no trees sufficiently near to cause leaves to gather, debris would be likely to be thrown up by the sea.

He had not observed any debris in the gap. He could not tell whether there was soil or whether there were small plants in amongst the pebbles on the ground. He disagreed with the view of Mr Clarkson, the defenders' expert, that the air flow would be sufficient to prevent dampness. He likened the gap to congested locations such as low level corners within buildings. Although differences in pressure would cause air to move, the movement in this location would be insufficient to prevent dampness.

[86] Mr Vince was of the view that it was likely that at some stage the gutter of the extension would fail, causing a discharge of water into the gap between the buildings, increasing the risk of damp in the western wall of Seven Gables.

[87] So far as access to the upper part of the wall was concerned, Mr Vince considered that safe access using the roof of the extension would necessitate edge protection on the roof, and additional protection for the roof light in the extension. To erect scaffolding would be a slow process, as it would have to be brought in from South Street. It would take 2 days to erect a temporary structure to span over the roof light in the extension, and perhaps another day to build a higher structure if that were required. It would be difficult to deal with emergency repairs.

[88] Mr Vince had inspected the first floor windows in the western elevation of Seven Gables. He observed that the sash and case windows did not have simplex hinges which would allow the lower sashes to be swung inwards. As a result all the maintenance of them needed to be done externally.

[89] He assessed the distance between Seven Gables and the Smiths' conservatory as 900mm, based on a review of photographs showing paving between them in which the paving consisted of one and a half 600mm slabs. A colleague had undertaken desktop measurements using title plans and come to a figure of 888mm.

[90] In cross examination Mr Vince was asked about his initial contact with Mr Fitzgerald. That had been a telephone conversation of about half an hour. It furthered his understanding of what the proposals were. He had not made any suggestion to Mr Fitzgerald that the pursuer had a right of access over the land within the curtilage of Seaforth. He was discussing practical measures to address the maintenance needs of Seven Gables. He had commented at the time that some maintenance was required at that time. He had not suggested that the construction of the extension should be resisted. He had been asked to comment on the problems created by the construction of the extension, and what the implementation of the proposals would bring. In his view the proposal for the ventilated cavity had been flawed, although he did not think he had discussed the flaws with Mr Fitzgerald. The flaws were the risk of leakage from the gutter and the lack of provision for detecting a leak. Even if drainage in the gap had been incorporated in the design, it would still have been a concern that there was no way to inspect the interior of the cavity. He had not suggested in his first report that the pursuer should not countenance the cavity.

[91] On the basis of his consideration of the plans prepared for the purposes of planning permission, his inspection of the site and his discussion with Mr Fitzgerald he had concluded that the extension would be built "tight" against the western elevation of Seven Gables. He had reached the view that the proximity of the buildings and the dimensions of the void between them would prevent future maintenance to the lower part of the wall. He had made recommendations as to the work that should be done to the wall of Seven Gables before the extension was built and as to particular aspects of the proposed capping detail. Mr Fitzgerald had suggested that there might be an offer from his client to do remedial works to the wall of Seven Gables before the extension was built. Mr Vince accepted that

the purpose of the proposed ventilated cavity had been to avoid the gap between the buildings being open to the elements. He thought, however, that the plan had flaws. He had probably not spoken about those flaws when he discussed matters with Mr Fitzgerald. The flaws were partly addressed in the recommendations he had made.

[92] Mr Vince did not know what loading the roof of the extension would be able to take, and it would need further work to make it a safe means of access for maintenance. He accepted that it would be pre-eminently for a contractor to advise as to whether and how they would be prepared to carry out work in the space, although he qualified that by saying that some contractors were not as alive to health and safety considerations as they ought to be. Even in the context of maintenance work, however, it would be necessary to comply with the Construction (Design and Management) Regulations. Regulation 17 required that there must, so far as reasonably practicable, be suitable and sufficient safe access and egress from every place construction work was being carried out. It required, further, that a construction site must, so far as reasonably practicable, have sufficient working space and be arranged so that it was suitable for any person working or likely to work there, taking account of any necessary work equipment likely to be used there. Regulation 9 placed a duty on designers to consider the implications of their design with regard to maintenance. It was Mr Vince's view that these matters had not been given adequate consideration in the design of the extension.

[93] There had not, to the time of the proof, been a significant build-up of debris in the gap, but that would have to be monitored. The only visible debris was roof tiles.

[94] It was a matter of judgement as to whether 900mm or 800mm was sufficient space for the purposes of maintenance. There was guidance from the Health & Safety Executive to the effect that safe and suitable scaffolding would normally be at least 600mm in depth, and he

had allowed a further 300mm for the erection of the scaffolding. That was a key consideration in his having suggested a requirement for access over an area 900mm wide. He was aware that the common passage measured less than 900mm in width. He accepted that the common passage had been adequate for the purposes of maintenance. He disagreed with Mr Clarkson's view that there were no exceptional challenges involved in maintaining Seven Gables.

[95] In re-examination Mr Vince explained, so far as the ventilated cavity was concerned, the planning permission plans showed a section through the gap, with the roof extending to butt up against the elevation. The drawings showed a shaded mass that extended over the top of the gap and stopped in line with the elevation, but did not detail how the junction would be formed. He had not improved his understanding of that greatly by his discussion with Mr Fitzgerald. If the roof was to butt up against the wall, it would be critical how the flashing detail was done. It was only when the building warrant drawings were available that it was clear that what was proposed was a ventilated cavity. The ends of it were "defined" as ventilation. Mr Vince thought that he had seen those drawings only after the battens had been attached, and after the defenders had departed from the proposal to build a ventilated cavity.

[96] Mr Vince was generally a credible witness. His views as to the practicalities of maintaining the wall of Seven Gables from within the gap were, like those of Mr Simpson, influenced by his initial view that it was not practicable to access the gap. I set out my views in relation to particular aspects of his opinion evidence elsewhere.

John Tulloch

[97] John Alistair Tulloch has worked as a quantity surveyor for 25 years. He is a member of the Royal Institute of Chartered Surveyors and is an associate quantity surveyor with Hardies Property and Construction Consultants. Mr Tulloch's evidence was not significantly different from that of Mr Munro, the defenders' quantity surveyor, and I therefore narrate it only briefly.

[98] He had reported in the first instance as to the costs the defenders would be likely to incur in moving the extension 900mm to the west as at June 2018 (JB 11). His first estimate had been £23,604. He had considered the report by Mr Munro, instructed by the defenders (JB 17). He accepted Mr Munro's criticism, which was that the estimate did not take account of the cost of moving materials to the site by hand from a nearby location. He had therefore increased his estimate by £2,500.

[99] He accepted that it would be appropriate to take into account risk involved in the enterprise. A figure would be allocated to reflect the circumstance that at the start of a project, with no design available, there would be a number of unknown factors which might give rise to costs. Risk would reduce as the design developed and became more specific. He recognised that he should have incorporated a figure of £4,750 in respect of risk as at June 2018.

[100] A further difference between him and Mr Munro was in relation to allowance for preliminaries, overheads and profit. Mr Tulloch had used tender rates from other contractors. Preliminaries would be listed as an item in tenders, but profits and overheads would not. Mr Munro, had, however, shown all three factors separately. Either way of proceeding was professionally acceptable. Mr Tulloch had allowed 12 per cent for preliminaries. Mr Munro had allowed 11.4 per cent. Overheads and profits were included

in the rates used by Mr Tulloch. He had not had a bill of quantities for the work in question, so the best available information was that available from contractors' tender rates current at the time of his estimate.

[101] His revised estimate, taking into account the cost of moving materials and an allowance for risk was £30,584. He considered that would be a reasonable estimate of the cost of moving the wall of the extension by 900mm.

[102] He had prepared an estimate also in respect of the cost of moving the whole extension by 900mm in the sum of £50,000, and had provided a further report (JB 12). He had considered a schedule of damage prepared by the defenders' architect (JB 38) detailing damage to Seven Gables that had occurred in the course of the work to build the extension. He had estimated the cost of repairs at £544.

[103] Mr Munro had estimated the cost of moving the eastern wall of the extension at £58,000. Mr Tulloch indicated that he did not object to the figures used by Mr Munro. His evidence was that if he were to estimate the cost himself at present he would provide a similar figure. He accepted various concerns listed in Mr Munro's report. These were as to how the alteration could be achieved without compromising the membrane below the ground floor slab, which acted both as damp-proofing and as a barrier to radon gas; and that the project would be unattractive to contractors because of the potential for damage to the extension from the alteration.

[104] Mr Tulloch commented that the approaches taken both by him and Mr Munro were in relation to a high level estimate, and that their figures would be likely to move closer as further information became available about the project and the detail of its design. Both of them had made assumptions, and their assumptions might differ. Mr Munro was entitled to have reached the view that he did.

[105] Mr Munro had expressed the view that it would be unlikely that both the east and west walls of the extension could be relocated while leaving the remainder of it in place. Mr Tulloch's view was that it might or might not be possible. The extent of the work required would be subject to the design.

[106] Mr Tulloch had taken account of the valuation certificates in considering the money expended on the extension as at June 2018. He had reached a figure of £68,000, which was similar to the figure proposed by Mr Munro.

Fraser Mitchell

[107] Fraser John Mitchell has practised as a solicitor for 15 years. Since August 2019 he has been a member of the planning and environment team at Shoosmiths. Between 2003 and 2019 he was employed by Shepherd and Wedderburn.

[108] The pursuer is a longstanding client of that firm. In April 2017 one of the private client solicitors approached Mr Mitchell because the pursuer was interested in objecting to applications for planning permission and listed building consent relating to the property next door to his in Elie. The application was live on the Fife Council website, and Mr Mitchell had access to the relevant documents using the planning portal.

[109] Mr Mitchell drafted and submitted a letter dated 1 May 2017 stating objections (JB 33). He took instructions from Mrs Robertson by telephone. He learned that she was aware that an application was being made in connection with Seafort. She had concerns about the impact on "their" own house if the development were to be built. The main concern in was in relation to a "lane" that existed between the properties, and the consequences of the development for the maintenance of the roof, gutters and windows on the gable end of Seven Gables. There was an existing conservatory extension, but repairs

could be carried out from a ladder. The proposed new extension would reduce the area available for a ladder to be placed, and that would prejudice their ability to repair and maintain the gutters, roof and windows. Mrs Robertson was the source of the information contained in the letter of objection.

[110] The letter included the following passages:

> "The proposed extension to the eastern side of this south elevation will have an unacceptable impact on the amenity enjoyed by [the pursuer] as the proprietor of Seven Gables.
>
> There is a narrow lane located between Seven Gables ([the pursuer's] house) and Seafort (where the development is proposed) which is around half a metre in width. The location plan submitted with the applications notes that the proprietors of both houses have rights of common access over the lane, suggesting that each proprietor has equal right to the lane.
>
> The applications plans clearly indicate that the proposed extension will encroach into this lane. The existing glass conservatory has caused practical issues for [the pursuer] in terms of exercising his rights of access over the lane. The proposed extension, which would result in the width of the lane being narrowed further, which would exacerbate these issues (sic).
>
> Amongst other things, the lane provides a crucial area within which workmen (local builders, roofers and the like) can place an extendable ladder in order to inspect the roof at Seven Gables and carry out any necessary maintenance and repair. The current width of the lane causes practical issues for these workmen, although working within it is still possible. If the lane was narrowed further, as would happen if the extension proceeded, it is unlikely that they could continue to place extendable ladders in it and carry out necessary maintenance and repair works, which would be to the detriment of the structure and fabric of Seven Gables."

and, in relation to listed building consent:

> "In our view, the materials that are proposed for the extension are not in keeping with the listed buildings, and that their use would harm their setting and features. These materials are referred to in the application documents and include black stained timber cladding, perforated metal sliding screens, and pre-oxidised copper. The external appearance of Seafort, as noted on the Historic Environment Scotland listing, is 'colour washed rubble'. Importantly, its south elevation, on which the extension is proposed, faces the sea and can be easily viewed from a range of places. The proposed extension would therefore have a prominence which, in our submission, elevates the special regard that the Council must have to the desirability

> of preserving the building and its setting, and the special architectural and historic interest that it possesses."

[111] Mr Mitchell submitted further representations to Fife Council by email dated 4 May 2017:

> "The photographs contained the Design Statement prepared by WT Architects may give the appearance that the lane between Seven Gables and Seafort is wider than it actually is. We would therefore strongly recommend that the case officer dealing with the application carries out a site visit prior to determining the applications."

The email also indicated some uncertainty as to the height of the extension relative to a window on the gable wall of Seven Gables. Mr Mitchell sent it after a further conversation with Mrs Robertson. He said in evidence initially that Fife Council notified him in July 2017 that both applications had been granted, but accepted in cross examination that planning permission had been granted on 1 June. He told Mrs Robertson. After that he had a telephone call with Mrs Robertson, because she was concerned as to whether or not something would be happening relative to the application "in the short term".

[112] In October or November he was in communication with the pursuer as to the next steps in the matter. As a result he agreed to send a letter to the owner of Seafort (JB 56). The letter is dated 8 November 2017. It is headed "Proposed extension – Seafort", and reads:

> "We act on behalf of [the pursuer], the owner of Seven Gables, being the neighbouring property to yours on South Street, Elie.
>
> Our client is aware of your proposals (contained in planning permission reference (17/00747/FULL and listed buildings consent 17/00747/LBC) to extend your property. The plans and photomontages that accompany these consents indicate that the proposed extension will involve the demolition of the existing conservatory and the erection of a new extension to the rear of Seafort.
>
> The plans also suggest that there may be some degree of encroachment into the lane that is located between Seafort and Seven Gables.
>
> In the documentation that was submitted in connection with the planning application, the lane was identified as 'common property'. We enclose a copy of the Title Deed which contains a description of the lane (highlighted in orange) and

> confirms that it is joint property'. This clearly indicates that neither party shall be entitled to the exclusive use of the lane.
>
> The lane is an important feature of Seven Gables. Amongst other things, it provides vital access to the side of Seven Gables in order for regular works to be carried out in relation to the maintenance of the roof, gutters and windows.
>
> Our client has therefore instructed us to make it clear to you that should any encroachment into the lane occur then he will seek to enforce his property rights in relation to the lane."

The reference to the Title Deed leads to a footnote to the letter, which reads, "Disposition by Robert MacKenzie in favour of James Murray's Royal Asylum for Lunatics dated 15 May 1893." Mr Mitchell's understanding was that the "lane" was held in common between the two properties. When he wrote the letter he had not seen the title relating to Seafort. The letter was sent by recorded delivery. He had not known that Seafort was used only as a holiday home. It was returned undelivered. It was addressed to "The Owner". Mr Mitchell acknowledged in cross examination that he knew from the planning applications the identity of the architect acting as the defenders' agent, and that an alternative course open to him would have been to try to communicate with the architect.

[113] A further letter (JB 58) dated 8 January 2018, but otherwise in identical terms, was sent by ordinary post and recorded delivery.

[114] On 19 January Mr Mitchell received a call from the first defender in response to the letter. Mr Mitchell's file note (JB 76) was composed by dictation shortly after the conversation, and he confirmed in his oral evidence that its contents reflect his conversation with the first defender. The reference in it to "Richard" are references to the first defender, and "FZM" is Mr Mitchell's reference:

> "Richard explaining that he had received by letter in respect of the lane between Seven Gables and Seafort. Richard's view was that there was a misunderstanding in relation to the lane. When he acquired the property, he had received the Title Deeds and also plans from when Mrs Smith (the previous owner) had built the

> conservatory. These showed that the lane which is in common ownership extended only as far as the rear elevation of Seafort. The wall was built from the rear elevation of Seafort. The wall to the side Gable of Seven Gables. That wall had a gate in it so the lane could be accessed. Richard expressed a degree of sympathy for Major Soulsby but made the point that he wanted to maximise the living space in his refurbed conservatory/extension, and also maximise the space in the back yard which was quite small in any event.
>
> Richard offering to send across the Title Deeds and also the Plans in relation to the conservatory. Stuart & Stuart were representing Richard in the purchase and he would instruct them to send those over. FZM explaining that would be helpful. We would review the Plans, discussing matters with Major Soulsby and take instructions, and get back to Richard next week if possible.
>
> Richard explaining that the start time for the contractors was in around 2 weeks. He was in Elie this weekend to clear the property so it could be handed over. His ultimate view was that this was based on a misunderstanding, and that he didn't want to fall out with Major Soulsby, but that his priority was to make sure his extension was built out the way he wanted it."

[115] The suggestion that the "lane" only went half way down the sides of the properties was a new one to Mr Mitchell at this stage. The file note also records a call that Mr Mitchell made to the pursuer after his conversation with the first defender. During the afternoon of 19 January the first defender sent two emails (JB 59 and 60) to Mr Mitchell. With them he sent various documents, including the title sheet and relative plan. It later transpired that the plan was not wholly accurate, and required to be amended, but that is not material for present purposes. The first defender reiterated in his email that the narrow alleyway that was shared ended approximately at the rear door of Seafort. Mr Mitchell formed the view, having considered the documents the first defender had sent, that the first defender was correct about this. The email produced at JB 59 also contained a representation that the defenders envisaged that the extension would be "sufficiently supportive" to allow access to the gable above, and saw no reason why there would be any issue accessing the gable from time to time once the work was complete, subject to precautions to protect the extension.

[116] Property disputes were outside Mr Mitchell's normal area of practice, and he consulted colleagues in the firm's property dispute resolution group, and property department. Colin Archibald in the property dispute resolution group referred Mr Mitchell to Stephanie Hepburn. Mr Mitchell consulted Emma De Sailly in the property department regarding the title. Ms De Sailly investigated the titles and provided advice. On 31 January 2018 Ms Hepburn and Mr Mitchell spoke further to the first defender by telephone. Mr Mitchell did most of the speaking. He and Ms Hepburn were in a room together and listened to the call to the first defender on a speakerphone. The file entry relating to the conversation is JB 78. It contains passages indicating that Mr Mitchell and Ms Hepburn told the first defender that they accepted that the titles showed that the common passage extended to a point slightly beyond the rear elevation wall of his house. It goes on,

> "From the information we have been given from Major Soulsby, our view is that he has acquired further rights through the passage of time regarding the repair and maintenance of Major Soulsby's wall. What is less clear at the moment is whether Mr Jones' proposed extension, if it is built, to what degree that will interfere with Major Soulsby's rights. We have instructed a surveyor in relation to this matter."

The file entry then records that the first defender explained that the gap between the properties would reduce when the extension was built. The gap would be enclosed at either end so that there would be no requirement for maintenance of the pursuer's wall. It would no longer need regular painting, because it would not be exposed to the elements. The first defender estimated that the gap between the properties would be 1.5 to 2 feet. It records that the first defender again indicated that there would be no difficulty with the pursuer's obtaining access from the roof of the extension, with permission. The first defender is recorded as saying that the "alleyway" was created 12 years earlier, which appears to be a reference to the gap left between the conservatory and the western wall of Seven Gables. The note relates that the first defender said that just because he had given permission to the

pursuer to use the area to access his property, that did not give the pursuer any rights.

There follows this passage:

> "FZM advising that in Scotland, if you exercise a right for 20 years, that right can then be crystallised. It won't be written down expressly in the titles but it is an implied right acquired through a period of time. Whilst the passageway wasn't necessarily there 12 years ago, the land was.
>
> FZM advising that we have gone back over 120 years in the titles and the common access lane certainly has been on the titles for that length of time. FZM acknowledging that it may be that the bit beyond the common access wasn't there in terms of being an alleyway but the land was there. We are not suggesting it was a passageway, we are simply saying that our client has acquired an access right over the area by his use."

The first defender is recorded as saying that he did not think the granting of a "formal right" regarding access would be an issue, and suggesting that Mr Mitchell and Ms Hepburn might want to speak directly to his architect. The final paragraph of the note relates that the first defender confirmed that the work was due to start "on Monday".

[117] Mr Mitchell formed the impression that the first defender understood what was being said to him. There was discussion with the first defender as to whether "the rights actually were there" and as to what solutions there might be. The first defender made comments that made it clear that he did not think that "the rights were there". He was aware that the pursuer was asserting rights. In cross examination Mr Mitchell accepted that the first defender was co-operative, and that the discussion was constructive.

[118] Mr Mitchell again spoke to the first defender by telephone on 5 February 2018, and completed a further file entry (JB 80). It includes the following:

> "Mr Jones called to explain he had received my email telling him that David Vince from Hardies had carried out a site visit, reviewed the approved Plans in relation to Mr Jones' Planning Permission, and intended to phone Mr Jones' architect today to discuss the proposed solution in respect of the part of Major Soulsby's gable wall that the extension would be built adjacent to.

> … Mr Jones raising the issue of an express right, that FZM and SFH had raised with him on the phone last week. Mr Jones explaining that he had discussed things with his solicitor (Stuart & Stuart)."

It contains also a record of discussion as to an agreement between the pursuer and the first defender regarding access, and whether the pursuer might wish to have a form of agreement that would run with the land, rather than a personal agreement. That discussion was Mr Mitchell's last involvement with the matter.

[119] Mr Mitchell was a credible and reliable witness. His evidence was consistent with the correspondence and file notes to which he referred in his evidence.

Stephanie Hepburn

[119] Ms Hepburn is a solicitor and a senior associate at Shepherd and Wedderburn. She qualified as a solicitor in 2011, and became employed by Shepherd and Wedderburn when the firm took over the practice of Tods Murray. Her practice includes the litigation of property disputes, other types of litigation and crofting law. Mr Mitchell approached her towards the end of January 2018 in relation to the pursuer, and told her that there was a contentious property dispute in the pipeline and asked for her "input" in relation to prescriptive rights of access. The title had already been reviewed by the firm's property department. She had access to the title deeds for both Seafort and Seven Gables.

[120] She participated in the telephone call with the first defender on 31 January and was the author of the file entry relating to it (JB 78). That was indicated by the presence of her initials in the reference in the heading of the file entry. After the call she dictated the note and it was typed by her personal assistant. She would usually take notes during a call. She said that she recalled the conversation independently of the file entry. She explained that the reference in the file entry to title investigations was to investigations carried out by

Ms De Sailly. Ms Hepburn had spoken to her, and also had a written summary as to the relevant title provisions.

[121] By the time of the conversation she had come to appreciate the distinction between the common passage and the area in relation to which there was a dispute. She had reached the view that the pursuer had acquired rights through the passage of time, on the basis of information provided to her by Mr Mitchell about the use of the area by the pursuer and his family since 1996. It was not clear to her precisely how the extension was to be built. She checked the local authority portal to see whether building warrant plans were available. She said that there was no approval of building warrant plans listed when she looked. Also by the time of the call Shepherd and Wedderburn had received fee estimates from a number of firms of surveyors. Hardies were instructed on 31 January or 2 February after the call with the first defender.

[122] Ms Hepburn said that she remembered independently of the file note Mr Mitchell's assertions to the first defender that the pursuer had acquired rights through the passage of time. It reflected her view, and her advice to Mr Mitchell, but it was Mr Mitchell who spoke during the call, and she took the note. She advised the file entry was accurate in recording those assertions. She was in no doubt that that proposition was put to the first defender. The file entry was accurate also in its record as to the practical solutions that the first defender suggested might be adopted to assuage the pursuer's concerns. One of the things discussed was whether an express right of servitude might be granted. The first defender raised the matter, but suggested a contract between himself and the pursuer personally, rather than a servitude.

[123] The first defender's estimate during the conversation of the gap between the buildings after construction of the extension as between 1.5 and 2 feet had surprised her. It was wider than she had understood from Mr Mitchell and the pursuer.

[124] Ms Hepburn first visited Seven Gables on 2 February 2018, and met Mr Vince and Mrs Robertson there. She took the majority of the photographs numbered 85-104 in the joint bundle although Mr Vince had taken some, as had the first defender's architect. She had added notations to them detailing the dates on which they had been taken, and confirmed the accuracy of those notations. She was not party to the call between the first defender and Mr Mitchell on 5 February. She became aware of it the following day. Mr Mitchell handed over the file to her at that point to take forward "from a litigation perspective". She was waiting for a report from Mr Vince. When he reported to her initially it was orally or by email.

[125] On 6 February she contacted Mr Cameron of Stuart and Stuart Solicitors, who had acted for the defenders in the purchase of Seafort. She wanted to have a discussion between solicitors to see whether the dispute might be resolved. She prepared file entry JB 82. Her evidence was that it was accurate and that she recalled the conversation independently of the file entry. Her intention had been to discuss the matter with Mr Cameron and advise him that Seven Gables benefited from a right of access by virtue of prescription and to see what his response was. His response was that he did not doubt that the pursuer had got a prescriptive right.

[126] The file note included the following:

> "SFH saying that there seems to be a bit of a dispute simmering between our clients and she wanted to get a feel for Mr Cameron's view. Mr Cameron said he has no idea what the dispute is over, as far as he is concerned there isn't a dispute.
> Mr Cameron saying that it is clear from the parties' titles where the common access line extends to. SFH explaining that the area in dispute seems to be the area past the

common access lane towards the sea. Mr Cameron saying that Major Soulsby has no rights over this area. SFH saying that we have been exploring prescriptive rights. Mr Cameron saying that he doesn't think there is any doubt that Major Soulsby has a prescriptive right and referencing a case from last year. He doesn't think anyone would challenge that.

SFH asking, if that is the case, would Mr Jones consider granting an express right to Major Soulsby? Mr Cameron saying that Mr Jones is willing to grant a contractual right to Major Soulsby to use his property to access the wall for repairs but as far as Mr Jones has told Mr Cameron, there will be no gap in the future which will make it easier to do the repairs by standing on Mr Jones' roof.

SFH saying that a contractual right obviously doesn't run with the land and our client would prefer an express right. SFH asking why, if they are so sure Major Soulsby has a prescriptive right, they are unwilling to grant a deed of servitude? Mr Cameron indicating that Mr Jones thinks that Major Soulsby will sell before he does so it isn't really a concern to him whether it is a real right or not. It is Major Soulsby who wants the real right so that it binds any of Mr Jones's successors. Mr Jones doesn't know who Major Soulsby's successors will be and therefore doesn't know who will be exercising the access rights.

Mr Cameron suggesting that we could refer to the prescriptive right of access in the contractual, personal right.

SFH advising we have instructed David Vince of Hardies to assess matters, look at the property and assess whether there are any other practical solutions for taking access and whether the option proposed by Mr Jones is practical and safe. Mr Cameron appreciating that we need to do this exercise and understanding the rationale.

Mr Cameron saying he doesn't see that there is really an issue here and he doesn't think anyone should be falling out over it. SFH agreeing and saying that is her objective, to try and resolve matters without there being a falling out. Obviously we both have to manage our client's expectations in terms of what rights they (a) are entitled to and (b) can insist upon.

SFH saying she will need to talk to Major Soulsby about all of this and take instructions and asking whether she should revert to Mr Cameron or Mr Jones directly? Mr Cameron advising she should revert to him."

[127] Ms Hepburn was concerned by Mr Cameron's reference to the case "from last year". She did not know which case he meant. He had told her it was about the maintenance of a wall, although that detail was not included in the file entry. She was worried that she had missed a judicial decision of significance to her area of practice, and emailed Ms De Sailly.

She consulted the 2017 edition of the "Conveyancing" publication by Professors Gretton and Reid. She thought that if there was a key case it would be in the publication. She found that the publication referred to a case from "the fifties or sixties" which the authors were bringing to the attention of the profession. I note here that the case in question was *Brydon* v *Lewis*, to which further reference is made elsewhere in this opinion.

[128] The reference to there being "no gap in the future" was at odds with what the first defender had told her. Ms Hepburn's evidence was that she did not know what was to happen on the ground. She could not recall when Mr Vince had told her the outcome of his discussions with the defenders' architect. She said that her reference to trying to resolve matters without a "falling out" represented both her own genuine attitude to the matter, and the instructions that she had from the pursuer. She wrote to Mr Cameron on 10 April 2018 (JB 61). The letter included the following:

> "We enclose copies of the titles. You will note that there is a Common Access Lane on Seafort … that is used by our client (and was used by his mother as his predecessor in title) to enable access to be taken to the rear west side of Seven Gables. There is a strip of ground beyond this Common Access Lane (which we have coloured brown on the plan enclosed with this letter for ease of reference) (hereinafter referred to as the 'Strip of Ground') that is used by our client (and was used by his predecessor in title) for the purposes of repair and maintenance to the rear west side masonry walls, rainwater goods, roof and chimney at Seven Gables. We are advised that this access has been exercised as of right for a continuous period in excess of 20 years and that it has been exercised openly, peaceably and without judicial interruption.
>
> On this basis, and in terms of section 3 of the *Prescription and Limitation (Scotland) Act 1973*, it is clear that Seven Gables benefits from a prescriptive right of access over the Strip of Ground for the aforementioned purposes and is therefore exempt from challenge. We understand from a conversation with Gordon Cameron that the fact there is a prescriptive right of access over the Strip of Ground is not disputed by your clients."
>
> and
>
> "We understand that your client has obtained planning permission to erect an extension to the rear of Seafort. According to the plans submitted with your client's

> planning application, this will be larger than the conservatory currently in situ and would replace the existing conservatory. Our client's position is that, should your clients' proposed extension proceed as planned, our client's right of access over the Strip of Ground for the purposes aforementioned will be obstructed."

[129] The letter went on to narrate that the pursuer had received advice about proceedings for declarator as to the existence of the right in question, and about "interim interdict and/or removal of the extension and any work done to date". It related the view of the author that the pursuer would be successful in seeking "declarator and interim interdict", but then went on to say that the pursuer was prepared not to raise proceedings providing certain conditions were met. These included the grant of a deed of servitude, and an undertaking that the defenders will not "commence their development work" until the deed has been submitted for registration and acknowledgement received from Registers of Scotland. Other conditions included particular requirements about the development works said to have been recommended by Mr Vince. One of these was in relation to analysis of the render coating of Seven Gables for "breathability", and the possible replacement of the wall covering, depending on the outcome of the investigations. The conditions included sealing against Seven Gables the capping detail over the void between the buildings, and a number of other requirements as to the materials and construction to be used in creating the ventilated cavity. Finally, there was a condition requiring the defenders to carry out any repairs then currently required to the upper section of the western wall of Seven Gables. The letter concluded by stating that the author would recommend to the pursuer that proceedings be commenced if the defenders did not provide an undertaking not to commence development of the proposed extension by 5.00pm on Friday 20 April 2018.

[130] Counsel asked Ms Hepburn why matters had reached "the stage of a rather more express statement" of what the legal position was. She responded that she thought that

during the earlier telephone calls the assertion of a prescriptive right had been made clear. What was more clear by 10 April was the impact of the obstruction on Seven Gables, because Mr Vince's report was available at that stage. She said that the pursuer was "not at all" set on litigating at that time, but was willing to if necessary. When she was on site on 1 or 2 February, the conservatory was still in place. There was nothing on the local authority portal to indicate that a building warrant had been granted. She thought the first step would be to demolish the conservatory, and there was no basis for stopping that from happening. When she wrote the letter she thought that the building of the extension had not commenced.

[131] After Mr Vince had visited the site and prepared a report, Ms Hepburn discussed it with the pursuer, and advised him as to seeking interim interdict and as to the risks in expenses. He was keen to try to find a solution that avoided the expense of court action and instructed her to use the information from Mr Vince to try to negotiate a solution. Mr Vince had had reservations about the proposals that came from his discussion with Mr Fitzgerald, and his report contained suggestions as to how the extension might come to be built.

[132] DLA Piper Solicitors replied on the defenders' behalf on 19 April 2018. Enclosed was a draft deed of servitude. The letter included the following:

> "Dealing, firstly, with the access issue, your client asserts that he has acquired a prescriptive right of access over a defined area lying within Seafort, and that by virtue of the fact that he has been exercising access over the area as of right, openly, peaceably and without judicial interruption for a continuous period in excess of 20 years. You will no doubt have seen from our clients' title that they have only owned Seafort since 2016. Therefore, irrespective any representations that our clients may have made to your client, our clients are not in a position to confirm whether your clients have exercised the access in a way which would be sufficient for a prescriptive right to have been established. Their position on that is, therefore, reserved. That aside, our clients are amenable in principle (subject to the remaining terms of this letter and without any obligation to do so) to granting an express right of access to your client over a defined route within Seafort to enable your client to continue to clean, maintain and decorate the building on Seven Gables as required."

> "As regards your proposal, however, that our clients do not commence their development works until such time as the Deed of Servitude has been signed by both parties, presented for registration in the Land Register and an acknowledgement received from the Land Register, as your client is no doubt aware, our clients' contractors are already on site. It will not be practicable, therefore, for our clients to delay construction as you suggest …"

The letter contained a rejection of the condition regarding analysis of the render coatings of the wall of Seven Gables. The author of the letter pointed out that sealing of the cavity capping was already proposed, "in the detail of our client's design proposal, which, as above, your client has been invited to view". It rejected certain other conditions so far as the construction of the cavity was concerned. It rejected the condition that the defenders carry out any repairs then currently required to the upper section of the western wall of Seven Gables.

[133] Ms Hepburn did not understand there to have been contact between the pursuer and the defenders directly. She thought the reference in the letter to representations by the clients was a reference to the content of her call with Mr Cameron.

[134] Ms Hepburn's answer, when asked whether she was at that time aware that there were already contractors on site, was that she was aware that "maybe some works" had been carried out, but nothing substantial. She was "not sure". When she received the letter from DLA Piper she thought that matters would proceed to a resolution. She was concerned about the rejection of the conditions aimed at "protecting" Seven Gables. She took instructions from the pursuer. Before he had reached a concluded view, it became apparent that the capping and sealing of the void between the properties involved attaching the extension to Seven Gables and the attachment took place. She was not personally aware that this was envisaged, and, so far as she could tell, neither was the pursuer or Mr Vince.

[135] The pursuer had received photographs of the extension and it was clear that items had been attached to Seven Gables by means of drilling into the western elevation. The pursuer was shocked that this had happened. Ms Hepburn wrote to DLA Piper on 25 April (JB 63):

> "… it has been brought to our client's attention that your clients' contractors have attached two wooden structures onto the west wall of our client's property. We enclose photographs that our client received from Richard Jones which evidence this. You will see from the second photograph that the lower wooden panel has been drilled or screwed directly into our client's property. It is not clear whether the upper wooden structure is resting against our client's property or has been permanently affixed.
>
> It may be that these two structures are temporary. Nevertheless, your client has no legal right whatsoever to rely on our client's wall for any purpose at all (whether temporary or permanent), nor have your clients received any consent from our client to enable them to do this. This is a clear case of encroachment on our client's land and is not acceptable. In addition, we assume your clients intend to make good any damage caused to our client's wall.
>
> There is nothing in your clients' planning application that indicates the construction will involve relying on our client's wall. Indeed the plans submitted with the application specifically state '*new construction offset from adjacent building*'. Should the construction attach onto our client's rear wall, your clients will not only be encroaching, but will also be in breach of their planning permission."

[136] The wooden structures had been removed, but the damage to the wall had not been made good. In the course of a telephone call with Ms Hepburn the first defender had suggested that his construction team might be stood down until a resolution was reached. She referred to that conversation in the penultimate paragraph of the letter, saying that the pursuer would like to take up that suggestion. So far as she was aware the construction team was not stood down pending resolution of the matter. JB 64 was an email from Ms Hepburn, dated 16 May 2018. It included the following:

> " … it is now clear that your client plans to leave only a very small gap between his extension and the rear west wall of Seven Gables.
>
> …

> Whilst my client is pleased that your client has now agreed to remove the fixings and to make good any damage, this work disclosed that enabling the cavity to be ventilated and sealed would involve attaching directly into the wall of Seven Gables. That position was not communicated to my client at all. His consent to drill into his property was not sought and any reference to a compromise in respect of this gap/cavity in our letter of 10 April was made without this understanding. Now that my client has been made aware (by virtue of the work commencing without his knowledge or consent) that your client's proposals to seal and cap the gap involve attaching fixings to my client's property and relying on it for support, in effect rendering the properties semi-detached, the offer made in our letter of 10 April is now withdrawn.
>
> …given it has now become apparent that your client cannot cap and seal the void, or adopt David Vince's recommendations, without encroaching on our client's property, our client is no longer willing to accept an express right of access. He therefore requires your client to amend his plans to ensure that his right of access is not obstructed. We have sought advice from David Vince that a distance of 900mm is required to be left between the properties to enable our client to adequately (and safely) access his property for the purposes of repair and maintenance. This distance is no more than the area over which the existing right of access is currently being exercised."

[137] At this point Ms Hepburn thought it likely that court action would be required. JB 65 was a further letter from her to DLA Piper, dated 25 June 2018. It responded to two contentions raised in the meantime in correspondence, namely that no servitude right of access exists, and that the pursuer had delayed in raising the existence of the servitude right of access until works had been progressed significantly. The letter referred to the telephone call of 31 January 2018. It asserted that the defenders were aware of the pursuer's position before work started on site, and chose to proceed at "his" (sic) own risk. The letter conveyed an offer of £40,000 towards the costs of moving the extension "to the agreed distance from [the pursuer's] property" and in return for a formal servitude right of access. By the time of this communication a summons had been served. The figure of £40,000 followed from advice provided by John Tulloch. Mr Tulloch had provided a figure of £23,000, and the offer was pitched so as to try to be attractive.

[138] The defenders rejected the offer, and on 27 June 2018 Ms Hepburn's colleague Ms Elaine Brailsford wrote to DLA by email in these terms:

> "Thank you. All noted. Obviously the cost of completing the extension is at your clients' risk.
>
> Our Quantity Surveyor's report indicates that the cost of cutting back the extension at this stage does not seem to be anywhere near the costs you have suggested.
>
> It is regrettable that an extra judicial settlement has not been reached."

[139] Ms Hepburn confirmed that she had been involved in preparing paperwork for the litigation. In relation to vouching for work done to Seven Gables, some historic files in the tax department had been found which contained information that had been produced in the present process. She said it was hard to tell whether everything of relevance had been found. The historical files were haphazard. The vouchers were not in folders, but bundled in envelopes and poly pockets.

[140] In cross examination Ms Hepburn accepted that sometimes a demand made on behalf of a client would be committed to writing, and that certain assertions of right and proposed conditions had been included in the correspondence produced as JB 58 and 61.

[141] At the time of the conversation on 31 January she was aware of the first defender's position as recorded by Mr Mitchell in his file entry relating to the conversation on 19 January 2018, both as to the potential for using the roof of the extension to provide access, and as to his representation that contractors were due to start 2 weeks later. She was aware of the title position and of information as to the use of the "lane" – which I understood to be a reference to the disputed area and the common passage together. She was aware of the distinction between the two. She would have been aware of the first defender's position as disclosed in the two emails that he sent to Mr Mitchell on 19 January.

[142] Counsel put to Ms Hepburn the first defender's position, which was that he did not remember any discussion to the effect that a right was being asserted. He recalled only a discussion about the express grant of a right. Ms Hepburn said she was surprised if that were his recollection. She accepted that if she had asserted that right in writing, there would be no room for doubt about the matter. She did not accept that the first defender could have come away from the conversation thinking that it concerned only the creation of a right in writing to assuage the concerns of the pursuer. After Mr Mitchell had asserted that a right existed, the first defender had said, "I don't think there is a right". The first defender said that there was no passage or alleyway "within Seafort", and Mr Mitchell tried to explain that there was no formal, delineated passageway, but that they were asserting that there was a right over an area in the garden. She was aware that if a right had been asserted, it was being disputed. The discussion was then about finding a solution which would involve the grant of an express right. The first defender did not think that access over the roof would be an issue, although he was concerned about the potential for damage to the roof.

[143] Ms Hepburn said that her understanding of the first defender's representation to her on 31 January that the work was due to start on Monday was that the work would be demolition. She accepted that the defender had not said anything to suggest that the nature of the work would be only demolition. She knew that he had planning permission both for demolition of the conservatory and erection of the new extension.

[144] When she spoke to Mr Cameron she understood him to be a residential conveyancing solicitor, rather than a litigator. Counsel suggested that the call lasted only 3 or 4 minutes. Ms Hepburn's recollection was that it was longer than that, but not so much as half an hour. She accepted that the call was of a relatively informal nature to explore how matters might be progressed, rather than one in which she anticipated resolving definitively

the rights and obligations of the parties. In the course of the call it was clear to her that the defenders were willing to grant a contractual right of access to the pursuer personally, but not to grant a deed of servitude.

[145] Ms Hepburn had assumed that demolition would be the first work to be done, and had also looked for information as to the grant of a building warrant. So far as the actual progress of work on the ground was concerned, she was unable to obtain instructions from the pursuer because he was not contactable. She was unsure as to the precise extent of the period during which he was not contactable. He was not contactable during the month of March. She had told the pursuer that the first defender had referred on 19 January to work starting in 2 weeks. She believed that there had been discussions about works commencing in the course of February, although the pursuer was not in Scotland at the time. She asked the pursuer to make investigations. She knew that Mrs Robertson was at the property regularly. Ms Hepburn herself personally, at the time, had no knowledge of when the works started or how they progressed. There was a gap of months between her first visit to the property on 1 or 2 February and her next visit. On the latter occasion the extension was pretty much complete. She did not receive communications from the pursuer in February or March as to what was happening on site.

[146] The next discussion was regarding the attachment to the property in April, which was followed by the letter of 25 April. Before that, she did not know what was happening on site. Although Mr Vince had been on site, that was, also, before work started.

[147] At the time of writing the letter of 10 April, she had Mr Vince's report, but was not aware that sealing the capping detail against Seven Gables would involve "attaching onto Seven Gables". She received Mr Vince's report in February. She had forwarded it to the pursuer, who wanted to discuss it with Mr Vince before taking further action. As at

10 April, Ms Hepburn did not think matters had changed from the pursuer's perspective. He had been clear from the start that the extension would have a material impact on his ability to maintain his property. The mention by the first defender of a gap of 1.5 to 2 feet made her wonder whether the pursuer's concern was a valid one. She had needed input from Mr Vince on that point. The impact of the proposed extension was clear by the time she wrote the letter and sent it. The letter contained the first indication given in writing that the pursuer was minded to litigate. Ms Hepburn said that the possibility of litigation was always made clear to Mr Cameron. She accepted that she had not suggested at any earlier stage that there might be a threat to the extension in the form of a motion for interdict.

[148] So far as she was aware Mr Cameron had not visited the site. He had not claimed to her to have any knowledge of his own as to the use of the disputed area by the pursuer or his tradesmen. She was not sure whether, by April 2018, she was aware of the content of the single survey questionnaire.

[149] Asked about who drafted the letter of 25 April, she responded that she thought she had done so. Ms Brailsford might have had some input into the drafting. That her name was at the end of the letter did not necessarily mean she had drafted it. She could not explain why no file entry had been produced relative to the call in which the first defender had offered to stand down his construction team pending resolution of the dispute, although she had referred to that offer in the closing paragraphs of the letter. She said that the letter of 10 April had been emailed to the first defender and that he had called her on the same day. He had been angry on receipt of her letter. He had said, "You use a lot of big words, do you not?" He had been surprised at the legal terminology used in the letter and asked her to explain the terms "interdict", "declarator" and "minute of agreement". She had explained that an interdict was similar to an injunction.

[150] Counsel asked Ms Hepburn whether, when writing the letter of 10 April, and seeking an undertaking that works should not commence, she had been proceeding on the basis of information that the work had not started, or whether she had been proceeding on an assumption. She responded that she thought it was her assumption, but could not say for sure. She was uncertain because, she thought, the letter was drafted a while before it was sent. She could not remember how long that was, but said it was weeks, rather than days. It had not been drafted as early as the beginning of February, following her visit to the site. It had probably been drafted at the start of March, after she had seen Mr Vince's report, which she had received in mid-February. She had not checked whether the development work had started before she issued the letter.

[151] Ms Hepburn was generally a credible and reliable witness, and in relation to most points her evidence was supported by and consistent with the terms of correspondence and file notes. Her evidence was vague as to why there had been no contact between her firm and the defenders between early February and 10 April, and in consequence I did not regard her evidence in relation to that particular matter as reliable.

Michael Reid Delaney

[152] Mr Delaney was aged 50 at the time of the proof. He lives in Leven, and has worked as a window cleaner for the last 15 years. He trades under the name "Squeaky Clean". His evidence was that he had cleaned the windows at Seven Gables since 2007. He did not know whether or not he had taken over from another window cleaner. He usually cleaned the windows monthly, and had a standing instruction to do so from the letting agent, Ms Patullo of Elie Lettings, and subsequently East Fife Holiday Homes. He had also dealt directly with Mrs Ann Robertson. He understood Mrs Robertson to be the owner of Seven

Gables. He identified JB 137 and 138 as bills he had rendered to Ms Patullo on, respectively, 28 May 2010 and 31 May 2012 for window cleaning. Absent a clerical error on his part, he said, there should be a similar bill for every month. His normal remit was to clean all the windows at Seven Gables. They had to be cleaned from the outside, because they were sash and case windows, which did not open and turn from the inside.

[153] He recalled there being seven or eight windows in the western gable. Asked how he gained access to it when he first visited in 2007, he replied that permission was sought from the owner of the neighbouring property, and access was permitted through their wooden gate. He confirmed that he had sought permission. He had knocked on the door, found someone in, and asked if it was all right to go down the side alley to get to the rest of the property. He had not seen the person again. He did not know who the person was. He had never subsequently seen anyone at Seafort.

[154] Some of the windows on the west side were cleaned with a pole system, and some by ladder. When he first visited he noticed a slab path between the two properties. He cleaned some of the windows on the western side of the property by hand, and others using a water fed pole system.

[155] The passage between Seven Gables and the neighbouring building was formerly about 2.5 feet wide. It was a tight space, but did not present a problem. A new, larger extension had, however, been built. Since it had been built he could not reach the last two or three windows on the west side, and he could not get onto the sea wall to access the flat roof area facing the sea to clean the bedroom windows above.

[156] In cross examination he accepted that the arrangement with letting agents pertained to the summer months. He cleaned the windows "nine or ten" times a year. He would do so at Christmas and possibly also New Year, depending on whether the property was let or

not. He normally cleaned between April and October, and again possibly in December. He did not know that there was a dispute between the parties about access rights.

[157] By reference to photograph 55 in JB 125 he identified the two upper floor windows in the southern part of the western wall of Seven Gables. His evidence was that it had formerly taken him about 5 or 6 minutes to wash them, using the water-fed pole system. He had on one occasion attempted to wash the windows by going on the roof of the extension, and had been able to do so.

[158] I accepted Mr Delaney's evidence, taking into account the concessions he made in cross examination as to the frequency of cleaning, as credible and broadly reliable.

Paul Oliver

[159] Mr Oliver is 58 years of age. He is the owner of Easter Seven Gables, 2 South Street, Elie. The house had been "in his family". He thought his parents bought it in 1963 or 1964 from cousins. When they purchased the property it included the house now known as Seven Gables. They retained the eastern part of the property, and sold the remainder to the pursuer's grandmother, Mrs Jamieson. His parents separated in 1977. His mother received the house when they divorced, and sold two further rooms to Mrs Robertson, the pursuer's mother, in 1983. Mr Oliver inherited the property. Easter Seven Gables had never been his principal residence. He said that as a boy he went there for weekends "all the time", and that he spent summer and other holidays there. When he was 18 years of age he went to St Andrews University and used the house from time to time when he was a student. He described a pattern of visiting irregularly, sometimes frequently, and other times not, and of visiting more often in the summer when the weather was better. In 1984 he moved to London and visited less frequently. He was not particularly clear or specific as to the extent

of his visits during the 1980s or 1990s. He said that he was married in 1995, and that he visited more as his children were growing up, in August, at Easter and during half term holidays.

[160] Mr Oliver said he had not been inside Seven Gables frequently. He had visited when invited for drinks, and had a cordial relationship with the pursuer. He recalled that when he was a child and young adult, there had been a small wall which "defined" a "path" south of the kitchen window of Seven Gables. The wall ran parallel to the exterior of Seven Gables. The area defined by the wall was wider than the common passage from South Street between the buildings. He estimated its width as 2.5 to 3 feet. Garden lay to the other side of the wall. He saw the area defined by the wall being used for maintenance. He said there was an "old boy" called Sumner or Sumpter whom his father instructed to look at the sea wall after storms, and when tiles were missing. He would take access "down that track". He went on to say that he would not see this happening, as he was at school in the 1960s and 1970s, but would hear conversations to the effect of "Sumpter will fix it". In answer to a leading question he confirmed that he was clear that the use of access extended to the use of the "path" to the south of the kitchen window, along the full length of the western wall of Seven Gables. Mr Sumpter did not paint the house or houses.

[161] Mr Oliver recalled that at one stage "early on" Easter Seven Gables and Seven Gables were painted together as one house. He said that there was no question in his mind, and "no debate" that the full length of the area was used for maintenance. When asked directly what he had observed himself, however, he gave answers indicating he had been an irritating child who had interfered with the paint. Counsel pressed him as to what he had seen. He responded by referring to the need to bear in mind that he was at school and only at the house during weekends and holidays. He said that "if there was a problem, [the

work] would be done as and when by this chap". He had heard talk about the work done by Sumpter. Mr Oliver was young at the time and was not directly involved. He did not think he had observed any use of the area for maintenance in the 1990s. He was not paying particular attention at the time, and was in his "own side of the house" with his young children.

[162] Mr Oliver said he had been surprised when permission was granted for Ms Smith's conservatory. After it was built there was still a means of passage to the side of it. He did not recall any use being put to the area between the conservatory and Seven Gables. He "suspected" that the conservatory had been built in a position to permit maintenance of Seven Gables. He regarded the new extension as extraordinarily close to Seven Gables. He said that on his own property there was a void that he cleared of sand and seaweed. Without being invited to do so, he expressed his opinion that the gap between Seven Gables and the extension would fill with seaweed, sand, flotsam and jetsam.

[163] In cross examination he disclaimed any spirit of congeniality between his family and that of the pursuer, saying that while there was no animosity between them, they were "distant". He was unsure as to the name of the proprietor of Seafort in the 1960s. He thought that a brother and sister lived there together in the 1980s and 1990s. He said that everyone in South Street Elie was "congenial" and would chat. He said, apparently in contrast to what he said in evidence in chief, that he had lived there all his life. He said that he did not have relationships with neighbours with whom he did not share a boundary. In relation to the pursuer, he characterised the relationship as one between congenial neighbours. They would go for drinks at one another's houses, but not for dinner or supper.

[164] Mr Oliver expressed the view that it was "inconsiderate and outrageous" to have built so as not to allow the house next door to be maintained. He said that he required to

remove debris from a void at his property three to six times each year. The frequency depended on the incidence of storms. He was asked again about whether he had seen tradesmen using the land at Seafort for access. He said that Sumpter went down to do the gutters, and said he had witnessed painting. He said that it was "a long time ago". He did not know whether there had been any discussion with the proprietor of Seafort about access. He did not remember any gate restricting access to Seafort beyond the common passage, and referred to a dog or dogs as having run in and out without obstruction. He said that he did not remember much from before he was 10 years of age. The last time he had seen anything of relevance to the present inquiry would have been in the late 1970s or early 1980s. He said it was impossible to say how many times he had seen the access used for maintenance, but that it was not more than ten times.

[165] I was not impressed by Mr Oliver's evidence. His demeanour and attitude when answering questions from Mr Sandison was different from his demeanour and attitude when answering questions from Mr Thomson. In the former case, he sought to convey a degree of bluff charm, although the content of his answers demonstrated that he was making an effort to volunteer answers which he thought would assist the pursuer, rather than on all occasions answering the question Mr Sandison had asked. His tone towards Mr Thomson risked the appearance of arrogance. His evidence was largely irrelevant, and to the extent it might have been relevant, I am not prepared to place any reliance on it.

David Allan

[166] Mr Allan was 51 years old when his evidence was taken on commission. He gave evidence that he had been a self-employed painter and decorator for 30 years, operating mainly in Elie. He had done exterior painting work to the west side of Seven Gables, on the

instructions of Mrs Robertson. He had not met the pursuer, but had met Mrs Robertson on a couple of occasions. He had painted the chimney, walls, rhones, downpipes and windows on the western side. He recalled the construction of Ms Smith's conservatory some 10 to 15 years earlier.

[167] He described the harling on the wall of Seven Gables as very large, in the sense that the chips that formed part of the harling were large in size. He would usually paint harling of that sort with a brush. He said that was because he was "old fashioned" and that "brush [was] best". A roller would allow quicker work, but would not be as good. It would be hard to roll paint on the surface with a roller, and a better job would be done with a brush. In re-examination he said that the roller would do the same job as a brush, but that it would be more difficult.

[168] Mr Allan said that he had coated the chimney. He said that Mrs Robertson did not paint it very often. He had probably painted it once in 20 years. In cross examination, however, he said that he had probably painted the chimney twice in that period. He had painted the rhones and downpipes from time to time. He had painted the window frames. Rust manifested itself from metalwork on the paintwork of the wall within about a year or two. He said that Mrs Robertson did not paint the metal items frequently enough to prevent them from rusting. He said, "She only waits until it's falling off before she does painting." He had painted the wall surface probably twice, on a cycle of about once every 8 years. He would not paint the chimney separately, and it would be painted at the same time as the rest of the wall. The windows, rhones and downpipes would be painted once every 5 or 6 years, probably once every 5 years.

[169] When he first visited, there was no conservatory or extension in the garden of Seafort, and he would do the paintwork using a ladder. When the conservatory was built,

he only had about 2 feet to work in. It was more difficult to work, but he still managed to do so. He said he always asked permission from someone at Seafort before starting to paint the western aspect of Seven Gables. He would ask if they were in, or wait until they came back and get permission to enter. He did not know who the owners were, and the owners changed quite a lot. People at Seafort had seen him doing his work on perhaps a couple of occasions. No-one had ever asked him what he was doing. He said, "As long as you asked they seemed to be okay about it."

[170] With the new extension in place it was now impossible to use ladders as he had done previously. In his view it would be necessary to place battens on the roof of the extension to reach the upper part of the wall of Seven Gables. It was impossible to get into the gap between the buildings at ground level. A gap of at least 2 feet was required to enable him to paint the whole of the wall, and perhaps 3 feet in order to reach the chimney above.

[171] Asked about 6/84 (JB 142), Mr Allan confirmed that it was an invoice from him addressed to Mrs Robertson in January 2008 for work done at Seven Gables. It referred to exterior paintwork including rhones, downpipes, windows and fascia boards. He agreed that it included those elements on the west side of Seven Gables. Similarly he agreed with counsel that 6/86 (JB 144), an invoice dated November 2011, related to rhones and downpipes on the west side of the building. Production 6/87 related to work down on the sea-facing elevation of the building.

[172] In cross examination Mr Allan said that he had first painted Seven Gables about 25 years earlier. He had painted the external walls only on a couple of occasions during that time. He said that it was very rarely that Mrs Robertson instructed that work. He had painted the windows and rhones perhaps four times in total. When he was there to paint the walls, he would also paint the windows and rhones. So far as the western gable beyond

the end of the common passage was concerned, there were no rhones, downpipes, windows or doors at ground level. He said that it was impossible to paint the wall at the ground level, with the new extension in place. He had not tried to do so. It was not impossible to paint the windows, rhones and guttering. The presence of "chips" on the roof of the extension would make it difficult to use for access, as they might cause a ladder to slip, and the pressure of the ladder on them might damage the roof.

[173] Describing the layout of the land at Seafort before the conservatory was built, he said that he entered from a gate at the road, went along the space between the buildings, then went into the garden through a second gate.

[174] I did not have the opportunity to observe Mr Allan's demeanour, but my impression from the record of the evidence taken on commission is that his evidence as to the frequency for the work was based on what he thought would be a likely cycle of works, rather than on a recollection of any cycle upon which he actually did work at the property, and that he was prepared readily to accede to suggestions made to him as to the location of the work referred to in the invoices put to him. I am unable to place much reliance on his evidence as to the frequency with which he in fact carried out painting work to the western elevation of Seven Gables.

Defenders

[175] The first defender gave evidence. The defenders led evidence from Thomas Fitzgerald, whose evidence was interposed in the course of the pursuer's case, James Brindle, Wojciech Eisler, Neil Clarkson, Malcolm Cordwell-Smith, and Kenneth Munro.

The first defender

[176] Richard James Jones was aged 49 years at the time of the proof. He is a company director, and resides in Harrogate. He is the CEO of a company that manufactures static caravans. He has previously worked as a finance director, and is a chartered accountant. He and the second defender, who is his wife, purchased Seafort as a holiday home in 2016. They knew that the conservatory had been added by the previous proprietor, Ms Smith. The gap between it and the sea wall was 2 to 3 feet wide. The gap between it and Seven Gables to its east was about 3 feet wide. The area between the conservatory and Seven Gables was used for storing ladders, tiles and plant pots. The defenders formed the impression that Seven Gables was not in a good state of repair, based on their observations of its exterior.

[177] When they viewed Seafort, Ms Smith showed them around. She told them that the common alleyway that led to the rear of Seafort ended where the conservatory began. Nothing could be kept or stored in it, but beyond it was the property of Seafort. The common passage or alleyway ended at about the rear door where the conservatory began. They had no particular discussions with Ms Smith about the conservatory itself, or what the lie of the land had been before it was built. They saw the plans for the construction of the conservatory, which showed an open courtyard to the rear, with a small abutting wall and a gate into the courtyard from the common alleyway. Ms Smith did not say anything to them about the owner of Seven Gables having any rights beyond the common alleyway, or about their having made use of land beyond it from time to time. The content of the questionnaire in the single survey was consistent with what they had been told. They relied on it. Their solicitors did not suggest that the owner of Seven Gables had any right of access over the

ground. They had no dealings with the pursuer or Mrs Robertson before purchasing Seafort.

[178] The defenders obtained entry on 1 July 2016 and began to use Seafort as a holiday home. They tried to use it during most school holidays, and visited every 6 weeks to 2 months. In the summer they would stay 2 or 3 weeks, and at other times a week or 10 days. They appointed architects not long after they purchased Seafort. They wanted to make better use of the interior space. They found the conservatory hot in summer and cold in winter, and wanted to create a more "usable" space. They wanted to remove the conservatory and replace it, and to use the land then between the conservatory and Seven Gables to build on. The land was used only for storage and to provide access to the rear courtyard. They sought planning permission and listed building consent. The gap between the properties was to be made smaller. In the initial plans the gap to the roof level of the new building would be formed into a sealed, ventilated cavity. The area would become like an interior wall and not require maintenance. He confirmed that the design statement setting out the materials and plans (pages 19 and following of JB 31, the planning application) accorded with his intentions for the development.

[179] The defenders saw the objections from the pursuer and Mrs Robertson online. His reaction to the assertion in the pursuer's letter of objection that the plans encroached on the lane in respect of which the proprietors had rights in common was that it was incorrect, because the common access lane did not extend to the area on which the extension was to be built. The defenders, through their architect, submitted information to the council detailing the ownership rights in relation to the land on which they proposed to build the extension.

[180] After they obtained planning permission, the defenders engaged architects to obtain quotations, to prepare detailed drawings for the building warrant application and to obtain

tenders. The defenders selected Green Olive Projects. Their quotation and plan of works (JB 39) reflected an overall value of around £387,000 for the work, which included work to the existing building of Seafort. The architect dealt with the various applications and with entering into the building contract. The first defender thought he had entered into the contract in January, before work started in February. He accepted he had signed the contract in late March.

[181] Before receiving the letter dated in January 2018 from the pursuer's agents, he had had no contact with the pursuer regarding the development. The first defender regarded the letter as "restating" that the defenders were building on land that was owned in common, a contention that had been dealt with at the stage of the planning application. After he received the letter, the first defender communicated with Mr Mitchell, and provided him with information to indicate that the area was not in common ownership. They discussed whether the defenders would be willing to provide a right of access to allow the pursuer to maintain his property. So far as he was concerned there would be no difficulty in accessing the wall of Seven Gables from the roof of the extension, and he had no issue with allowing access means.

[182] The first defender recalled the telephone discussion of 31 January 2018. The only significant particular in which his recollection of the discussion differed from the file entry and the oral evidence of Mr Mitchell and Ms Hepburn was in relation to assertions by Mr Mitchell that the pursuer already benefited from a right constituted by use over a lengthy period of time. In all other significant respects his oral evidence was consistent with theirs, and with the file entry. He recalled a discussion about the gap being reduced between the properties so that it would no longer be open to the elements or require painting. He recollected saying that the gap would narrow to 1.5 to 2 feet, and that there

would be no issue about access being taken via the extension roof. Similarly, he recalled a discussion to the effect that the "alleyway" (in this context the access to the east of the conservatory) was something that had been created 12 years earlier, when the conservatory was built. He recollected saying that he would need to speak to his wife and his lawyer regarding any grant that would bind future proprietors.

[183] He did not recall having referred to giving permission in the past for access. He did not recall saying that work was due to start on Monday, but said that he would have done so. He did not recall anything being said to the effect that the pursuer had acquired rights over his land. In summary, he recalled the discussion to the effect that the pursuer's agents were going to draft a document detailing how access over Seafort was to be granted, so that the defenders could consider it. They were drafting it because no right presently existed. Nothing was said to him to suggest that he must not proceed with the extension or that he must alter its dimensions or location.

[184] The first defender's evidence was that he spoke to Gordon Cameron, who had acted for the defenders in the purchase. The first defender told Mr Cameron that he had been asked whether he would grant a right of access over the property. Mr Cameron did not express the view to him that Seven Gables already benefited from rights of access over Seafort. The first defender was aware that Mr Vince and Mr Fitzgerald had had a telephone conversation. He was not given details of what was discussed, but Mr Fitzgerald indicated that the meeting had gone well, that they had discussed the plans, and that Mr Fitzgerald had offered to show Mr Vince more detailed plans. Mr Vince had not required to see these. He had not been made aware of any problems or "red flags" in the light of the discussion between Mr Vince and Mr Fitzgerald.

[185] The next communication the first defender received was in April. On 9 April he made a number of calls to Shepherd and Wedderburn to inquire how they were progressing with the document they were drafting. He telephoned three times and was told that Mr Mitchell was on holiday. On 10 April he heard that the matter was being dealt with by Ms Hepburn, and he received the letter dated 10 April by email. He did not understand the content, given the previous discussions between the parties. He had been expecting to receive a draft deed for consideration. He understood the letter to be saying that the defenders should not be building in the manner that they were. That had not been said before. Nothing had changed regarding the plans for the extension. The pursuer had not previously represented that the extension would make it impossible to carry out repairs and maintenance. He had not represented that the extension might damage the integrity of the western elevation of Seven Gables. The defenders discussed with their architect the pursuer's proposals regarding particular aspects of the development works. The defenders did not consider that it was their responsibility to carry out any remedial works to Seven Gables in respect of matters that already needed repair. The defenders themselves had made no representations to the effect that they accepted that there was a right of access, and they were not aware that anyone else had done so on their behalf.

[186] In early May the pursuer and the first defender met on the site. They discussed the extension. By that time construction of the cavity had started, and the builders had fixed battens into the wall of Seven Gables. The pursuer was concerned about that and said that he did not want it to happen. He did not want the properties to be "fastened" to each other. So far as the first defender was concerned, those were parts of the projected works which were being completed according to the plans. He nonetheless offered to remove the battens and leave a gap between the properties, finishing the wall of the extension as an external

wall. The first defender accepted that there had been no prior discussion of that with the pursuer, or an agreement that battens would be attached. The first defender had thought that because Mr Vince and Mr Fitzgerald had met and discussed the plans, the attachment of battens would have been discussed and agreed at that time.

[187] The discussion between the pursuer and the first defender was principally about the battens, rather than anything else about the extension. The meeting ended with the pursuer saying that he would discuss matters with his solicitors as to what the options were. There was thereafter a series of correspondence between solicitors. By email dated 16 May (JB 64) the pursuer's agents represented for the first time that the access required to be 900mm wide.

[188] The extension element of the work cost about £170,000. The total cost of the works at Seafort was in the region of £370,000. As at 10 April 2018 the existing conservatory had been demolished, a concrete slab foundation installed, the steelwork was on site and construction of the extension had started. By that time, the defenders had spent about £50,000 on the extension. They had committed other funds to it. Materials for it were being ordered, or had already been manufactured, as some of them had lead periods for their construction. By the time the summons was served in June, a great deal of the construction work had been done for the extension, and most of the materials for it ordered. The defenders consulted their architect and quantity surveyor as to the level of costs incurred. They discussed whether if they removed the extension or tried to move it whether any of the materials could be used, and how much it would cost to move the extension. Morham and Brotchie produced a list of costs incurred (JB 54). It detailed construction costs to date for the extension of £66,000 excluding VAT and fees, and listed a further £25,000, again exclusive of VAT, for costs committed to materials for the extension. The architect's fee was a percentage of the construction costs.

[189] It was possible to access the narrow gap now existing between the properties. The first defender had seen his architect access it. The builders had had to finish the wall of the extension from within the gap, as the original design had had no external cladding at that side, given the plan for a ventilated cavity. The defenders had offered through their agents to make good any damage caused by the works, including the attachment of the battens, and to repaint the western gable wall up to the level of the tiles on the buttress (JB 73, 10 August 2018; JB 74, 24 August 2018). The pursuer had not agreed to that work being done. It was not practical now to remove the extension or move it 900mm to the west. It would be necessary to seek fresh permissions and start the design process all over again. It would not be possible to move just one wall, and the defenders would need to redesign and rebuild the extension completely. The space would be significantly compromised if the extension were 900mm narrower. The first defender remained willing to grant rights of access over the extension.

[190] In cross examination the first defender accepted that he had understood from the terms of the objections to planning permission that their authors were not referring to the common passage, but to the area to its south, when referring to encroachment into a "lane". At the time he had no idea as to whether the factual assertions about the use of the area for maintenance were correct. There was no reason, from looking at the condition of Seven Gables, to suppose that maintenance work to the wall had been carried out only up to the end of the common passage. He had not communicated with the pursuer about the pursuer's objection.

[191] The first defender did not remember any encounter with the pursuer just after New Year in 2018. He had not been in the country on 2, 3 or 4 January that year. He did not recall the incident the pursuer had described in his evidence. He did remember the pursuer

coming round to Seafort at some stage, but believed that that had happened in summer 2017 after the grant of planning permission. His recollection was that the pursuer had called on him in the summer and invited the defenders for a drink. The first defender asked the pursuer whether he would like to discuss the plans. The pursuer had responded in the negative, and indicated that the invitation was simply for a drink. The defenders had declined because they had their children with them.

[192] In relation to the letter (JB 58) which he received in January 2018, he again accepted that it must relate to encroachment in an area to the south of the common access. It did not relate only to the area actually owned in common. That was how he had understood the communication at the time he read it. He was aware of the extent of the area owned in common because it had been the subject of express discussion during his purchase, and the subject of express provision in the missives.

[193] In cross examination the first defender's position was that the author of the file entry for 31 January 2018 had recorded something that had not been said in relation to the assertion that the pursuer had acquired a right of access over Seafort. He confirmed that he understood that it would be a "problem" for his case if there had been such an assertion. At the end of the conversation on 31 January the first defender was aware that the pursuer was looking for "ongoing permission" to access the defenders' property. At that stage the first defender had not granted that permission or committed to do so.

[194] He accepted that he may have said to Ms Hepburn, on 10 April, that he was willing to stand down his builders, although he did not recall having done so. He had understood that the need for battens to be attached to Seven Gables had been "sorted out" between Mr Fitzgerald and Mr Vince. He so understood because Mr Fitzgerald advised him that the meeting with Mr Vince had gone well, that the former had offered the latter sight of further

information and drawings, and those had not been required. Following communication about the battens the defenders stood down their builders from work on the extension for a period. The purpose of doing so was to discuss whether to remove the battens and leave the wall open to the elements, or to leave them in place and create a ventilated cavity. The pursuer was very clear that he did not want the properties to be attached to each other, so the defenders agreed to remove the battens and leave a gap between the properties.

[195] The first defender was a credible and reliable witness save in relation to discrete passages of evidence which bore on matters which were potentially contrary to his interests in the litigation. The most obvious and significant of these was his recollection of the telephone conversation on 31 January 2018. His evidence that he did not recall or did not understand from that conversation that the pursuer's agents were asserting on the pursuer's behalf that he benefited from an existing right of access over the disputed area was not credible and reliable. His recollection of the conversation was in other respects largely at one with those of Mr Mitchell and Ms Hepburn. The first defender was a business person who appeared well capable of understanding a professional person who was explaining a legal matter to him. I do not accept that he was confused by the conversation or misunderstood it.

Thomas Fitzgerald

[196] Mr Fitzgerald holds the degrees of Bachelor and Master of Architecture, and has been a registered architect with the Architects Registration Board since 2015. He is an associate architect with WT Architecture. The defenders approached that firm in July 2016 to explore the possibility of making alterations to Seafort, including the building of an

extension. The existing conservatory was not making the best use of the site, and his brief was to "create an exemplary piece of contemporary architecture better suited to the site".

[197] The defenders made him aware at an early stage that they owned the passage from South Street in common with the pursuer. The land from the northern end of the conservatory running south to the sea wall belonged only to the defenders. WT Architecture prepared drawings and designs, and eventually plans. They made an application for planning permission and listed building consent on the defenders' behalf. Mr Fitzgerald was personally involved in making the applications. By the time they applied for planning permission they had prepared outline drawings at a scale of 1:100, plans and elevational drawings, and an outline description of the works sufficient to permit a quantity surveyor to provide an outline cost. Despite objections from the pursuer, Mrs Robertson and the Architectural Heritage Society of Scotland, planning permission was granted on 1 June 2017.

[198] Once the defenders obtained planning permission, the project moved to RIBA Stage 4, with the preparation of more detailed drawings and designs demonstrating how the building was to be constructed, to allow contractors to tender for the works. WT Architecture prepared more detailed versions of the floor plans and elevations; structural engineering designs were prepared by others, and details were provided in relation to finishes, lighting and the like. Following a tender process, the defenders selected Green Olive as the contractor. Green Olive were given access to the site on 5 February 2018, although the building contract was not signed until the end of March.

[199] A building warrant application was submitted. That process normally involved some discussion between the architects and the council regarding compliance with building standards. That process took place, and the council issued a building warrant on 13 February. He identified various plans and drawings, including that produced at JB 24, as

having been submitted and approved in relation to the building warrant. He had on 6 February notified the council that work was to commence, with effect from 12 February. He acknowledged that work had started before the building warrant was issued. He said that this was because there had been a delay in the council's administrative processes, and that it was not unusual for work to start in this way.

[200] Mr Fitzgerald was challenged in cross examination as to the propriety of the works' having started before the building warrant was available. In re-examination he explained that there was a collaborative process involving phone and email contact with the building standards officer regarding any compliance issues. Once those had been resolved, the local authority was "obliged" to issue the warrant. At that point there had been an unexplained hiatus during which the warrant had not been issued. He understood and expected that the building warrant would be issued. There was nothing particularly unusual in the sequence of events in this project.

[201] WT Architects were retained as architects and contract administrator. Mr Fitzgerald personally was involved in the certification of work for the purposes of monthly interim payments. The contractor had a programme of work which indicated that the project would be completed in August 2018. Practical completion was not achieved until December 2018, for a variety of reasons, including contractor and supplier delays. Mr Fitzgerald attended all the site visits (detailed in JB 84), other than one which took place on 25 April. The visits designated progress meetings were minuted meetings with the contractors. The architects kept a photographic record of the site. He was responsible for the issue of the interim certificates produced in JB 45 to 51. He confirmed that the works were carried out. He issued a certificate of practical completion on 13 December 2018. The works were carried out in accordance with the building warrant, with the exception of the original design

relating to the eastern boundary of the extension. An amendment was sought for that. The change meant that there was no connection between the new extension and the western gable wall of Seven Gables. The omission of the connection meant that the eastern wall of the extension was exposed. It was necessary to incorporate suitable cladding and make changes to the design of the guttering, and make some minor changes to the electrical layout.

[202] The original intention had been to "make best use of" the defenders' land by bringing the extension as close as possible to the western side of Seven Gables. The buildings would have been connected by an extra wide gutter bridging the gap between them, designed to be a continuation of the waterproof roofing. It would have formed the top of a cavity. WT Architects were instructed to make changes following objections from the owner of Seven Gables. The council approved the amendment, which was sought after the work had been completed.

[203] Mr Fitzgerald had one telephone call with Mr Vince in the week of 5 February 2018. The first defender had told him to expect the call. He knew Mr Vince was working for the pursuer. He expected that Mr Vince would call to discuss generally the proposals relating to the project. Their conversation was concerned with the technical details of what the defenders were proposing with regard to the extension. There was a particular focus on the eastern boundary, the bridging from the extension and how it touched the side of Seven Gables, on issues as to how the connection would be made, the materials used to weatherproof the top of it, and ventilation of the cavity below. Mr Vince was aware that there would be a connection between the buildings. They did not discuss rights of access over land, but Mr Vince did communicate a question as to whether the defenders would consider incorporating into the design the ability for people to use the flat roof for access to

maintain parts of Seven Gables. The roof was never specifically designed to facilitate that, but with some or no modification it would stand light foot traffic.

[204] By reference to photographs taken by him or a colleague, Mr Fitzgerald confirmed that the conservatory was removed during the first week that contractors were on site. By 4 April 2018 the primary steel superstructure of the extension was in place. The post and beams to which timber would be attached were in place. Before the steelwork had been erected the concrete floor slab had been completed, and the drainage and other works underneath it. By 10 April the timber joists of the roof structure were in place. The contractors had started to install the timber frame for the wall structures, and to build low walls of concrete blockwork. Alterations had been made to the sea wall. By 25 April the external envelope – the walls and roofs – were largely complete. Insulation had been installed in some areas. By June the roof insulation and waterproof membranes were in place, and the roof was for the most part watertight.

[205] There had been a week's delay in the project when the defenders paused to consider what to do. WT Architects had been asked to consider with the quantity surveyor the costs incurred and the cost of redesigning the extension.

[206] It was Mr Fitzgerald's view, based on his initial visit to the site in July 2016 and his visits thereafter, that Seven Gables was not well maintained. The rainwater goods were visibly corroded, with corrosion stains bleeding on to the surrounding rendered walls. The woodwork of the windows did not appear to have been painted or furbished in some time. Mr Vince had alluded to the poor state of maintenance of Seven Gables when the two spoke.

[207] Mr Fitzgerald had been inside the gap now existing between Seafort and Seven Gables. He could get in at either end, and had done so. The contractors and their workmen had done so also. He had not witnessed the contractor installing the external cladding on

the eastern side of the extension. It would not, however, have been possible to install it otherwise than from within the gap. The extension had never been designed with a view to providing access for maintenance. The presence of the gap resulted from omitting the bridging.

[208] Counsel asked whether the amended design accommodated safe access. He did not answer the question asked, but replied that the CDM regulations did not propose particular dimensions for a safe access route. There would have to be a risk assessment by maintenance contractors for any particular proposed work. Asked about the proposition that a building warrant should not have been granted for a design that did not allow access for maintenance, he responded that the building warrant application did not propose a gap. The council had approved the amendment. He had not heard of a local authority's declining to grant a building warrant on the basis of difficulties with access, particularly in relation to domestic projects. It would not be practical to move the eastern wall of the extension to the west by 900mm because the work do to so would be destructive, the costs high, and the risks substantial. The clients would rather remove it entirely. He accepted that it was necessary to consider access requirements, particularly in projects concerning complex historic buildings.

[209] In cross examination Mr Fitzgerald confirmed that he had discussed the nature of the objections to planning permission with the defenders. He had discussed the objections with the planning officer. The objections alleged that the defenders were going to build on land owned by the pursuer. That was incorrect, and he had told the planning officer so. Pressed by counsel he conceded that he had understood the objection to relate to the land along the whole western elevation of Seven Gables, and not just the common passage. The defenders shared that understanding.

[210] Counsel asked Mr Fitzgerald whether as at 10 April 2018 it would have been feasible for the defenders to stop and "rethink" the works. He accepted that it would have been possible to redesign at a lower cost than would have arisen at a later stage, but said that the question was one properly for the quantity surveyor who had considered the matter.

[211] Mr Fitzgerald accepted that there had been some damage to the wall of Seven Gables in the form of the holes drilled for the wooden battens attached in the course of the abortive attempt to connect the two properties. He accepted that some of the stonework on the original seawall was exposed as a result of the work, and that additional harling would have to be applied to weatherproof it. Some of the tiles on the top of the buttress had been damaged in the course of the work.

[212] He had discussed in detail with Mr Vince the nature of the bridging between the properties. Mr Fitzgerald had described the timber supports that created the structure, with bridging across with a slope to allow water to drain in one direction. The materials would "drape upwards" and be fixed to Seven Gables. He had also discussed the ventilation of the cavity beneath and other technical matters. Mr Fitzgerald was aware that Mr Vince had questions and concerns as to the effectiveness of what was proposed. Mr Fitzgerald was aware that Mr Vince had seen only the planning drawings. He summarised Mr Vince's proposals to the defenders immediately after the phone call.

[213] Counsel asked Mr Fitzgerald to what extent he had considered the requirements of maintenance in redesigning the eastern boundary. He responded that "over several weeks and months" there were conversations with the defenders about this. They included not only the practicalities of access to complete the work at Seafort, but also how people might get in to maintain Seven Gables. He had not been in a position to anticipate all the types of work that might be required, but some consideration was given to the matter. He believed

he had discharged his obligations in redesigning the boundary. He had advised his clients, and they had "not decided that it [ie access for completion of the works and maintenance] would be completely impossible".

[214] Mr Fitzgerald was generally a credible and reliable witness. The detail of his account of his conversation with Mr Vince, so far as the method of fixing the gutter detail to Seven Gables was concerned, was not put to Mr Vince, and I accord little weight to his evidence on that point.

James Ewan Brindle

[215] Mr Brindle is 54 years of age and is a contracts manager for Darroch and Allan, Elgin. His work involves the conservation, repair and maintenance of buildings. He has worked in the construction industry since he left school. After his apprenticeship he worked as an employed builder for 9 years, then operated as a sole trader for 5 or 6 years. Thereafter he worked in the construction of new buildings for a contractor in Buckie for 2 years, before joining Darroch and Allan in 2002. His work there involved the repair and maintenance of stone buildings, including the use of render to stop water penetrating traditional stone buildings. Since 2002 he had been involved in the use of traditional lime mortars. The use of cement renders had been unsatisfactory. Lime renders were breathable and more suitable for the conservation of traditional buildings. Harling contained lime and rough sand. He left Darroch and Allan in 2005 to work at the Scottish Lime Centre, as a foreman mason to gain experience of conservation work, but returned to them in 2006, and had remained with them since.

[216] Mr Brindle carries out work on listed buildings, provides reports as to their maintenance requirements, prices the work, and then if an estimate is accepted, manages the

work to completion. His work concerns traditional buildings, which he explained were mainly constructed before 1900 and of older materials, such as stone, lime and clay. Darroch and Allan had been trading for 50 years and employed 75 people. Their work was varied and included working for distillers, for local authorities and Historic Scotland, and on domestic properties. The nature of the work included harling, rebuilding stonework, and picking and pointing. They also were involved in the construction of new buildings.

[217] Mr Clarkson had asked him to provide an estimate to do isolated render repairs and painting work to Seven Gables. He knew Mr Clarkson as an engineer with whom he had dealt with on other projects. He had provided an estimate based on photographs in the first instance. He did not know that the estimate was being requested for the purposes of a court case. He then found that he was cited to attend court, and said that he would require to visit the property. He decided to take a colleague. He had initially thought that the work would have to be done from outside the gap by using a roller from the level of the extension roof. He had changed his mind on seeing his colleague, Liam Cruickshank, enter the gap and walk from one end of it to the other.

[218] He had prepared an estimate dated 15 September 2019 for the following: accessing the roof of the extension by lightweight aluminium scaffolding towers to allow painting of the wall from above and the sides because of the limited access; carrying out four small isolated patch repairs to the harling with natural hydraulic lime; and applying two coats of masonry paint over an area of 25 metres square. The price was £2,650 exclusive of VAT. He had envisaged using a "dead man" system with the worker working at or near the edge of the roof, but attached to a frame and weights on the roof. The reference to the render repairs were to three small holes on the gable wall, and a patch of render which was missing next to the sea wall. He had visited in person "a couple of months ago".

[219] He said he was experienced in dealing with cement render of the type in place at Seven Gables, and in painting similar external gable walls. He had consulted his health and safety manager, and had decided to take a colleague to find out whether it would be feasible for him to get into the gap. He had done so, and it was apparent he could get in and out of it without a problem. Mr Brindle saw him entering the gap from the southern end, using a ladder. He took a roller with him. He came out the northern end, but did not try to get back in through it. Mr Brindle said that he knew what would be required in order to do render repairs and painting, and was of the view that his colleague would have been able to do the necessary work in the space. Mr Brindle himself had not gone into the gap, but had taken photographs. He confirmed that the videos, 7/49 and 7/50 of process were taken on the same occasion.

[220] Mr Cruickshank had worn a harness because it had been thought that he would require to be secured if working from the roof, but he might not need a harness if were able to work from inside the gap. He would need goggles and an overall if carrying out the work. He did not think that the space gave rise to health and safety risks that could not be managed. He had developed knowledge and understanding of health and safety practice in the course of his experience in the industry. It was not "ideal" to work in the gap, but it was practicable. He had viewed Mr Cruickshank in the gap from the top and ground level. Mr Cruickshank had himself said that he thought he would be able to do the necessary work.

[221] Mr Brindle envisaged a tray with paint being taken into the gap, and placed in the parts of the gap that were wider. The paint could be located on the roof, but he would intend to put it in the larger parts of the gap. A roller on a pole would be used for the upper section of the lower wall, and paint would be applied to the rest of it with a hand roller. It

would be possible to manoeuvre both of these items. It would be possible to apply adequate pressure. The only point at which there would be an issue would be at the pinch point where the gap was much narrower. It would be necessary to go to the other side of the pinch point where the space was wider, and work from there. It would be possible to reach to the top of the buttress from within the gap, using a roller on a pole. If the render had been fresh, it would have been difficult to use enough pressure to paint it properly with a roller, as opposed to a brush, but this was render that had been painted on previous occasions, so that its finish was not as rough, and the "troughs" or voids in it were less deep. Other methods of painting were by brush or spray. His firm did not do spray painting, but did have subcontractors who did, and he could arrange for it to be done. If it were necessary to "cut in" with a brush, that could be done within the gap.

[222] Mr Brindle explained that the work on which he was engaged at the time of the proof was work in Edinburgh instructed by Mr Clarkson. It was unusual for Darroch and Allan to work in central Scotland.

[223] Mr Brindle said that he had identified routine health and safety concerns about the site relating to the use of equipment, mixing materials, potential risks of disease arising from the presence of rats and birds, and hand/arm vibration. These did not arise from the nature of the space. He had considered whether the gap might be a confined space for the purpose of the relevant regulations. He did not think a person was likely to overheat in the space, because it was well ventilated. The work to be done it was fairly light work and did not involve much exertion. The paint would be water-based, and without toxic fumes. He would not use scaffolding to paint the lower part of the wall, but said that one would be needed to paint the part above the level of the extension roof. It was not necessary to use

rope access to get into the gap. It would be possible to paint from outside the gap to a distance of about 1.5 metres, but that would not be his preferred method.

[224] The views he had expressed about health and safety were his own, but he had consulted his health and safety manager, who had expressed the same opinions. He stood by his original estimate. He thought the west gable wall was in fairly good condition. Some repairs had been done which were not in keeping with the building, being flat, cement repairs, rather than textured render. The upper part of the wall needed some maintenance. He had not given any thought to the date as when it had last been maintained. His views were summarised in the blue text on page 17 of JB 19.

[225] In cross examination Mr Brindle acknowledged that the work of Darroch and Allan, insofar as it was outside the Elgin and Moray area, was of a specialist nature. He was challenged as to whether it was realistic to suppose that Darroch and Allan would travel from Elgin to Elie to do the work in question. He said that it was realistic, and that it did not matter that it was not a "big job". It had not crossed his mind that Mr Clarkson was not in a position to instruct the work – he had been asked for a quotation and sent it. He did not regard the request as unusual. He had been asked to price a job in Perth, and did receive requests regarding work outside Moray "now and again". He often priced work having seen photographs. He had priced the work allowing for two trips, and two operatives, on the basis of two 12 hour shifts. A round trip was 360 miles, and he had allowed 60 pence per mile. He had not priced a lightweight tower scaffold separately.

[226] Mr Brindle accepted that it would be easier to work in a space of 900mm than in the gap that he encountered. He did not accept that the upper part of the gable wall could be painted from a ladder if the extension were not there. He would use a mobile scaffold.

[227] He had been unpleasantly surprised to receive a citation to come to court as a witness in October 2019, and had "had a word" with Mr Clarkson. He accepted that he would have been made to look stupid if he had issued an estimate on the strength of seeing photographs, but had then changed his mind when he visited the site. He visited the site first with Mr Clarkson, and then, on a second occasion with Mr Cruickshank. His employers were aware he was doing so. Mr Cruickshank was a man in his twenties. Mr Brindle was of the view that other operatives than Mr Cruickshank could work in the gap. Mr Henderson, the health and safety manager, had requested that the exercise with Mr Cruickshank be undertaken. Mr Brindle could not see "where Mr Simpson was coming from" in saying that the work could not be done safely.

[228] In relation to render repairs within the gap, Mr Brindle explained that it would not be possible to use the technique of applying new render by throwing it on. It would be necessary to use a smooth render. Damaged render would be removed with a pick and hammer. If it were loose it should come off easily, although it would have to be taken back to where the render was sound. That would be difficult in certain parts of the gap. He accepted that thought would need to be given to the design of scaffolding to work above the level of the extension roof. He would use a specialist scaffolder outwith Darroch and Allan. If there were a gap of 900mm he would probably use Darroch and Allan's own normal lightweight scaffold.

[229] I accepted Mr Brindle's evidence as credible and reliable on material matters for reasons more fully explained later in this opinion. I did not regard his opinion as to the practicability of work as having been influenced by the circumstance that his firm had carried out work commercially on projects in which Mr Clarkson had been involved in instructing the work.

Wojciech Eisler

[230] Mr Eisler is 40 years of age and is a self-employed joiner. He first trained as a joiner 14 years ago, and worked first as a joiner then as a construction manager, running small building sites for projects like home extensions. For the last 11 years he has had his own business. He is a director of Green Olive Projects. In 2017 he was approached by the architect and invited to tender to carry out work at Seafort. The work involved demolishing the existing extension, building the new extension and refurbishing the B-listed building. He first saw the property in October 2017. Green Olive tendered for the work and the tender was accepted. He prepared a programme of works. He started work in February 2018 after an agreement reached by email, but the contract was not signed until March 2018.

[231] He had stopped work for 2 weeks in April or May of 2018. By that stage the existing extension had been demolished, a reinforced slab installed at ground level and the walls had been erected. Work was about to start on the roof structure. The work was valued every month, and a valuation submitted to the quantity surveyor. He confirmed that the defenders had made all requested interim payments. Mr Eisler personally attended the site on average once a week to inspect the site and assess progress. He would spend a full day there.

[232] His recollection was that the western gable wall of Seven Gables was "pretty dirty" and that it did not look very well maintained. There were streaks of mud or rust. The coping slates on top of the buttress were chipped. Referred to production 125, he confirmed that the condition of the construction as at 4 April was as depicted in photograph 48. Steelwork was in position forming the shape of the extension. In the original design the roof of the extension was to be attached to the western wall of Seven Gables. A "hidden gutter"

would cover the space between the extension and Seven Gables. After his firm had installed the foundations and erected the steelwork, one of the first steps in constructing the roof was to attach timber to Seven Gables. That was what he was starting to do when he was stopped by a call from the architect. He learned that there was a problem "with the design or with the neighbour". Work stopped for 2 weeks while the work was redesigned.

[233] His firm had not wanted to start drilling into the wall without warning the proprietor of Seven Gables, as the work would create a lot of noise and vibration. One of his managers knocked on the neighbour's door. Work had started to attach woodwork to the wall, but was halted swiftly. The works reached practical completion towards the end of 2018.

[234] Mr Eisler's evidence was that it was, at the time of the proof, possible for a person to enter the gap between the properties. At the end of the project he had required to install external cladding on the east wall of the extension. He and the architect had inspected the area to check whether it was feasible to install cladding. The installation of external cladding had reduced the space by 20mm. He explained that he was 180cm tall, and weighed 100kg.

[235] After the cladding was installed, one of Mr Eisler's employees entered the gap to wash the cladding, and also to add some screws that were missing. To install them he used a cordless drill. Mr Eisler did not see the cladding being washed, but had visited after and was satisfied that it had been washed. He initially said that it would not have been possible to wash the whole length of the cladding without entering the gap, but acknowledged that it might be possible to wash it using an attachment similar to that used by window cleaners to clean windows at higher levels. His firm did not, however, have equipment of that sort. The architect had inspected and been satisfied that all the screws had been installed. It

would not have been possible to install them from outside the gap. He could not recall at what level the missing screws had been located.

[236] The eastern wall was constructed – from the outside to the inside – of weatherproof artificial board cladding, timber battens, a vapour control layer, and insulation, with plasterboard on the interior. The insulation and plasterboard were installed from the interior. The vapour control layer or sheeting, the timber battens and the cladding boards were installed from the outside. The sheeting was installed using a large nail gun. The cladding was installed using screws. A single worker could install the sheeting and battens. The external cladding boards were very heavy, and two people were needed to lift them into place, hold them in place and install them. They could not be installed from the inside. Pebbles had been used as a ground layer between the buildings. They were put in buckets and a worker had manually spread them in the space. He had not seen that being done, but there was no other way to put them in place in a professional manner. The architect had raised no concerns as to the manner of their distribution.

[237] The cladding came in 1.2 metre wide boards. The sheets as purchased were taller than the extension. A single full board spanned the space from ground to roof. He saw the cladding being installed and helped to carry the boards. The boards were brought in horizontally and slid along. One worker held the board in place and the other applied screws with a cordless drill.

[238] Mr Eisler's evidence was in all material respects credible and reliable.

Neil Robert Clarkson

[239] Mr Clarkson is 60 years of age. He is a structural engineer. He graduated in 1981 with the degree of BSc in civil engineering, and with that of MSc in concrete design the

following year. He became a chartered engineer in 1989 and is a Fellow of the Institute of Civil Engineering. He has worked in a range of civil and structural engineering contexts. He has given evidence twice in this court and has accepted instructions as an expert witness over the past 10 or 11 years in a range of contexts relating to construction design and workmanship involve masonry, steel frames, watertight basements and other engineering problems. He prepared reports dated 20 September 2019 and 28 January 2020, numbered, respectively 16 and 19.

[240] He was instructed to provide a report about "the ability to main the western gable of Seven Gables as a consequence of the extension". At paragraph 2.1 of JB 16, he described the ongoing maintenance requirements at first floor to roof level as including the rendered stone wall and chimney, the windows, the eaves boards and rainwater goods, including the gutters and sloping downpipe. The only maintenance requirement at ground to first floor level was the rendered wall. He visited the property on three occasions, in August and November 2019, and January 2020. The second was in the company of Mr Brindle and the third in the company of tradesmen employed by Darroch and Allan.

[241] Paragraphs 2.7 to 2.9 of JB 16 described the development of the detail of the extension adjacent to the wall of Seven Gables. Mr Clarkson characterised the original plan as for the installation of a non-loadbearing connection to the wall to create a ventilated internal cavity. The detail was amended – he did not say when – to leave the gap open, but to install a gutter detail arrangement at roof level which would be connected to each building. The detail was then finally amended to remove any connection to Seven Gables and leave the gap fully open. That final version was built.

[242] He had observed no evidence on any of his visits of damage to Seven Gables other than the holes left from the attempts to fix battens to the wall and a portion of masonry left

unrendered on the sea wall following the work. He did not accept that there was a risk that debris would gather in the gap, causing the wall to become and remain damp. He had seen no such debris on his visits. He had seen a piece of tile, but no leaves or vegetation or other material likely to retain moisture. The proximity of the extension provided the wall of Seven Gables with some protection from weather. The situation was "virtually the same" as, but "slightly better than" it had been previously. He did not agree with Mr Vince that the proximity of the buildings would reduce air flow and prevent dampness from drying out. He did not agree that air flow would be restricted in any significant way. Wind from any direction would create suction and pressure forces around the building, and would ensure that air flow was maintained. He was used to designing buildings with wind loads from all directions in mind. For every building it was necessary to assess what wind loads would apply, and whether the building would withstand them. To do that he needed to understand how wind would operate on a building. When he had visited in January 2020 there was a south westerly wind "blowing a gale" down the gap. Also in January he had checked the condition of the render wall for dampness, particularly at low level, and general soundness. The render was generally sound and not damp. In cross examination he explained that a Mr Cruickshank of Darroch and Allan had tap-tested the render. Mr Clarkson had heard him doing so.

[243] Mr Clarkson had not done any work to identify whether the rate of the deterioration of the wall was worse than it would have been had the extension not been built, and was not aware of Mr Vince's having done any. He said that because of the buttress the masonry was twice as thick as the masonry elsewhere on the building, and could exist without the protection of render.

[244] It was his view that the gap was not a confined space for the purposes of the Confined Spaces Regulations 1997. He had considered a code of practice issued by the Health and Safety Executive, entitled *Safe Work in Confined Spaces*. The space was "substantially enclosed", being a narrow gap, although it was fully ventilated, as it was open on three sides. He thought that of the potential risks identified in the code of practice, the only one of any practical significance was the risk of loss of consciousness from increased body temperature. In his view the risk was no greater in the context of the gap than in any other construction context. The risk would not arise from any want of ventilation or because the space was enclosed. He would expect a competent contractor to address any risks for himself, and to reach a view as to whether he could safely carry out particular work at the location.

[245] Asked about Mr Vince's criticism that the design of the extension had not taken adequate account of the need for access for maintenance and for a safe working space in the gap, he responded that it was his personal view that the gap provided a safe means of access and egress. It would, however, be for the contractor instructed for particular works to make his own assessment. That would be the case in respect of any risk to health and safety that Mr Vince had identified, including those arising from working at height. Mr Clarkson said he was, as a structural engineer, familiar with the relevant provisions of the Construction (Design and Management) Regulations 2015. He accepted that it was the responsibility of a designer to make sure that a building could be properly maintained. The normal way of achieving that was to speak to contractors and find out whether it could be maintained. He did not believe that the architect in the present case had failed in that responsibility. He did not think there was any basis for taking issue with the local authority's decision to grant a building warrant.

[246] Mr Clarkson's opinion was that the extension roof provided a better means of access for maintenance of Seven Gables from first floor level and upwards, notwithstanding that scaffolding would be required. He accepted that it would be necessary to span scaffolding boards above the roof light to protect it. He suspected that Mr Vince's requirement for a gap of not less than 900mm was based on that having been the gap before the extension was built. Although general access platforms were 600mm wide, scaffolding could be narrower than that. That would be necessary in the common passageway, which was narrower than 900mm. It would always be necessary to bridge a gap between the upper part of the wall of Seven Gables and a scaffold built up from ground level, because of the slope of the buttress. The provision for tethers, safety lines and edge protection would not be significantly different to the requirements for the work to be done from a scaffold built up from ground level. He had considered what would be necessary by way of scaffolding in conjunction with using the roof of the extension for access, in order to protect the roof light. He had shown that in an image at paragraph 7.9 of number 19. Some scaffold would be positioned in the gap at ground level, and boards would bear onto the roof of the extension to protect the extension roof.

[247] The only work that would need to be done below the level of the extension roof would be masonry work, render repairs and painting to the wall. Mr Clarkson was aware when he prepared his reports that the contractor who built the extension had had workmen in the gap to fix the cladding in place.

[248] Mr Clarkson himself contacted three contractors regarding work in the gap. He did so because working in the limited space within the gap was "clearly an issue". A contractor would be able to advise as to what he regarded as practicable. When he visited in August 2019 there was a contractor working nearby. That contractor – who was based in

Leven – was not able to give a price because he was too busy. He spoke to two further contractors, one of whom was based in Kirkcaldy and possibly named Sharp, who said they were too busy to assist. He then spoke to Darroch and Allan. At that point he needed advice by the end of September (as that was the deadline for lodging reports before an earlier diet of proof), so there was only a short time available. He sent photographs of the site to two contractors. They said that it "should be ok", but that they would want to visit the site before expressing a concluded view.

[249] Mr Clarkson had come across Darroch and Allan 5 or 6 years earlier, and had used them for "two or three" specialist stonemason jobs. They were based in Elgin, and he had encountered them first doing work at Ben Alder and Dalwhinnie. They had also done work in Glasgow. Stone masonry skills were rare, and it was difficult to find skilled tradesmen who would carry out small works. At the time he was looking for advice regarding Seven Gables, they were working in Edinburgh on stone masonry work in Multrees Walk. He spoke to them and they agreed to price the work. He was concerned to obtain advice from contractors who carried out render repairs, as the work would not simply be painting and decorating work. He did not accept that he had had to travel the "length and breadth of Scotland" to find a contractor. He took the view that he had ready access to Darroch and Allan as they were at the time working in Edinburgh. They had confirmed that the works were possible and had quoted for them. They had subsequently confirmed that their estimate provided at that time still represented the scope of the work required.

[250] Mr Clarkson adopted sections 3 and 4 of his report JB 19. These included a statement that the design of the extension roof had been confirmed to accommodate a maintenance live load (paragraph 3.1), and that the roof could therefore be used to undertake maintenance and repair. Part 4 dealt with specific maintenance requirements of Seven

Gables. In it he expanded on the views expressed in his earlier report. It was his view that painting of the upper gable wall could be done from a lightweight hop up scaffold on the roof of the extension, and the painting of the lower wall could be done from within the gap using extended roller poles.

[251] His evidence was that the gutter and windows could be accessed from the extension roof. The pitched roof and chimney could be accessed from the adjacent pitched roof area or from a scaffold on the extension roof. Roofing contractors would not normally require access directly below a particular section of roof, but would gain access from a suitable point on the perimeter, and traverse the roof using roof ladders. He envisaged access being taken to the roof from the front of the property on South Street, or the common passage. If the cast iron gutters were replaced with aluminium gutters, less maintenance would be needed. The windows in the gable wall could be altered so that they could be cleaned from the inside.

[252] So far as the cost of carrying out maintenance with the extension in place was concerned, Mr Clarkson accepted that the cost of works between ground and first floor level would, potentially, be greater. He referred to "a small margin", and then went on to suggest an increase in the region of 20 per cent. So far as the upper part of the wall was concerned, if the extension were not in place two storeys of scaffolding – or three for the chimney – would be required, rather than the scaffold that would be erected over the roof light. Pre-planning would be needed for the erection of scaffolding whether or not the extension was in place. In an emergency, it would be easier to get access from the extension roof than it would have been to gain access had the extension not been built. While a cantilevered section of scaffold might be needed to bridge the gap, once it was in place, all the rhones were within arm's reach. The roof of the extension was designed for service and maintenance access, and was not just a lightweight roof.

[253] Mr Clarkson had formed the view that maintenance was overdue on the west gable of Seven Gables so far as the windows and rainwater goods were concerned. It looked as if it had not had any maintenance work done for between 5 and 10 years. His only specific concern was in relation to the south-facing bay window, of which a lintel detail had failed and was in danger of collapse. That was not connected with the erection of the extension.

[254] In cross examination Mr Clarkson accepted that he was usually instructed as an expert witness when a structural element of a building had failed. There was no issue of that sort in this case, and his instruction in it was therefore unusual. He was asked whether he had "subcontracted metaphorically" to Darroch and Allan the questions on which he had been instructed to advise. He accepted that much of the dispute was about what works could be done to Seven Gables, and how they could be done. He said, however, that he had a great deal of experience of renders and mortars and how they functioned. He said that he had formed his own view, and that he had found that Mr Brindle supported it. It was not a question of deference to the contractor.

[255] He accepted that he was not used to providing prices for work, but said that his usual work included preparing design documents and bills of quantities. He was prepared to say on the basis of his knowledge about the costs of scaffolding and the quantities that would be needed, that less scaffolding would be required to maintain the upper part of the wall of Seven Gables than would have been the case without the use of the extension roof, and that it would be cheaper.

[256] Mr Clarkson provided some further information about his contact with contractors in Fife. He had seen one contractor, from Leven, in the street near the property. He had found a contractor named Sharp in Kirkcaldy, by means of an internet search for renderers and roughcasters in the area. He had sent them photographs, but they had not been able to

provide a price within the time available. He had not sent photographs to the contractor from Leven, or to a third contractor, called Rennie. He had not mentioned to any of the contractors that he was seeking advice in the context of a contentious matter which was the subject of litigation. He had not mentioned that circumstance to Mr Brindle. Mr Brindle had been unhappy when he received a citation to come to court for a previous diet of proof. Mr Clarkson had not returned to the market to seek further contractors once the time constraint imposed by the imminence of that diet had been removed.

[257] Mr Clarkson accepted that there was potential for a "ransom element" in the price for the work as only limited contractors appeared to be interested in carrying it out, and, specifically in relation to Darroch and Allan, additional cost associated with their travel to the site. He did not accept that that arose in relation to the upper part of the wall.

[258] Mr Clarkson's view was that scaffolding rather than a ladder ought to be used for access to the upper part of the wall, regardless of whether the extension was in place. He did not accept that the use of a ladder would be in accordance with current health and safety requirements.

[259] In relation to the evidence he had given as to the practices of roofing contractors, he maintained that he had observed many roofs being repaired, and that it was not usual for there to be a means of access provided all around the perimeter. As to the modification or replacement of windows and gutter, he accepted that in relation to a historic building it would be a matter for Historic Scotland or a local authority in each case. He said, however, that there were acceptable and approved materials that matched, for example, cast iron guttering.

[260] Mr Clarkson was a credible and generally reliable witness. He was not, in my view, able to provide reliable evidence as to the costs involved in relation to the use of scaffolding

before and after the extension was constructed. I comment more fully on some aspects of his opinion evidence below.

Malcolm Cordwell-Smith

[261] Mr Cordwell-Smith is aged 68 years. Before he retired, he worked as an estate factor, land agent and estate agent. He spent his whole career working in those areas. He is the former husband of Ms Linda Smith. They were married from 2005 to 2014. He was her partner at the time she purchased Seafort from Mrs Robertson's executors. They viewed the property together 2 days before the closing date. Because of his experience in relation to property, they did not have Seafort surveyed until after Ms Smith had made an offer to purchase it. It was obvious to him that it was in a poor state of repair. Seafort was "a major project", requiring rewiring, replumbing, timber treatment and damp proofing. It was to be a second home for him and Ms Smith. The date of entry was in July 2004, but they were not able to move in and live there until July 2005 because of the work that needed to be done. Mr Cordwell-Smith rather than Ms Smith was responsible for organising and supervising the work. During the period from July 2004 to July 2005 they made day visits to the property every weekend, but could not stay overnight.

[262] On average the couple spent between a quarter and a third of each year there. Most of the time they spent was in the summer, including 2 or 3 weeks at a time during the summer. They would spend weeks or long weekends at the property at other times of the year, including Easter. The last time Mr Cordwell-Smith had been in the property was in April 2013. He and Ms Smith never let the property, although they allowed family and friends to use it from time to time, and sometimes offered use of it as a prize in charity auctions. Taking that use into account, the property was unoccupied for about approximately

half the year, principally during the winter months. When it was empty Mr Cordwell-Smith visited regularly to check the heating and make sure it was secure. There were times when Ms Smith would have been present in Seafort when Mr Cordwell-Smith was not there. In 2010 friends had stayed in the house for a number of months over the winter, because of a problem with their own property.

[263] He had some pre-existing familiarity with Seven Gables, having rented the property in about 2002 or 2003.

[264] At the time Ms Smith purchased Seafort, there was a door to the passageway at the street, and also a short wall and a dilapidated door less than a metre beyond the kitchen window of Seven Gables, leading into the grounds of Seafort. The passageway led from the street to the door beyond the kitchen window. The door was about half way along the distance between the street and the sea wall. When Ms Smith purchased the property, he was aware that the titles made provision for common ownership of the passage from the street to the door, and that the ground at the back was owned exclusively by the proprietor of Seafort. He inferred from the poor condition of the door that it had been there for a long time. He thought that very little work had been done to Seafort during the period (since the 1950s) of Mrs Robertson's ownership of it. He had found paperwork in the house relating to grant aid for roof and other repairs dating from 1984 but did not know whether the door predated that time or not. He had no knowledge of any right of access for the proprietor of Seven Gables over the garden ground of Seafort.

[265] The garden contained raised flower beds, a low dwarf wall, a redundant shed, and an outside WC in 2004. There was paving scattered in different areas. Mr Cordwell-Smith and Ms Smith re-used the paving to pave the common passageway from the street. The

dwarf wall was a low ornamental wall, about 18 inches in height. It started just beyond the door into the garden area. There were paving slabs on both sides of the dwarf wall.

[266] The conservatory was built in June or July 2005. The dilapidated door was removed as was the dwarf wall. It was possible to get round the conservatory by walking towards the sea wall and then adjacent to the sea wall. There was a gap of not more than 2 metres between the conservatory and Seven Gables, and of between a metre and a metre and a half between its southern elevation and the sea wall. Ms Smith and Mr Cordwell-Smith wanted a gap around the conservatory for their own use and benefit, to provide them with access to the sea wall and round to the western side of the garden ground. They had had to apply for planning permission and listed building consent to erect the conservatory. Neither the builder (a Mr Findlay) nor the architect (a Mr McLean) involved in the project had raised any issue about there being a need to maintain a gap to allow access for the proprietor of Seven Gables. So far as Mr Cordwell-Smith was aware, no issue of that sort had been raised by Mr Findlay with Ms Smith.

[267] Mr Cordwell-Smith was asked some questions apparently in anticipation of what Ms Smith's evidence might be regarding the significance or otherwise of the gap left for access at the time the conservatory was constructed, conversations she had had with Mr Findlay, and her having seen window cleaners attending. There was, in the event, no evidence from Ms Smith, so I do not narrate those passages of evidence in any detail. They were matters about which Mr Cordwell-Smith said he had no knowledge.

[268] Referred to photograph 123, Mr Cordwell-Smith identified the redundant shed, the WC and the dwarf wall, and also the paving to which he had referred. There had been other paving to the west of the area covered by the photograph. He said the photograph was taken in 2004. He initially said in evidence that he thought the dwarf wall might have been

12 feet away from the western wall of Seven Gables, but later said that the two were separated by no more than 2 metres. He was able to date very precisely photograph 126, which he said was taken on about 15 August 2004. He remembered it was taken on a party for his granddaughter's birthday. It showed the dwarf wall and some paving. He thought that a darker part of the photograph showed a garden shed, but also, to its right on the photo, the position of the door between the common passage and the garden. The dwarf wall was an ornamental wall and did not mark a boundary. He referred to it at one point as demarcating one part of the garden from the other. He did not know when it was built, why, or by whom. The eastern boundary of the property was at the western wall of Seven Gables.

[269] In 2004 the western wall of Seven Gables did not appear to have been painted for years. The rhones and downpipes were rusty. During the renovation of Seafort there was scaffolding at the eastern side of Seafort for re-roofing and pointing repairs. The scaffolding took up the "passageway". Mr Cordwell-Smith contacted Mrs Ann Robertson suggesting that while he was painting and repairing the eastern side of Seafort, he could also paint the wall of Seven Gables, and the rhones and downpipes. Mrs Robertson had said that she did not have a "lot of money". Mr Cordwell-Smith was prepared to do the work, and agreed that if Mrs Robertson would contribute to the cost of the paint, he would pay for the tradesmen to apply it. This arrangement related to the area of wall at the common passage. The work was done at some point before December 2004, as that was when the scaffolding came down. The paint was applied by Mr Cordwell-Smith himself and by tradesmen employed by him. He wrote to Mrs Robertson making an approach, but discussion had taken place "on the ground" with him and her looking together at the condition of the wall and the rhones and downpipes. He had made the approach because he could see the condition of the wall, and thought that

Mrs Robertson would not be able to see it from her property. There was no back door to Seven Gables and she would not have any reason to go along the passageway often.
Ms Smith agreed with the approach taken by Mr Cordwell-Smith and with the proposal that the work be carried out. The painting done at this point extended to around the kitchen window of Seven Gables. The upper part of the wall was painted from the scaffolding, and the scaffolding was also used to repair a couple of tiles on the roof of Seven Gables. Once the scaffolding was down it was easier to get access to the lower part.

[270] The conservatory was finished in July 2005, with the foundation being constructed in June 2005. Mr Cordwell-Smith had painters to paint a rendered wall of the conservatory. He and Ms Smith could see the western boundary wall of Seven Gables from the conservatory. It was not attractive. It had not been painted, was stained with rust, and the windows needed painted. He again approached Mrs Robertson. She again said that she did not have much money. He said that he and Ms Smith would be willing to contribute to the cost, as it was to their benefit to have it looking attractive and watertight. He and Ms Smith arranged for the windows and the wall to be painted. At one point, when there was a changeover of tenants at Seven Gables, Mrs Robertson came and said that one of her windows was stuck. He opened it from the inside, using a chisel. The painters used ladders against the wall of Seven Gables. The ladders were footed in the garden ground of Seafort. He said that they were there with his permission and with Ms Smith's permission. The work took 2 to 3 days, as more than one coat of paint was applied. The work was done in the autumn of 2005.

[271] Between that time and April 2013 he did not see the western wall of Seven Gables being painted again. He did approach Mrs Robertson because he was concerned about the gutters. They were rusty. His grandchildren were running around in the garden, and he

was concerned that the gutters might come down and injure someone. He told Mrs Robertson that he was concerned about the condition of the gutters, and asked her if her roofer could replace them with pre-painted cast aluminium gutters, which would not rust. She said she would look into it, but did not think she could afford to have the work done. The next thing he knew was that she had arranged for someone to come and paint the rhones to cover the rust. It did not in his view resolve the issue that he had raised with her. He could not remember the year this happened, but thought that it was before 2010. He had not seen the work being carried out, as he and Ms Smith were away from Seafort at the time. He would not have offered any objection to the work being done if he had been present. When he was referred to production 142, an invoice from Mr Allan dated 17 January 2008, he thought that it referred to this work. He acknowledged that this involved an assumption on his part, based on the circumstance that the invoice referred to rhones and downpipes.

[272] When asked if he had seen a window cleaner at Seven Gables, he replied that a window cleaner may have come. The new door which he had installed at the street end of the common passage was not locked, and the access was free for anyone to go down, whether to clean windows or for maintenance. When pressed, he said that he could not honestly recall whether or not he had seen a window cleaner. He and Ms Smith had a window cleaner who worked at other houses in the street. He did not know whether the same window cleaner worked at Seven Gables. He thought that "they" were at Seafort probably once a month. He would only have had cause to see any window cleaner at Seven Gables if he had happened to be in the conservatory at the time, and had seen the window cleaner on a ladder at the upper windows. A window cleaner could have attended when no one was there to see him, or Mr Cordwell-Smith and Ms Smith might not have noticed him.

[273] Mr Cordwell-Smith had assumed that Mrs Robertson was the owner of Seven Gables. He sometimes had contact from Sally Patullo of Elie Lettings. He said, "She [Ms Patullo] would say, something happened, let us have access or whatever". After he and Ms Smith separated, he received an email from Ms Patullo trying to contact Ms Smith to "gain access to upgrade the gas pipe in the common passage". He had passed the email to Ms Smith's daughter. He had never met the pursuer. His relationship with Mrs Robertson was amicable. He had no issues or problems with her, and she was prepared to listen to any concerns he had. Other than passing the time of day with Mrs Robertson, his communications had been confined to seeking contributions to the cost of the painting already referred to, and to the cost of repairing drainage in the common passageway.

[274] No question of the proprietor of Seven Gables having a right of access over the Seafort garden ground had ever been raised with him. He said this was, " … because we would not have objected, and we tried to help, as neighbours, look after our respective properties." Other than the painting he had referred to in his evidence, he was not aware of any other maintenance to Seven Gables during the time when he was involved with Seafort. He was unaware of any activities which involved taking access in the light of a right to do so. As far as he knew, no one had spoken to Ms Smith about rights of access. He said, "We knew about the common passage, but it never became an issue." So far as he was aware, Ms Smith's state of knowledge regarding maintenance of Seven Gables and activities undertaken in the exercise or assertion of a right of access was no more extensive than his own.

[275] He had not seen the single survey, and was not involved with the property at the time when it was completed. If he had required to complete it himself, he would have said

there were no formal rights of access over Seafort but that there was a neighbourly point in allowing access.

[276] The costs of maintaining Seafort were higher than "average" because if its exposure to the sea air and the wind and rain coming off the sea. On occasion sand and debris came off the sea wall and had to be cleared from the garden.

[277] The same official, a Mr Smith, was involved with both the planning application and the application for listed building consent. Historic Scotland objected to the size of the planned conservatory. One of the issues was Historic Scotland's understanding that a buttress at the bottom of the southern gable wall of Seven Gables was associated with a chimney, where in fact it was there to strengthen the southern gable wall. According to Mr Cordwell-Smith's recollection he would not at the time have anticipated a successful application for planning permission to build to the boundary, but the policy of the planning authority had changed in the intervening years.

[278] Mr Cordwell-Smith's evidence was credible and generally reliable. He had a very good recollection of those events that were connected with the renovation of Seafort. It was clear that he had been closely involved with the detail of that project and retained a good memory of it.

The issues for determination

Has the pursuer acquired a servitude right of access for the purpose of maintaining his property by virtue of prescription?

Submissions – pursuer

[279] The pursuer submitted that the disputed area had been used continuously, openly, peaceably and without judicial interruption since at least 1966. It was the pursuer's position

that he and his predecessors had possessed the 900mm of the area for the prescriptive period. He relied on evidence regarding work to the western gable wall, the windows in it, the rainwater goods, the chimney stack and the roof, and on evidence regarding the use of the disputed area for the purposes of inspection.

[280] A pursuer did not have to demonstrate an unrealistic degree of precision in his evidence, given the period over which the evidence ranged: *McGregor* v *Crieff Cooperative Society* 1915 SC (HL) 93, Earl Loreburn, p 98. The location of the property was such that it needed regular maintenance. The pursuer submitted that the evidence established that it was painted on a cycle of 10 years at a maximum, and sometimes more frequently.

[281] The requirement that possession be open was a requirement that the dominant proprietor exercise his right openly, not that the servient proprietor be aware of that exercise. As to what was required by way of open possession, the pursuer referred to *Lord Advocate* v *Wemyss* (1896) 24 R 216 at 229, and Johnston, paragraph 18.15. There was no suggestion anywhere in the evidence that possession had been clandestine.

[282] The defenders asserted that any failure to object to access being taken indicated only that the access had been exercised as a result of tolerance, rather than as of right. The burden of establishing that lay with the defenders: *Grierson* v *The School Board of Sandsting and Aithsting* (1882) 9 R 437, Lord Rutherfurd Clark, p 441-2; *Neumann* v *Hutchison*, unreported, 1 May 2008, Sheriff Principal Dunlop, paragraphs 43, 44, 46.

[283] Prescriptive possession of a servitude is inherently likely to involve "toleration", but the important matter for the court is the nature, quality and frequency of the use that is being made. The court required to look at what was being "tolerated". Where possession is of sufficient quality, a successful challenge to that possession is required. The fact that a servient proprietor has permitted, or continues to permit the possession will not, therefore,

prevent prescription from operating: *Aberdeen City Council* v *Wanchoo* 2008 SC 278, paragraphs 18, 19.

[284] Where possession has been of sufficient duration, this will constitute prescriptive possession, even if its origin was in tolerance: *Rome* v *Hope Johnston* (1884) 11 R 653, Lord Justice-Clerk (Moncrieff), p 657. Where permission is given by a servient proprietor, this must be given by the owner of the servient tenement, or with his authority, and in a way that shows that it is a challenge to the assertion of right: *Stevenson* v *Donaldson* 1935 SC 551, Lord Justice-Clerk (Aitchison), p 554-5. It is neither fatal to a case of prescriptive acquisition nor necessarily indicative of tolerance that parties have peacefully and amicably co-existed, or even that one party has encouraged the other: *Cumbernauld and Kilsyth DC* v *Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44, Lord Jauncey of Tullichettle, p 47-8; *R(Lewis)* v *Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, Lord Rodger of Earlsferry, paragraphs 93-96.

[285] The question of whether a right is being asserted is an objective one: *Aberdeen City Council*, paragraph 19. The state of mind of the dominant proprietor was irrelevant. What mattered was whether his conduct was objectively sufficient to indicate that a right was being asserted.

Submissions – defenders

[286] The defenders submitted that the servitude that the pursuer claimed to have possessed was one for the specific purposes identified in the first conclusion, namely (i) inspecting, cleaning, maintaining, repairing and renewing all of those parts of Seven Gables which form part of, or are attached to, that part of the western exterior wall of Seven

Gables which abuts the maintenance strip; and (ii) inspecting, maintaining, repairing and renewing the south western section of the roof of Seven Gables.

[287] They submitted that only servitudes recognised by law could be acquired by prescription: *Alexander* v *Butchart* (1875) 3 R 156, Lord Gifford at p 160. Although they did not positively assert that a servitude for these purposes was not recognised by law, they pointed out that the pursuer was not seeking a servitude of laddergang of the type discussed by Cusine and Paisley at paragraph 3.32.

[288] The defenders' position was the acts of possession founded on were very limited in number and character. Such activities as might have taken place gave rise, at best, to an inference that they had taken place by reason of tolerance only. Possession must be open and as of right. It is not as of right if referable to toleration or permission. Permission might be express, or tacit, by way of toleration: *McGregor*, Lord Dunedin p 103, Lord Sumner p 107. Whether possession is referable to toleration is to be determined objectively, from the nature, quality and frequency of the use: *Aberdeen City Council*, paragraphs 11 and 18. Toleration is not inferred where possession is overt in the sense that it is of such a character or is done in such circumstances as to indicate unequivocally that a right is asserted and the nature of the right: *McInroy's Trustees* v *Duke of Athole* (1891) 18 R (HL) 46, Lord Watson, p 48. Where the use is of such an amount and of such a manner that it would reasonably be regarded as the assertion of a right, the owner cannot stand by and ask that his inaction be ascribed to good nature or tolerance: *Cumbernauld & Kilsyth District Council* v *Dollar Land (Cumbernauld) Ltd* 1992 SC 357, Lord President (Hope) at p 366.

[289] The pursuer could not found on acts of possession unless he established that those acts were or ought to have been known to the defenders or their predecessors: *McInroy's Trustees*, Lord Watson, p 48. Possession must be such as to indicate to a reasonably

observant owner that a right to his property was being asserted: *Stevenson-Hamilton's Executors* v *McStay (No 2)* 2001 SLT 694, Temporary Judge Coutts QC, p 697; *Duke of Athole* v *McInroy's Trustees* (1890) 17 R 456, Lord Justice-Clerk, p 472, Lord Lee, p 464-5. Possession of a very short route that might take a very short period to cover is difficult to characterise as open possession: *Midlothian Council* v *Crolla* (2004, unreported, Lord Carloway, paragraph 13). Occasional usage would be more likely to give rise to an inference of usage by tolerance rather than right: Gordon, *Land Law,* paragraph 24.49, cited in *Greig* v *Middleton* (2009, unreported, Sheriff Evans, at p 25). Close relationships between the proprietors would tend to yield an inference of possession by reason of tolerance rather than as of right. Examples of the court attributing possession to tolerance included: *Purdie* v *Steil* (1749) Mor 14511; *Greig*; *Macnab* v *Ferguson* (1890) 17 R 397; *Blair* v *Strachan* (1894) 21 R 661.

[290] Contrary to the pursuer's submission, the onus of establishing possession justifying the creation of a right remained with the pursuer throughout: *Sawers* v *Russell* (1858) 2 Macq 76 at p 78; *Duke of Athole* v *McInroy's Trustees* p 463; Cusine and Paisley, paragraph 10.19; *Mitchell* v *Messham* (1910) 27 Sh Ct Rep 360, Sheriff Leslie, p 364; *Nationwide Building Society* v *Walter D Allan* (2004, unreported, Lady Smith, paragraphs 31, 35). Any serious conflict in the evidence would mean that the pursuer had failed: *Macnab*, p 400. For possession to be continuous it must have been exercised sufficiently regularly to establish a pattern of prescriptive possession: *Hamilton* v *McIntosh Donald Ltd* 1994 SC 304, Lord Justice Clerk (Ross), p 323B-E.

[291] Possession by someone other than the proprietor must be by a person licensed by the proprietor: *Hamilton*, Lord Justice Clerk (Ross) at p 330; although that decision had been criticised for imposing too few limits on who can civilly possess on behalf of another: Johnston, paragraph 18.13. The defenders submitted that a contractor who used the

servitude route without being told by the proprietor that he can or should do so is not a person licensed by the proprietor. Mr Allan and Mr Delaney had given evidence that they had sought and obtained permission to use the disputed area. So far as the pursuer had provided hearsay evidence to the effect that tradesmen had not sought permission, I should reject it. Mr Clunie had not been called to give evidence.

[292] Possession established the extent of any servitude: *Carstairs* v *Spence* 1924 SC 380 at p 385.

[293] The defenders disputed that the pursuer should be afforded any latitude in relation to the precision of the evidence as to possession. The prescriptive period when *McGregor* was decided was 40 years. The sort of latitude as to precision described by Earl Loreburn should not be given where the period was now only 20 years: Cusine and Paisley at 10.12. Even when the prescriptive period was 40 years, the court would not tolerate imprecise evidence in relation to any substantial part of the period. The period in respect of which latitude was given in *McGregor* was in any event only 2 years out of the forty: *Carstairs* v *Spence*, Lord President (Clyde) at page 389.

[294] Although the pursuer described a need for regular maintenance, the evidence as to when that maintenance had taken place was notably lacking in precision.

Decision

[295] Section 3 of the Prescription and Limitation (Scotland) Act 1973 provides, so far as material for this case:

> "3(2) If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge.

…

(4) References in subsections (1) and (2) of this section to possession of a servitude are references to possession of the servitude by any person in possession of the relative dominant tenement."

[296] I observe at the outset that an attempt to constitute a servitude right of access for the purposes of inspection, repair and maintenance by means of prescription faces particular challenges. As Professors Gretton and Reid have observed in the context of servitudes of necessity, in a passage to which I refer in the part of this opinion dealing with that chapter of the case, a right of access for repair will be exercised infrequently if at all: Conveyancing 2017.

[297] In assessing whether the user is of the quality and frequency to support the contention that a servitude has been constituted in this way, it is necessary to have regard to the nature of the servitude contended for. Where the nature of the servitude contended for is such that the use is not particularly frequent or easily capable of observation, however, it may be difficult to regard it as of such frequency and nature as to give rise to the inference that it was exercised of right. It may not be coincidental that parties did not direct me to any case in which a servitude for these purposes has been held to have been established by means of prescription.

[298] So far as the quality of the evidence is concerned, there must be credible and reliable evidence of possession throughout the 20 year period. The reduction of the period to 20 years should present fewer difficulties regarding the availability of evidence than the period of 40 years. Any period of substance in relation to which there was no evidence might indicate that there had not been possession for the requisite period. I broadly concur with the analysis offered by Cusine and Paisley at paragraph 10.12, although it may not be entirely fair to regard the exercise carried out by the court in *McGregor* as one of mental

gymnastics. I read that decision as reflecting simply that it may be easier to infer that use has occurred during a short period in relation to which there is no or little specific evidence where there has been good evidence of use during much of the greater part of the prescriptive period. The evidence in each case must be assessed on its own merits, and in the context of the nature of the servitude that is claimed. A pursuer in an action of this type is seeking to establish off-register real rights in land, which bind future proprietors of the servient tenement. With that in mind, I consider that there is little room for imprecision in the evidence, or for any periods of substance in respect of which there is no evidence of use.

[299] The nature, quality and frequency of the acts of possession on which the pursuer founds are of central importance. They, rather than the subjective state of mind of the proprietor of the servient tenement are the focus of inquiry: *Aberdeen City Council*, paragraph 18. They are relevant to the constructive knowledge of the proprietor of the servient tenement; to the extent of any servitude constituted by those acts over the prescriptive period; and to the question as to whether or not it is to be inferred that those acts of possession were done in assertion of a right, as opposed to by virtue of tolerance.

[300] There was no dispute that I required to consider whether the possession was or ought to have been known to the proprietor of the putative servient tenement, or that the test was an objective one. The defenders submitted, and the pursuer did not dispute, that possession must be such as to indicate to a reasonably observant owner that a right to his property was being asserted. Reference was made to authorities such as *McInroy's Trustees*, which concerned a rural location. I was not referred to any authority that dealt with what ought to be known to the proprietor of a domestic property in respect of a right of access exercised for inspection and maintenance.

[301] The site is very modest in its dimensions. There is no question of activity falling outside actual or constructive knowledge because it was taking place in a remote location. This case concerns incursions into garden land at the rear of the supposed servient tenement for inspection, painting, window cleaning, and some modest repairs of the gable wall of the supposed dominant tenement.

[302] I have approached matters on the basis that it is on the fact of proprietorship that I must focus in relation to the question of constructive knowledge. Proprietors of domestic properties will vary considerably as to their subjective knowledge as to what takes place on their property. They may or may not occupy the property as their main residence. They may let them out. They may use them as holiday homes. Even when they do use them as their main residence, they may or may not be in them during the business day at the time when cleaning and repair works are usually carried out, absent emergencies. Against that background I have not found it straightforward to determine what capacity for observation ought, objectively, to be attributed to the proprietor of Seafort. Observation need not be confined to what a person sees being done. If a wall, or pipes, or windows, have been painted, it may be obvious to the proprietor of a neighbouring property that that has been done. Depending on the layout of the properties, and the nature of the work, it may be obvious that the work must have been done by taking access from his land.

[303] The nature and character of the acts demonstrating possession are bound up with the question as to whether they ought to have been known to the proprietor of the "servient" tenement. The nature and character of the acts also go to the question as to whether they support possession as of right. There is no suggestion that any of the potentially relevant acts in this case were done clandestinely, in the sense of being deliberately kept from the proprietor of the "servient" tenement. That is not, however, sufficient.

[304] Evidence as to the character of the relationship between the proprietors of the dominant and servient tenements respectively is potentially relevant evidence that needs to be taken into account in determining whether possession has, or has not, been as of right. In some cases close relationships may provide an objective basis for inferring that permission has been granted to a proprietor personally to him. Possession which originated in a personal grant of permission of that kind, may, however, over time, give rise to the inference of user as of right: *Aberdeen City Council*, paragraph 17. In this case I have not found evidence as to the nature of the relationships between the proprietors from time to time to be of assistance. Relations have always been at least friendly and co-operative. There was no evidence to suggest that they were of a particularly close nature such as to point to a grant of permission personal to the proprietor of Seven Gables.

[305] Parties differed as to the approach I should take to onus. As this was an area of dispute, I set out at greater length some of the authorities referred to by parties.

[306] The passage in *Grierson* to which the pursuer referred, in Lord Rutherfurd Clark's opinion is this:

> "Again, it is said that the use which has existed is to be attributed to mere tolerance. But I would rather draw the inference that it was due to right. A long continued and uninterrupted use is, I think, to be presumed to be in the exercise of a right, unless there is something either in its origin or otherwise to shew that it must be ascribed to tolerance. The pursuer cannot appeal to any circumstance which can construe the use into a mere tolerance. There is no fact in the case but the use only. It is said that it is not unlikely that the heritors were willing that the successive schoolmasters should have permission to cut peats as a favour. But it seems to be just as probable, if not more probable, that it was an addition to the benefice, and that the usage is the evidence of a grant, or, in other words, was of right and not of tolerance."

Lord Craighill concurred. The passage quoted is probably, strictly speaking, obiter, although both Lord Rutherfurd Clark and Lord Young refer to the court's having "decided" that a servitude existed. What was before the court was a summary application for interdict,

and it was refused because the use was of long standing. No determination as to whether there was a servitude was necessary for the disposal of the case. Lord Young concurred in the result – which was that the pursuer's application for interdict should be refused, but not in the passage of reasoning quoted above. He wrote, in terms which are offensive and discriminatory to the modern eye, as follows, at pages 442-3:

> "… I cannot concur in the view that the parish schoolmaster having for forty years cut peats, the legal conclusion is a servitude in favour of the house in which he lives. A servitude is not constituted by use for forty years, or even for 100 years.
>
> A right of servitude requires a grant. It may be a direct grant, or it may be implied on sufficient grounds. But it is by grant alone of the proprietor of the servient tenement that it is created, though that grant be implied from usage, that is, possession. If that is proved or admitted to have existed for forty years, it is reasonable to presume that it was authorised, and a Court or jury may therefore presume a grant as the origin or foundation of the use or possession which has been proved. But it is not the law that use for any period will constitute the right, and in many cases which in former times were sent to a jury the issue was not put whether there had been use or possession for forty years, but whether the servitude had existed for forty years. It was the same with a right of public road, the question being whether the right of public road had existed during forty years, that not being a question of law but a question as to the existence of a state of facts which the jury could presume to have existed as matter of right.
>
> Here the heritors provided a residence for the schoolmaster, and allowed him to cut peats. I could not conclude in law from that that therefore a servitude was created over the commonty in favour of that particular residence in which the schoolmaster lived. The statement is—the heritors provided their schoolmaster with a residence, and allowed him to cut peats—and the conclusion desired to be drawn is, therefore, a servitude was constituted. I cannot assent to that. I may very well allow my parish minister to cut peats in my peat moss, but the conclusion from my admission that he has done so would not be to establish a servitude in favour of the manse. Manses have passed from parish ministers to priests, and a parish church might pass into the possession of the Roman Catholics. The house in which schoolmaster or minister has resided might pass to an occupant of a totally different class, and permission to one occupant of it who happens to hold a particular public position or office would not be a safe ground for concluding that a servitude had been created in favour of the tenement itself in which he resided."

[307] In *Duke of Athole* v *McInroy's Trustees* in the Inner House it was Lord Rutherfurd Clark who dissented, expressing his agreement with the Lord Ordinary, Lord Kinnear, whose interlocutor was recalled. The Lord Justice Clerk (Kingsburgh) said, at pages 462-3:

> "It is evident that on such a piece of hill ground an occasional traversing of a path such as this may well be unobserved, and if in very rare cases it be observed, it may be thought unimportant, and be tolerated from good neighbourhood, nothing having been brought to the proprietor's notice suggesting that anyone is asserting a right. It is quite true that in a district of the country like that in question such frequent use is not to be expected as would be the case in more closely peopled estates, and there can be no doubt that a much smaller amount of evidence of adverse possession would be sufficient to prove the right than would be necessary in lower ground. But the character of the possession as being in the exercise of right must be proved by the litigant asserting the claim of the alleged dominant tenement, whatever be the locality. It is for him to prove, and to prove conclusively, that what was done was in the assertion of a right, and so done as to bring the assertion of the right home to the proprietor of the tenement which is said to be servient. In my opinion the respondents have failed to prove that they have used this path in the exercise of a right, and therefore I would move your Lordships to recall the interlocutor of the Lord Ordinary, and to grant interdict in terms of the prayer of the complainer's note of suspension."

[308] When the case reached the House of Lords (*McInroy's Trustees* v *Duke of Athole*), their Lordships affirmed the interlocutor of the Inner House. Lord Watson, at page 48, said:

> "I do not doubt that, in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right."

[309] In *Nationwide Building Society* v *Walter D Allan Ltd* at paragraph 31, Lady Smith, having reviewed the authorities already referred to, expressed the following view:

> "It is well established that it is for the party claiming the prescriptive acquisition of servitude to prove that the usage relied on occurred by means of assertion of right rather than by the tolerance or licence of the landowner. Further, if the approach of the Court of Appeal in England is to be followed, it seems that that party must exclude tolerance as an explanation of the use founded upon. If their use of the other party's land is as consistent with toleration or licence on the part of that landowner as it is with user as of right, that is not enough (*Patel & Ors v W H Smith (Eziot) Ltd*). Such an approach seems logical and would accord with the principle clearly

recognised in Scots law to the effect that the use relied on requires to be shown by the proprietor relying on it to have been as of right."

[310] In *Aberdeen City Council* Lord Eassie, delivering the opinion of the court, said, at paragraphs 17 to 19:

> "17. But with the passage of time and the expiry of the prescriptive period a personal right of access may become a real right of servitude by user. That is the very nature of the creation of servitude rights by operation of positive prescription. We reject the submission advanced by counsel for the pursuers and reclaimers that the right of access upon which the prescriptive claim is founded has to be a real right of servitude. If it were a real right of servitude there would be no need to invoke the positive prescription. Cadit quaestio. In this case the council and their local government statutory successors knowingly allowed access to be taken over their property for a period in excess of the prescriptive period and so, unless it can properly be said that the access so taken could not be 'of right' but could only be by mere 'toleration', the servitude right for which the defender contends is established or constituted.
>
> 18. In addressing the question of access 'of right', we would observe at the outset the risk of a semantic confusion which appeared on occasion to surface in the discussion before us. In one sense, user which is being taken 'of right' is always 'tolerated', in respect that the proprietor of the servient tenement acknowledges the right and does not question it. So 'toleration' in this context is, in our view, directed not so much to the mind of the proprietor of the servient tenement but to the nature, quality and frequency of the user. As was indicated in *McInroy v Duke of Atholl*, the test is objective. In the leading speech of Lord Watson in that case, his Lordship stated (p 48):
>
> > 'I do not doubt that, in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right'.
>
> Very occasional user in peculiar circumstances may readily be ascribed to a sense of helpfulness or personal obligement on the part of the proprietor of the servient tenement. But as is stated in Gordon (para 24.49):
>
> > 'If usage is only occasional, the court is likely to infer that the usage was by tolerance rather than as of right. As a matter of good neighbourhood a proprietor is not likely to object to occasional use of his property by a neighbour, and the law does not oblige him to object to such occasional use in order to prevent his neighbour from

> acquiring a right. But if use is substantial and fairly constant, challenge is necessary to preserve freedom from servitude rights, and the challenge must be successful. Persistence in use in face of an unsuccessful challenge is good evidence of use as of right'.
>
> To similar effect are Cusine and Paisley (para 10.19 in fine), where they say: '[W]hat matters is the volume of possession. Where the volume is reasonably substantial, taking account of the nature of the right claimed, this will be regarded as adverse and as the assertion of a right.'"

[311] The pursuer relied on the decision of Sheriff Principal Dunlop in *Neumann* v *Hutchison*. The Sheriff Principal carried out an extensive and helpful analysis of a number of relevant authorities, including *Aberdeen City Council*, at paragraphs 35 to 46 of his judgment.

> "35. In my view it is important at the outset of this discussion to make clear what is properly to be understood by the words 'as of right'. In Servitudes and Rights of Way Cusine & Paisley (at para. 10.19) treat the phrase as equivalent to the Latin phrase nec precario and state that it distinguishes use which is with permission of the owner and that which is not. This echoes the words of Lord Dunedin in *McGregor v Crieff Co-operative Society Ltd* – 'Now as to the character of the use. The expression hitherto used has invariably been that it must be "as of right". Sometimes it is put negatively, that it must not be clam vi aut precario.' (page 103). The same association was made by Lord Hoffman in *R v Oxfordshire CC ex p Sunningwell Parish Council*, in which he concluded that 'as of right' meant 'nec vi, nec clam, nec precario', and this was followed in *R (Beresford) v Sunderland City Council*. In my view it was also the basis for the court's approach in the other Scottish authorities to which reference has been made.
>
> 36. When looking at the proper meaning of the word precarium I derive considerable assistance from the judgment of Lord Rodger of Earlsferry in *R (Beresford) v Sunderland City Council* where he explains that in Roman law precarium was the name given to a gratuitous grant of the enjoyment of land or goods which was revocable at will. It was an informal arrangement which involved a positive act of granting the use of the property, as opposed to mere acquiescence in its use. At paragraph 65 of his judgment he states as follows:
>
> > 'The phrase "nec vi nec clam nec precario", taken over from Roman law, has resounded just as powerfully among Scots lawyers and judges as among their brethren south of the Border. But in reading the Scottish cases a linguistic point must be noted. English judges have tended to use "tolerance" as a synonym for acquiescence. See, for instance *Mills v Silver* [1991] 1 All ER 449. Scottish judges, on the other hand, have tended to use "tolerance" as a synonym for permission and

> as a translation of precarium. This is perfectly understandable since an owner who, perhaps somewhat reluctantly, decides to permit the public to walk across his land until further notice may be said to "tolerate" them doing so.'

37. In the same paragraph Lord Rodger refers to a statement of Lord President Inglis that 'precarious possession is a possession by tolerance merely' and then goes on to say that it is 'in this sense that Lord Kinnear, a recognised authority on Scottish land law, uses the phrase "tolerance or permission" in *Folkestone Corp v Brockman*.'

38. In my view these observations helpfully point to a distinction between permission, which is essentially a positive concept, and acquiescence, which is a negative one. In seeing the word tolerance as a synonym of permission one is more clearly pointed to the need for something positive to be done in the face of apparently adverse use of a way whereas the word acquiescence points more to silence or inactivity. As I understand the import of Lord Rodger's analysis it is the former which describes the true nature of precarium.

39. I recognise of course that in *McGregor v Crieff Co-operative Society Ltd* both Lord Dunedin and Lord Sumner emphasised the point that permission would include tacit permission and this might be thought to run counter to the notion that permission or tolerance could not properly be instructed where there was silence or inactivity. As Cusine and Paisley point out however (Servitudes and Rights of Way para 10.19) what matters is the volume of possession and where the volume is reasonably substantial, and the servient proprietor has done nothing to challenge it, that will be regarded as adverse and as the assertion of a right. Thus the volume of unchallenged possession becomes the primary means by which one distinguishes use as of right from use tacitly permitted.

40. The approach of Cusine and Paisley was expressly endorsed by the Inner House in *Aberdeen City Council v Wanchoo*. At paragraph 18 the court states as follows:

> [passage quoted above]

41. This approach echoes that of the Lord President in *Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* that 'where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the

public aware that the route is being used by them only with his permission and not as of right.'

42. The sheriff has followed the example of the Lord Ordinary in *Nationwide Building Society v Walter D Allan Ltd* in thinking that no assistance could be derived from either *Cumbernauld & Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* or *R (Beresford) v Sunderland City Council* on the question of what amounts to use as of right. It will be evident from what I have already said that I do not agree with that view. In the latter case Lord Bingham considered that the meaning of the phrase 'as of right' was one which applied for prescription purposes generally and without distinguishing between public and private rights and in this Lord Rodger appears to agree, expressly founding on *Cumbernauld & Kilsyth District Council* as part of his analysis. In similar vein the court in *Aberdeen City Council v Wanchoo* plainly thought that that case afforded an appropriate analogy and that approach is consistent with the opinion of Lord Dunedin in *McGregor* (at page 104) that in a question of the character of use there is no difference between those cases involving a claimed public right of way and those involving a claimed servitude. Like the sheriff principal in *Webster v Chadburn* I respectfully adopt that view.

43. Before seeking to apply the principles which emerge from these cases to the particular circumstances of this case it is necessary to address the argument for the pursuer that the sheriff has misdirected himself on the question of onus of proof, specifically that he has required the pursuer to exclude the possibility of permission or tolerance and, in the sheriff's own words, to prove a negative.

44. Given the close relationship between possession as of right and the existence or otherwise of permission there is a certain logic in saying that in order to discharge the onus of proving that the use was as of right the pursuer in effect requires to exclude permission or tolerance. Indeed both parties referred to 'as of right' and 'permission or tolerance' as opposite sides of the same coin. While that may be so, in my opinion it is unhelpful to define the nature of the onus on the pursuer by reference to excluding permission because it is apt to lead one to ignore the inferences to be drawn from the nature, quality and frequency of the user. Furthermore a definition of onus which requires the pursuer to prove a negative is in my view obviously unsatisfactory.

45. Borrowing the words of Lord Mackay in *Marquis of Bute v McKirdy and McMillan Ltd*, the task for the sheriff was to address himself to the dual question of whether on the whole evidence the user was exercised as of right or by permission or tolerance. In this regard I note Lord Rodger's opinion in *R (Beresford) v Sunderland City Council* that, while prudent landowners will often indicate expressly when they are licensing or permitting others to use their land only during their pleasure, he could see no reason why the implied grant of such a revocable licence or permission could not be established by

> inference from the relevant circumstances. I have no difficulty with that proposition but it is important nevertheless to emphasise the need for evidence which is capable of supporting an inference of permission.
>
> 46. In light of what was said in *Aberdeen City Council v Wanchoo* and *Cumbernauld & Kilsyth District Council*, if the user is of such amount and of such a character as would reasonably be regarded as being an assertion of right it will readily be inferred that the use was as of right unless that inference can be displaced by evidence of permission or tolerance as those words are properly to be understood. But if there is no such evidence, or if the evidence is of insufficient weight, there is in my view no justification for refusing to hold that the use was as of right simply because the pursuer has failed to exclude the speculative possibility that the use might be attributable to permission."

[312] The Sheriff Principal in *Neumann*, at paragraph 46, derived from *Aberdeen City Council* and the opinion of the Lord President in *Cumbernauld & Kilsyth District Council*, the proposition that if the user is of such amount and of such a character as would reasonably be regarded as being an assertion of a right, it will be readily inferred that the use was as of right unless that inference can be displaced by evidence of permission or tolerance as those words are properly to be understood. He said also, at paragraph 44, that it was not helpful to define the nature of the onus on the pursuer by reference to a requirement that he exclude permission.

[313] Like Sheriff Principal Dunlop, and for the same reasons as those given by him at paragraph 42 in *Neumann*, I consider that assistance falls to be derived from cases dealing with prescription in the context of public rights of way, such as *Cumbernauld and Kilsyth DC*.

[314] The passage in the Opinion of the Lord President (Hope) in *Cumbernauld & Kilsyth District Council* quoted with approval when the case reached the House of Lords (Lord Jauncey, page 47A-B), and quoted by Sheriff Principal Dunlop, was in the context of a reclaiming motion in which the Lord President described the issue between the parties in the Inner House as being focused by a ground of appeal which stated that "there was no

evidence of use which could not reasonably be ascribed to tolerance on the part of the proprietor". At page 365, the Lord President wrote:

> "In my opinion there are many indications in the authorities on this topic that the amount and quality of the user may indeed be decisive of this point. The significance of public user can be seen clearly from Lord Watson's speech in *Mann v. Brodie* at pp. 57 – 58 : 'Although the principles of law which govern the acquisition of a prescriptive right of way are in themselves simple, yet, in their application to facts, questions of nicety frequently arise. It then becomes necessary to consider whether the user has been that of the public, whether it has been continuous and uninterrupted, and whether it has existed for the full period required by law. These are all questions of fact, and it would not be expedient to lay down any specific rules for their solution. As regards the first of these questions, which has occasioned much more controversy than the others, I think it is safe to say generally, that in order to constitute a public user of the kind of road claimed in the present action, the user must be of the whole road, as a means of passage from the one terminus to the other, and must not be such user as can be reasonably ascribed either to private servitude rights or to the licence of the proprietor."

The question whether the user cannot reasonably be ascribed to the licence of the proprietor suggests an objective test. This is confirmed by a comment later in the speech at p 58 under reference to an argument about why the inhabitants of the district did not assert their right to use the way as vigorously as they might have done:

> "Such considerations are, in my opinion, utterly irrelevant. Public user is a fact which must be inferred from overt acts of possession, and defective evidence of user cannot be strengthened by proof of the motives which induced individuals to abstain from acts of that kind." Nor, in my opinion, is good evidence of public user of the appropriate volume and quality to be deprived of its effect by proof of the motives which induced the proprietor not to object to it."

[315] The argument advanced by the defenders and reclaimers in *Cumbernauld & Kilsyth District Council* was based on a passage in the opinion of Lord Deas in *Mackintosh* v *Moir* (1871) 9 M 574 at page 576, where he said:

> "… if the proprietor never prevented anybody at all from going, if he allowed everybody that pleased to go, looking upon this as a mere indulgence to them and no injury to him at all, there can be no question that that would be mere tolerance, which of itself would not make a public road, for whatever length of time it might have endured."

[316] In rejecting this argument, the Lord President said, at page 368:

> "It seems to me to be clear, on an examination of all the later authorities, that a proprietor who allows a way over his land to be used by the public in the way the public would be expected to use it if there was a public right of way cannot claim that that use must be ascribed to tolerance, if he did nothing to limit or regulate that use at any time during the prescriptive period."

The following passage appears in the opinion of Lord Cowie, at page:

> "senior counsel submitted that the respondents had positively to prove that the use was not simply being tolerated by the reclaimers while senior counsel for the respondents submitted that a public right of way is established if the public have used the route over the prescriptive period in a manner which was consistent with use 'as if of right', having regard to the quantity and quality of the use in relation to the nature and location of the route unless some specialty can be demonstrated which detracts from that use. On the basis of the authorities referred to by your Lordship in the chair, I am satisfied that the test formulated by the respondents is the correct one."

[317] In my view the onus is on the pursuer to demonstrate user that is of a quantity and character as to justify the conclusion that it is an assertion of right. The task for the court is to consider all the evidence available, and reach a view as to whether the user was exercised as of right, or by permission or tolerance. The focus is on the nature and frequency of the user, and the conclusions, objectively, to be drawn from them. If there were a requirement on a proprietor of a dominant tenement positively to prove that the proprietor of the servient tenement was not, subjectively, of the view that he was tolerating the user, that would be entirely unworkable. There can be no onus to exclude permission in that sense. As the Lord President said in the passage quoted above, the question about whether the user can reasonably be ascribed to licence must be approached objectively. Evidence of user of a quantity and character that supports the proposition that it is an assertion of right cannot be deprived of its effect by evidence of the motives of the proprietor, subjectively, for failing to object to the user. The court cannot properly be invited to speculate as to whether the user may have been tolerated.

[318] Turning to the evidence in this case, the evidence, such as it was, about the lie of the land over the years, does not assist in resolving the question of whether the pursuer has possessed the servitude for which he contends during the prescriptive period. I accept that there was a dwarf wall which ran parallel to the western wall of Seven Gables, and which was demolished when the conservatory was erected. It may have delineated an area used as a path within the garden area, but its presence does not necessarily indicate that it was a path for use by anyone other than the proprietor of Seafort. I accept that before the erection of the conservatory, there was a gate at a point at or near to the southern end of the common passage. There is no evidence that it was ever locked. If there had been, that would have been adverse to the pursuer. I regard its presence as neither supporting nor detracting from the pursuer's case.

[319] I did not regard the evidence about the content of the property questionnaire of any assistance. Taken at its highest it indicated that it was Ms Smith's subjective understanding that there was no right of access.

[320] The only user of any regularity and frequency which I am satisfied has occurred is access for the purpose of window cleaning. That took place monthly primarily during the summer months. It took place at most ten times per year, as was vouched by statements of account relating to 2016 and 2017. In other years less frequent cleaning was vouched. The frequency of window cleaning varied from year to year. I am satisfied on the balance of probabilities that the windows were cleaned monthly during the main holiday season of April to August each year. Although the documentary evidence about it is incomplete, I accept the evidence of Mr Delaney and Mrs Robertson that the cleaning took place at those times. Mr Delaney's evidence only concerned the period from 2007, but Mrs Robertson's related to earlier years as well. I am satisfied on the balance of probabilities that window

cleaning of the frequency I have described – that is, between five and ten times a year – occurred throughout the prescriptive period. The house has been let for holiday lettings for many years. I have no real doubt that it was cleaned and prepared as Mrs Robertson said it was so as to be in good condition for each set of tenants, and that that process included cleaning the windows during holiday seasons. Although Mrs Robertson's evidence was not very precise in relation to some matters, I gained the clear impression that she would have noticed had the windows not been cleaned. The cleaning that required to be done from the disputed area took 5 or 6 minutes each month to accomplish, on Mr Delaney's account. That is use of a fleeting nature, and I do not consider that, looked at objectively, it is use that falls to be regarded as being in assertion of a servitude right of access for that purpose.

[321] I accept that the area of wall at the common passage was painted by Mr Cordwell-Smith and tradesmen employed by him in 2004. I accept also that it was in autumn 2005 that Mr Cordwell-Smith and Ms Smith arranged for the remainder of the western gable, and the woodwork of the windows in it, to be painted. They did so because they could see it from their new conservatory, and wished it to look attractive. The work was done at Mr Cordwell-Smith's suggestion. I accept that the circumstance that a party may have encouraged another will not necessary tell against the proposition that something has been done in the exercise of right, rather than by virtue of toleration. In this case, however, I am not prepared to view the evidence of the painting from the disputed area in 2005 as evidence of use by the pursuer as of right. The painting was done at the express request of the proprietors of Seafort, on their instructions, and at their expense. Mr Cordwell-Smith had not seen it painted again before he ceased to be involved with the property. If, contrary to that view, the use of the disputed area for the painting at that time can be regarded as use by the pursuer, then it is an example of the "positive concept" of

permission envisaged by Sheriff Principal Dunlop at paragraph 38 of *Neumann*. It is not an example of a proprietor standing by inactive as access is exercised by another person.

[322] There was no suggestion from any witness that the exterior wall itself had been painted at any time between 2005 and the erection of the extension in 2018. The evidence about painting it was otherwise of a general nature, and to the effect that it was done on a cycle of 8 to 10 years. Mr Allan's evidence was not particularly precise as to when he had painted the wall. He said in evidence, variously, that he had painted the chimney once and twice in a 20 year period. He said that he had first painted Seven Gables 25 years earlier, and that he had painted the external walls only on a couple of occasions during that time. I did not have the opportunity to observe his demeanour, but my impression from the record of the evidence taken on commission, is that his evidence as to the frequency for the work was based on what he thought would be a likely cycle of works, rather than on a recollection of any cycle upon which he actually did work at the property.

[323] Mrs Robertson said the wall had been painted between 1974 and 1979. She was not sure whether Mr Allan's suggestion of twice in 25 years was right, and referred to the possibility that work had been done by another tradesman, a Mr Howie, during that period. The only incident of painting of the wall about which I can make a reasonably precise finding in fact is that in 2005 undertaken on Mr Cordwell-Smith's instructions. The remainder of the evidence about when it may have been done is very vague indeed. There is no actual date positively proffered in evidence on which it was done. I accept that it must have been done, periodically, over the years, but I cannot make any finding as to when or by whom.

[324] I am not satisfied that the exterior wall was in fact painted as frequently as every 10 years. Even it had been, I do not consider that this would amount to user of such

frequency or of such a character as to demonstrate that it was as of right for the purposes of constituting a servitude by means of prescription. For the avoidance of doubt, I am satisfied that when the western wall of Seven Gables south of the kitchen door, the windows in it, or its rainwater goods, have been painted, that has been accomplished from the disputed area.

[325] So far as other painting, that is painting to the rainwater goods and windows is concerned, Mr Cordwell-Smith gave evidence that he knew that the gutters had been painted. He thought this was before 2010, and when referred to an invoice from 2008 inferred that the work must have been done in 2008. I am able to find that it has been carried out on an occasion after 2005. It is, again, difficult to make findings with any precision as to when work was done to the western elevation of Seven Gables. The two invoices which may have a bearing on the matter are imprecise as to the location where work was done. Mrs Robertson appeared uncertain as to whether one or both of the invoices JB 142 and 144 related to work on the western elevation. I accept on the balance of probabilities that one of them did, given the evidence from both Mr Cordwell-Smith and Mrs Robertson about an occasion after 2005 when such work was done. Mr Cordwell-Smith had actual knowledge of this particular incident of painting, and it is reasonable to infer that Ms Smith, the proprietor of Seafort, knew or should have known of it as well. So far as Mr Allan's evidence is concerned, his evidence about the invoices was given in response to leading questions and I do not consider it reliable in helping to identify when the work was done. In relation to this episode, Mr Cordwell-Smith had actively invited Mrs Robertson to consider whether the gutters required some form of repair. A response to that invitation – again, at best for the pursuer, a form of active permission – by undertaking painting from the disputed area is not an example of user demonstrating possession of a servitude as of right.

[326] As with the painting of the exterior wall, even if these elements of paintwork were done as frequently as every 5 years, that is not user sufficient to constitute a servitude by means of prescription.

[327] I accept Mr Allan's evidence that he always asked and was granted permission from someone within Seafort before carrying out work on the disputed area. Mr Delaney's evidence also was that he asked and received permission, in his case on a single occasion. That does not assist the pursuer's case. These are examples of permission positively being given, rather than being inferred because of the inaction of the servient proprietor.

[328] The proximity to the sea and the prevailing weather conditions means that paintwork is liable to deteriorate relatively quickly, and that a more frequent cycle of maintenance of the exterior paintwork is desirable than would be the case in a more sheltered location. The evidence led at proof, however, does not support the proposition that painting or other maintenance and repair work has in fact been carried out on such a cycle of maintenance at Seven Gables.

[329] I accept on the balance of probabilities that the pursuer and/or his mother have used the disputed area on up to three occasions each year to look at the condition of the wall of Seven Gables and its various features. There is no evidence that access for this purpose was ever for any substantial period. I infer from the nature of the site that a superficial inspection of this sort from ground level would take only a few minutes. Again, this is not user of the sort of quantity or quality as to be of assistance to the pursuer in establishing a servitude right by means of prescription.

[330] I heard no evidence about roof repairs of any substance being done from the disputed area. The evidence about Mr Walls cleaning the gutters was in very short compass. It was not clear to me how often this work was done, whether cleaning rather than

inspection was required every year, or how long the task would take. So far as Mr Clunie is concerned, the pursuer's evidence was that Mr Clunie used the area from time to time. That evidence was lacking in precision. Mr Clunie was on the list of witnesses and was not called.

[331] I therefore consider that the pursuer has not discharged the onus on him of establishing possession of the requisite quality and frequency, and the defenders must be assoilzied.

[332] Further, the nature of the claimed servitude can be relevant to whether an inference is readily to be drawn that user is as of right or by virtue of tolerance. In *McNab*, for example, at page 400, the Lord Justice-Clerk said the following, in relation to a claim to be allowed to draw water from a well:

> "… the proprietor of a well may permit his neighbour to use its water not out of mere good neighbourhood, as in the case of a road; his toleration of his neighbour's use of the water may be due to the most ordinary dictates of humanity. I can figure cases where it would be gross inhumanity for him to prevent his neighbour getting the water."

Similarly, in the much older case of *Purdie*, the whole report is this:

> "Thomas Purdie had been in the use of bringing home his corns after harvest through a ridge of ground belonging to Steil and his authors, after their corns on the said ridge were cut down, and that for the space of 40 years.
>
> This, however, was found not to establish a servitude. In the case of town acres, every one, after the corns are cut down, leads his corn through his neighbour's ground, which, though done for 100 years, will not infer a servitude."

[333] The nature of the claimed servitude in this case is such that use is infrequent. It is in the interests of neighbourly relations to permit access for cleaning and repair, and it is in the interests of the proprietor of the servient tenement that a building at his boundary be kept in sound repair and reasonable cosmetic order. These are factors which are capable of yielding the inference, objectively, that access has been permitted.

[334] I do not require to determine whether the exercise of a right of access by a tradesperson who has not been specifically told that he can or should use it represents possession by the proprietor, because I have concluded that even taking into account all of the instances of access that I am satisfied have occurred, there is an insufficient basis to hold that the petitioner acquired the servitude right in question by prescription. I doubt, however, whether it can be necessary for evidence that a specific instruction had been given to a tradesperson using an area of the sort with which this case is concerned, before account can be taken of the use for the purposes of a case based on prescription. The situation is rather different from that in *Hamilton*, where the question as to whether persons were authorised by the defenders (a limited company) to shoot on land was significant to the court's determination that the shooting was referable to an assertion of rights of ownership and of proprietorial possession by the defenders. Absent evidence of that sort there would be nothing to connect the shooting to any assertion of right on the part of the first defenders. The land was an area of rough peat moss, and the first defenders held it on an a non domino title. A tradesperson doing work to the buildings on the dominant tenement in the circumstances of the present case, and given the lie of the land in the present case, might reasonably and obviously be inferred to be using the disputed area for the benefit of the proprietor and on his behalf and to be there with his authority.

[335] I am not satisfied that had the pursuer established sufficient use over the prescriptive period, there was a sufficient basis in the evidence for me to conclude that the servitude right of access extended over a portion of land extending 900mm from the wall of Seven Gables. The figure appears to have been one suggested by Mr Vince on the strength of his understanding about what would be desirable for the erection of scaffolding. The use on

which the pursuer relied did not involve scaffolding. It was no different from the use to which he put the common passage, which is of narrower dimensions.

Is there a servitude right of access (of that character) of necessity?

Submissions – pursuer

[336] If Seven Gables did not benefit from a servitude constituted by prescription, it benefited, in any case, from one constituted by necessity. A property might benefit from a right of access as a result of necessity: *Bowers* v *Kennedy* 2000 SC 555, Lord President (Rodger), paragraphs 12-16. The authorities relied on in *Bowers* were expressed in terms of access which is "necessary and convenient" or which provide "liberty to enjoy" the property. The underlying principle was that there were matters necessary for the reasonable enjoyment of property that must be implied as rights in the absence of express provision. Such matters must extend beyond the issue of entry alone. That approach was supported by Baron Hume, under specific reference to maintenance of property: Lectures vol iii (Stair Society vol 15, 1952) 206-7. Baron Hume's analysis was consistent with the civilian origins of the law of servitudes. According to Voet (Commentaries, 8,2,14 in Gane, The Selective Voet, vol 2, 455)

> "Even an unwilling neighbour could be constrained to grant such liberty for the erection of scaffoldings, if a building cannot be carried out in any other way. That is both because of the favour shown to public appearance, and also on the analogy of the road which must needs be yielded to one who is deprived of any other way out and way in."

[337] Modern academic commentary supported that proposition. Professors Gretton and Reid suggested that Scots law was sufficiently pragmatic to concede access rights for repairs when there was no other reasonable way in which the repair could be carried out: Conveyancing 2017. In *Brydon* v *Lewis* (unreported, 12 February 1958), it had been conceded

that a servitude right would exist to maintain a gable wall owned by the pursuer where the area required for access for maintenance was wholly owned by the defender. The sheriff had observed that it was "plain that there [was] a servitude right of access".

[338] *Finlay & Co* v *Bain* (1949) 65 Sh Ct Rep 59 related to property which had previously been held on a single title. Following division, the defender sought to argue for the existence of an implied servitude right for the purpose of inspecting and repairing the back of his property. On appeal the Sheriff (J Cameron KC) held that the defender and appellant could contend successfully that access was reasonably necessary for the comfortable enjoyment of his property. The existence of the right would be implicit and merged in the right of property over the unsevered subjects, and its separate existence perceptible only after and because of the severance. Although the Sheriff had been dealing with implied grant rather than necessity, his approach was in accordance with the authorities on which the pursuer relied.

[339] The evidence, and in particular the evidence of Mr Vince, Mr Simpson and Mr Allan supported the proposition that the western wall of Seven Gables could not be maintained adequately without access over the defenders' property. The extension had not been designed with the intention of providing maintenance access along that side, as the original proposal had involved the ventilated cavity detail. The pursuer invited me to reject the evidence of Mr Clarkson and Mr Brindle as to the practicability of maintenance from inside the gap.

Submissions – defenders

[340] The pursuer had failed to explain how a servitude of necessity could be created. It was clear that a servitude could be created by implied grant or reservation. The central

issue would be the presumed intention of the parties at the time of a disposition in favour of the defenders or his predecessors in title: Cusine and Paisley, paragraph 8.03. *ASA International Ltd* v *Kashmiri Properties (Ireland) Ltd* 2017 SC 107 concerned implied grants of servitude. The policy considerations which meant that a court should be slow to recognise servitudes created in such a manner, and identified by Lord Drummond Young at paragraphs 17-18, applied with even greater force to the right claimed by the pursuer in the present case.

[341] The doctrine of necessity – not depending on an implied grant – was limited in its application to access: Cusine and Paisley, paragraphs 8.04, 11.18-25. The legal basis of a possible right of laddergang was unclear: Cusine and Paisley, paragraph 11.13.

[342] The creation of a right of laddergang by necessity would provide a back door to the creation of servitudes in circumstances where the pursuer was unable to satisfy the stringent requirements for the constitution of a servitude by prescription. The requirements were stringent because they involved the off-register creation of rights restricting what a proprietor could do with his land. It was not open to a party to erect a building right up to a boundary and then assert a servitude right over their neighbour's land in order to maintain the structure. If that were possible, a person could burden a neighbour's land by his unilateral act. Whoever built to the boundary first would create a servitude which would prevent his neighbour from doing likewise.

[343] *Brydon* v *Lewis* had been brought to broader attention by Professors Gretton and Reid in Conveyancing 2017 at 162-164. The case was of limited value, as it proceeded on a concession. The pursuer and defender owned flats in the same tenement. The pursuer was under an obligation to maintain the wall in question, and that could only be done from the defender's garden. The obligation arose by virtue of the common law of common interest,

now codified in section 8(1) of the Tenements (Scotland) Act 2004, and the terms of her title. The sheriff had merely noted, the matter having been conceded, that it was clear that there was a servitude of access.

[344] Professors Gretton and Reid were in error in thinking that the existence of maintenance obligation ought not to be a determining factor. On the contrary, it was an obvious justification for restricting the use to which the defenders could put their land. In any event the professors had noted that whilst they thought the right of access ought to exist, it might not be a servitude right. Counsel also pointed out the difficulties touched upon by the professors in the part of their analysis relating to buildings on the land in *Brydon* v *Lewis* which had obstructed the exercise of the right.

[345] Even if it were possible to create by necessity a right of the sort contended for, the test of necessity had not been met. The test was necessity, rather than convenience. In *Bowers*, while holding that a proprietor of a landlocked property had a right of access as a necessary incident of ownership, the court held that he would have to accept any suitable access over the surrounding land.

Decision

[346] The passages in *Bowers* on which the pursuer relied do not provide the support for his case for which he contends. In *Bowers*, an explicit grant of a servitude right of access to and from a landlocked property had been extinguished by prescription. The surrounding farmland had been sold shortly before the property was disponed to the defender's predecessors in title. The disposition of the landlocked property included a servitude right of access. Although 20 years of non-use had elapsed, the court held that there was an implied right of access. The defender, when he bought the landlocked property and it was

conveyed to him, became entitled to obtain free ish and entry to it over the surrounding farm as an incident of his ownership of it. The Lord President's analysis of institutional writing and other sources of authority at paragraphs 12 to 16 is in the context of rights of free ish and entry only.

[347] The passage from Baron Hume's lectures referred to in the pursuer's submissions is this:

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

[348] Baron Hume does not elaborate on the juridical nature of the right to rest ladders on or suspend a scaffold over neighbouring land. He does not suggest that it is a servitude right. If he had in mind civilian urban servitudes of the sort mentioned in the passage already quoted from Voet, he did not say so in terms. The passage is part of a longer examination of a variety of circumstances in which private property rights may have to yield to other interests. The reference to "slight and temporary inconvenience" does not necessarily sit easily with the notion of a real right in heritable property. Professors Gretton and Reid, in their commentary on *Brydon* v *Lewis* (which I discuss more fully below) suggest that a servitude right would be a "promising choice" for the character of the right, while offering in the context of *Brydon*, the alternative of common interest.

[349] As the pursuer acknowledged, *Finlay & Co* v *Bain* related to contiguous properties, which had formerly been in one ownership but had passed into separate ownership in 1925.

The defender contended he had a right of access to allow him to inspect the rear of his property. The sheriff's reasoning appears at pages 4-5:

> "The existence [of the right] would be implicit and merged in the right of property over the still unsevered subjects, and its separate and identifiable existence would be perceptible only after and because of the severance itself. Nor do I feel that to sustain the appellant's contention in this case would necessarily involve the extension of such a right to every urban subject which is built up to its boundary line. The principle on which the appellant relies is one which is limited in its application to the very limited category of cases of which this is one."

It is apparent from the final sentence of that passage that the defender had the right for which he contended because it was a right which existed before the properties were separated, and which not only survived, but became perceptible, when the properties were separated. That reasoning is of no assistance to the pursuer in the present case, in which there is no contention based on the division of properties formerly held on a single title.

[350] *ASA International* involved a dispute as to whether, after a heritable property had been divided, conveyance of one part of the property carried an implied grant of a servitude right over the retained part. Lord Drummond Young (para 16) distinguished between the creation of a servitude by grant implied from circumstances and the creation of a servitude by necessity, saying.

> "The latter concept applies particularly to landlocked sites, where a right of access is necessary to enable the property to be used at all. Servitudes by implied grant, by contrast, may exist in circumstances where they are not strictly necessary for the use of the property."

He went on, at paragraphs 17 and 18 to articulate the following policy considerations:

> "17. The creation of a servitude by implied grant raises a number of important policy questions. There is a general presumption in favour of the freedom of the servient property (Cusine and Paisley , para 8.02). We are of opinion, however, that a number of more specific policy considerations apply to implied grant, and that these strongly support the view that in individual cases the law should be slow in recognising the creation of servitudes in this manner. First, when property is divided, it is always possible to create servitudes by express grant. If a servitude right is important, it can generally

be expected that the matter will be raised in negotiation and that an appropriate clause will be inserted into the disposition. The question of an implied grant only arises where no express provision has been made.

18. Secondly, claims for implied rights inevitably involve a degree of uncertainty, and if an expansive approach is taken to the creation of such rights there is a risk that a substantial number of dubious or even extravagant claims may be made. Thirdly, servitude rights are real rights created over heritable property. In this area of the law certainty has always been regarded as crucial, because of the perpetual existence of such rights. Fourthly, perhaps the most important factor is that real rights bind the whole world, and will be binding on any future purchaser of the servient property. Any such purchaser should be able to discover the existence of real rights easily. Normally this is achieved by express grant followed by the recording of the deed in the Land Register. Implied rights, however, do not appear in the Land Register. Thus there are strong policy reasons for restricting the recognition of such rights to cases where their existence is apparent from the surrounding facts and circumstances. Cases where the right is reasonably necessary for the enjoyment of the dominant tenement can be said to fall into the latter category."

[351] *Brydon* v *Lewis*, is an unreported sheriff court case from 1958 helpfully discussed at length – it appears for the first time—in *Conveyancing 2017* by Professors Gretton and Reid, Professor Paisley having recovered the papers from the National Records. The pursuer and the defenders owned flats in a two-storey building. The pursuer owned the ground floor flat, and the defenders owned the upper flat and the garden ground adjacent to the west gable wall. The west gable wall was the sole property of the pursuer, and repairs were needed to it to deal with dry rot and damp. They could only be done by taking access from the defenders' garden ground. The split-off disposition of the ground floor flat contained an express servitude of access to the flat, but there was no express servitude over the garden for repairs to the wall. The pursuer pled that she had a duty in terms of the title and at common law and was therefore entitled to a servitude right of access for the purposes of maintenance. The defenders conceded the existence of the servitude, but the sheriff (Garrett) offered the

opinion that it was plain that there was a servitude right of access. The authors comment, citing the passage from Hume relied on by the pursuer in the present case:

> "The pursuer's case … was that a person with an obligation to maintain a wall must be given the means of doing so in the form of the necessary servitude. Precisely why this should be so – why an obligation should give rise to a right, or indeed why such others (such as the defenders) must concede the right even though they may not be among the beneficiaries of the obligation (although in this case they were) – is not explained. In fact, it seems unlikely that the existence of the obligation to maintain is important. The truth is that Scots law is sufficiently pragmatic to concede access rights for repairs where there is no other reasonable way in which the repair can be carried out. The importance of getting a building repaired outweighs the temporary inconvenience of the owner of the land on which the ladder or scaffolding must be put. This flexible approach to property rights comes out of what appears to be the only other authority on this whole topic. This is a passage from the lectures of Baron David Hume, delivered to his students at Edinburgh University in academic year 1821-22:
>
> > [passage already quoted]
>
> Assuming such a right to exist, what is its juridical character? Hume himself gives none. Servitude, the attribution in *Brydon v Lewis*, seems a promising choice, although this would be a 'natural' servitude rather than one which was expressly created. An alternative attribution is common interest."

[352] One objection to accepting as correct the "promising" characterisation of the right as servitude is demonstrated by another aspect of the *Brydon* case commented on by the professors. The defenders had built a wooden hut close to the wall and a lean-to up against the wall. The pursuer had ancillary craves to ordain them to remove all wooden structures from the west gable wall insofar as they interfered with her access to the wall for maintenance, and to interdict them from erecting any structures so as to interfere with her servitude of access. The sheriff found for the pursuer, and as Gretton and Reid point out, that result necessarily followed from the characterisation of the access right as a servitude, as the exercise of servitudes is not to be obstructed by the actions of the burdened proprietor. They comment further:

> "The implications are significant. If the decision is right on this point, it might seem to prevent owners from building on their land if this would obstruct a neighbour from taking access to repair the outside of the neighbour's building. On that view the owner's land is sterilised and depending on the configuration of the neighbouring building, sterilised in respect of a substantial area. For example, in *Brydon v Lewis* the entire length of the pursuer's west gable wall abutted the land of the defenders. But we doubt whether this can be the law. A right of access for repair will be exercised infrequently if at all. Against the slight chance that it might be needed, an owner should not be stopped from building. Indeed the erection of a sound and permanent building abutting the neighbour's wall might well, of itself, remove the need for any future repairs to the wall. But there is a caveat. If the owner does build, and if the wall does need repaired, and if the repair can only be done from the outside – three big ifs – then the owner may have to make such provision as is necessary to allow the repair to go ahead."

[353] As *Brydon* v *Lewis* proceeded on a concession that there was a servitude right, it is of limited value. Assuming that the concession, and the sheriff's opinion of it, were correct on this point, the case is distinguishable from this case. The pursuer had an obligation to maintain the wall, which formed part of a flatted property. There is no similar feature in this case.

[354] I am not in any event convinced that the concession in *Brydon* v *Lewis* was correctly made. First, the difficulties that Professors Gretton and Reid identify regarding sterilisation of land in the light of a "servitude" right which may on their analysis be exercised very infrequently, are considerable. The solution that they propose is not logically compatible with the existence of servitude. They admit the possibility that a sound and permanent building may be built alongside the wall. In the event of dispute as to whether that building obviates future repair, however, there will likely be obstruction to a servitude right on which the proprietor of the dominant tenement is entitled to insist. Although there may be, as there are in the present case, arguments about discretion as to remedy, that does not detract from the difficulty involved in an analysis admitting of the existence of a servitude right of access, but seeking to avoid the consequence that the land will be sterilised.

[355] Second, no authority has been drawn to my attention in which a servitude of access for the purposes of repair, maintenance and inspection has been constituted simply by virtue of necessity. *Finlay* relates to property previously held on a single title, and that is essential to the sheriff's reasoning. Third, the policy considerations mentioned by Lord Drummond Young in *ASA International* in relation to implied grant militate against an expansive approach to the constitution of off-register rights, including servitudes of necessity. Fourth, the logical consequence of the pursuer's argument is that by building right up to the boundary of his property, a proprietor may create a servitude right of access for the purpose of maintenance, which sterilises the neighbouring property to the extent of preventing its proprietor B from exercising the liberty to build on his own land. There would in effect be a race to be first to build to the boundary, and the unilateral imposition of a servitude right.

[356] I do not require in this process to determine what rights a proprietor such as the pursuer may have regarding access to inspect, maintain or repair, or what may be the juridical character of any such rights. I am asked only to determine whether or not he has a servitude right of access by virtue of necessity, and have concluded that he does not. No doubt in reality the vast majority of requests for access are met with co-operation and goodwill and/or enlightened self-interest in avoiding property damage and personal injury from poorly maintained neighbouring properties. I note that the problem of obtaining access to neighbouring properties has been dealt with in England and Wales by means of legislation: Access to Neighbouring Land Act 1992, which followed on a report of the Law Commission in 1985, *Rights of Access to Neighbouring Land* (Law Com No 151).

If a servitude right of access exists, are the defenders entitled to vary it to the extent that necessarily follows from the construction of the extension?

Submissions – pursuer

[357] The pursuer submitted that the servitude over the disputed area for the purposes of repair, maintenance and inspection was obstructed by the erection of the extension. Anything that covered up and prevented the unobstructed use of the ground required justification. That meant that it must be something required for the proper working of the estate, and it must be an immaterial interference with the rights of the dominant tenement: *Lord Donnington* v *Mair* (1894) 21 R 829, Lord Justice-Clerk (Macdonald) at 832.

[358] In relation to the defenders' entitlement to vary the servitude, the pursuers referred to *Grigor* v *Maclean* (1896) 24 R 86, Lord Justice-Clerk (Macdonald), 89. The variation proposed did not merely make passage more inconvenient, but prevented for any practical purposes access to the lower part of the pursuer's property. It placed significant practical difficulties in the way of accessing the upper part. It was not equally convenient to the access previously available, and was accordingly impermissible. In *Finlay* v *Bain* the sheriff had held that a restriction which did not prevent access for maintenance, but rendered it much more difficult than before, was unacceptable.

[359] Even if I were to accept that it was possible to inspect and maintain the wall of Seven Gables with the extension in place, access would be far more difficult and expensive than it would have been before.

Submissions – defender

[360] The defenders submitted that, if a servitude did exist, they were entitled to vary the route provided that it did not interfere materially with the exercise of the right: *Bell's*

Principles, paragraphs 987, 988, 1010; *Moyes* v *McDiarmid* (1900) 2 F 918, Lord Balfour, p 923, Lord Kinnear p 926; Cusine and Paisley, paragraph 12.41. A court order was not required to vary the route unless the variation was material and extensive: Cusine and Paisley, paragraph 12.63. One way of assessing that was to consider whether the benefited property was less marketable: Cusine and Paisley, paragraph 12.71. The defenders had offered to reroute any servitude over the roof, and that would provide access for window cleaning and repairs and maintenance to the upper part of the wall. It was possible to carry out work in the gap so far as painting and maintenance of the lower part was concerned.

Decision

[361] I did not understand the defenders to be disputing that the extension interfered with the exercise of the servitude right of access that the pursuer said he had. They disputed that the interference was material. Both *Grigor* and *Moyes* are cases in which a party sought to interfere with a right of access which was the subject of an express grant. In *Grigor* the titles of a house situated in a close contained a provision for "free egress and regress by the front passage from the High Street". The owner of the solum of the close sought to diminish its width to 3 feet 9 inches. The Lord Justice-Clerk (Macdonald) contrasted the situation with that relating to a right of access over vacant ground, which might be altered or diverted by way of an access equally convenient. The proprietor of the solum was not entitled "without making arrangements" with the proprietors who have a right of access by it, to encroach on it.

[362] *Moyes* concerned a route described in a disposition "minutely as to its breadth and direction throughout its course." The pursuer argued that the route could be varied. The Lord President (Balfour), at pages 923-4, distinguished cases relating to rural servitudes of

way, first on the basis that the essence of such servitudes was convenient access, rather than a particular route, and also because of the necessity of giving effect to contractual obligations. In relation to indefinite rural servitudes of way, and rural servitudes of way which had become definite by use rather than contract, he said:

> "The essence of a servitude of way to a farm, a mill, a peatmoss, or the like, is that the owner of the dominant tenement shall get convenient access to these places; the precise route is, or may probably be, immaterial, if it be reasonably convenient, and it is therefore intelligible that when the country began to be fenced and enclosed, on the introduction of modern methods of cultivation, the Court should, in exercise of its inherent power to regulate rural prædial servitudes, have allowed undefined rights of way to be made definite by being confined to a particular track, or even, where they had been defined by use, have permitted them to be cast about, so as to substitute for them another track equally convenient."

[363] Cusine and Paisley comment, at paragraph 12.41, that it is clear from the foregoing that servitudes constituted by a means involving no specification of the details of a precise route burdening servient tenements located in rural areas may be capable of variation. They take the view that that approach is not excluded in relation to urban tenements. I did not understand either party in this case to suggest otherwise. Bell, at paragraph 987 and 988, refers to the right of the owner of the servient tenement to substitute one road for another, if equally convenient, and his duty not to do anything to diminish the use or convenience of the servitude to the owner of the dominant.

[364] It is necessary that any variation of route is to be equally commodious or convenient to the dominant proprietor: Cusine and Paisley, paragraph 12.46 et seq. None of the cases cited in Cusine and Paisley seems to have involved a right of access for the purposes of maintaining a building on the dominant tenement. The discussion is of routes for access or for pipes providing water supplies. The linear route here is not being varied. But the breadth of the ground available at ground level has been very materially reduced, and the route, so far as serving the upper part of the western wall, must run over the roof of the

extension, and is therefore to run at a different horizontal level. Whether the variation is material and extensive requires to be determined by reference to the requirements of inspection, repair and maintenance which are said to be the purpose of the servitude.

[365] I have concluded that the pursuer does not have a servitude right of the type for which he contends. Had it existed, it would have been one constituted by prescription. Applying the law set out above, I would have had to consider whether the exercise of the servitude right of access for inspection, repair and maintenance with the extension in place would be equal in convenience to its exercise before the erection of the extension. I record my view on that matter here.

[366] Inspecting, maintaining and repairing the western wall of Seven Gables with the extension in place are possible. It is, however, manifestly less convenient to carry out those tasks with the extension in place, at least so far as the wall below the level of the roof of the extension is concerned. I deal separately, below, with the inspection, repair and maintenance of Seven Gables above the level of the extension roof.

[367] It is possible for a person to enter the gap and move from its southern end to its northern end. That is clear from the video recordings produced by the defenders and which formed part of the evidence at proof. I accept that they are accurate recordings of the progress of Mr Cruickshank, the individual who entered and moved along the gap. I accept also as credible and reliable the evidence of Mr Eisler, who was involved at first hand in carrying out work in the gap. That work was needed because, when the ventilated cavity ceased to feature in the design, it became necessary to install external cladding on the eastern side of the extension. The cladding was installed from the outside. I accept Mr Eisler's evidence that one of his employees was able to wash the cladding from inside the gap, and to install screws. I accept that an employee added screws that were identified as

missing after the cladding was installed, and that he used a cordless drill to do so. I accept that the pebbles at ground level in the space were distributed from within the space.

[368] None of the video recordings demonstrated someone using a roller or applying paint. Mr Cruickshank took a roller with him, but did not attempt to use it to apply paint. I am satisfied, however, that it will be possible to carry out painting work from within the gap.

[369] I accept the evidence of Mr Brindle that it will be possible to paint the render from within the space by the means he described in his evidence, and that it will be possible to carry out repairs to the render should those become necessary. His evidence was that it would be possible to apply adequate pressure by using a roller within the gap. Although the area around the pinch point would be more difficult to paint, it could be painted. He is well qualified by virtue of his experience to comment on the repair and maintenance of historical buildings. He observed Mr Cruickshank's progress in the gap. Render repairs in the future can be done without "throwing" the new render on, by applying a smooth render. Some parts of the gable wall have smooth render on them already, indicating that areas have been repaired in the past using that method. The existing render can be painted more easily than fresh rough render, because the troughs between the chips in it are already filled to some extent with paint from previous decorating. The difficulty that would arise in painting new, rough render, if repairs are required, will not arise in relation to smooth render, as there will be no need to force paint into troughs or gaps in it.

[370] The way in which Mr Brindle's advice was obtained in the first instance was far from satisfactory, not least from his own point of view, as Mr Clarkson did not disclose to him that his view was being sought for the purposes of a court action. I regard it, however, as a factor favouring his credibility and reliability that he believed that he was providing an

estimate for work which he might then be expected actually to do. He frankly acknowledged that it would have been embarrassing to have to revise his view – initially formed on the basis of photographs – on visiting the property, and again, that acknowledgement tells in his favour.

[371] Mr Simpson and Mr Allan gave evidence to the effect that it would not be possible to work from within the gap. Mr Simpson had considered in the first instance, whether it would be possible to paint the lower part of the wall, using a pole from the roof of the extension. Neither he nor his supervisor had managed to get into the gap. Their attempts had been made from the roof and from the northern end of the gap. His evidence about carrying out preparatory work was also given from the perspective that it would not be possible to obtain direct access to the surface of the wall from within the gap. He said he would "not be happy" about asking someone to work in the gap, but did not appear to have considered – perhaps because he had not regarded access as possible – what safety precautions might be appropriate if work were undertaken in the gap. He had no expertise in harling repairs. His evidence appeared to me to be coloured by the belief he had initially held that it was not possible to get into the gap. Mr Allan was asked about this matter only briefly at the commission, and it is not clear to me from his evidence the extent to which he had or had not actively considered whether it would be possible to work within the gap, and I attach little weight to the view he expressed. I have attached little weight to the views expressed by Mr Clarkson as to the practicability of work inside the gap, as he largely deferred to the views of Mr Brindle, rather than expressing an independent view on this point.

[372] Some time was taken in evidence discussing whether the gap was a confined space for the purposes of the Confined Spaces Regulations 1997. I do not require to express a view

on this matter. Even if the gap is such a confined space – which I doubt – the regulations do not prohibit work in confined spaces, but require that work be done in them only when it is not reasonably practicable to do the work by other means, and impose requirements regarding safe working systems and arrangements for rescue. No witness identified any particular risk that a worker would suffer injury simply by reason of the nature or dimensions of the gap itself. Safe working within it would require an assessment of risk, including, probably, consideration as to how a worker would be removed from it if he was injured or became unwell for any other reason. That is the case in relation to a variety of places where work has to be done, and does not render it impractical to do work in the gap.

[373] Without touching upon whether work at this level will cost more with the extension in place, I am therefore satisfied that it will be materially less convenient to carry out inspection, maintenance and repair to the wall between ground and first floor level with the extension in place. Turning to the question of cost, Mr Clarkson accepted that the costs of work between ground and first floor level would be greater, and suggested a figure of 20 per cent. It is difficult to know how much weight to give to Mr Clarkson's lack of success in obtaining estimates for the work. He was asking for estimates on a very short timescale, which is likely to have discouraged tradesmen from becoming involved. It does not necessarily follow that it will be particularly difficult to find tradespeople to do the work in the future. The working situation is, as Mr Brindle acknowledged, "not ideal", and it is realistic to infer that this is likely to discourage some tradespeople, with the prospect of less competitive pricing of the work.

[374] Those conclusions are sufficient to dispose of the defenders' argument that they would be entitled to vary the servitude in the way they contend. If there were a servitude right of access, I am satisfied that the erection of the extension has made its exercise

materially less convenient. For the sake of completeness, my conclusions about the relative convenience of work to the wall above the level of the extension roof are as follows. I accept that it will be possible to inspect, repair and maintain the windows, wall and rainwater goods from the roof of the extension. Window cleaning can be done from the roof.

[375] With the extension in place, scaffolding will be required to work above the level of the roof. I accept that the proximity of the extension means that work cannot be done using a ladder. Mr Allan, and probably other tradesmen historically, have done work from ladders in the past. The pursuer himself has done painting work to other elevations using a ladder.

[376] I note, however, that Mr Simpson said that had the extension not been in place, he would have preferred to erect scaffolding to paint the wall. In re-examination, he said that in a "desperate scenario" he could work from a ladder, although it was not clear what sort of scenario he was envisaging. Mr Vince had treated the space that he thought was necessary for scaffolding as a key consideration informing his suggestion that the area used for access should be 900mm wide. Mr Brindle's evidence was that if the extension were not in place, he would use a mobile scaffold to paint the upper part of the gable wall. Mr Clarkson did not accept that the use of a ladder would be consistent with current health and safety standards. So far as current working practices are concerned, I am satisfied that it is more likely that tradespeople instructed to paint the upper part of the wall would do so using scaffolding, rather than ladders, with a view to providing a safe place of work. I am not able on the evidence available to make a finding about whether the scaffolding would be more expensive than scaffolding that would have been erected on the disputed area. Mr Clarkson appeared to be speculating to some extent when he said that it would not. Mr Simpson thought it would be more expensive but did not elaborate. Mr Brindle's view was that a

tower scaffold that he would have routinely available would have sufficed had the extension not been in place. None of these witnesses had been asked to investigate or address the cost of scaffolding in any detail.

[377] I accept Mr Clarkson's evidence that the roof of Seven Gables could be accessed without the need to use the disputed area. His evidence was not contradicted on this point. He appeared to me to be qualified to give it on the basis of his experience in relation to construction projects.

Is the pursuer barred from seeking the remedies that he does by reason of mora, taciturnity and acquiescence?

Submissions – pursuer

[378] The pursuer submitted that acquiescence, as a form of personal bar, required "inconsistent conduct" on the part of the pursuer, together with consequential prejudice to the defender. The test was strictly applied in cases involving heritable property. The facts from which acquiescence might be inferred must be such as to leave no reasonable doubt as to the intention of the parties at the time: *Duke of Buccleuch* v *Magistrates of Edinburgh* (1865) 3 M 528, Lord Justice-Clerk (Inglis) at 531.

[379] There was no foundation for the defenders' plea. The pursuer had raised concerns as to the effect of the extension on his ability to maintain Seven Gables when the defenders were seeking planning permission. The pursuer's agents raised the issue of a servitude right before work had started. Further detailed objections were raised in April, at a stage when building works were not far advanced, but the defenders chose to proceed with the project. The pursuer had never acted inconsistently with the right he now asserted, and had not acquiesced.

Submissions – defender

[380] The defender submitted that the requirements for a plea of mora, taciturnity and acquiescence were those set out by the Inner House in *Portobello Park Action Group Association* v *City of Edinburgh Council* 2013 SC 184 at paragraphs 13 to 16. All three elements of the plea must be present. The court must have regard to all the circumstances of the case. Mora meant delay beyond a reasonable time. Taciturnity meant a failure to speak out in assertion of a right or claim when a reasonable person in the position of the party against whom the plea was being taken would be expected to speak out. Acquiescence meant assent to what had taken place. The enquiry was not a subjective one to be answered by looking into the mind of that party. The question was how the matter would have appeared to a reasonable person observing the party's conduct, knowing of all the circumstances of which the party knew or ought to have known when acting as they did. The issue had been considered further by the Inner House in *Kenman Holdings* v *Comhairle Nan Eilean Siar* 2017 SC 339, from which counsel drew the following propositions. Prejudice was not an essential element of the plea. Any analysis of whether a period of delay was unreasonable must be considered in the factual and legal context, which included the remedy being sought. It must begin by identifying the starting point of the period of delay. Acquiescence fell to be inferred from unreasonable delay and taciturnity: *Kenman*, paragraphs 39-41, 49.

[381] An individual was presumed to know the extent of his property and any servitudes. The extent of the right ought to be articulated to prevent acquiescence: Blackie and Reid, *Personal Bar*, paragraphs 6.47, 6.49. I quote here, for completeness, also paragraph 6-48:

> "6-47 The benefited proprietor may be barred from later objection only if he or she knew both that work was being carried out on the burdened property and that obstruction of the servitude right was a likely consequence. In this connection, proprietors are in ordinary circumstances expected to know the

extent of their own title and thus to be aware of any servitude rights which it contains.

6-48 In order to prevent bar arising, the benefited proprietor must make objection to such operations within a period which is reasonable in the circumstances. A relevant comparator is the upper limit imposed by the Title Conditions (Scotland) Act 2003, section 16, in relation to acquiescence in breach of real burdens, namely 'twelve weeks beginning with the day by which that activity has been substantially completed'. However, there may be situations in which it would have been reasonable to object considerably sooner if, for example, building works have been undertaken under the eye of the benefited proprietor.

6-49 The common law makes no stipulation as to how objection should be intimated, and thus oral intimation is sufficient, subject to problems of proof. There is also no settled authority as to whether, in order to prevent bar arising, the benefited proprietor's objection must make specific mention of the fact that the proposed operation obstructs his or her servitude right. If, for example, the benefited proprietor has cited amenity reasons in objecting to the grant of planning permission but has made no reference to the servitude, it is arguable that this is insufficient to prevent acquiescence. In those circumstances the right to oppose the development in terms of the relevant planning legislation has been invoked, but acquiescence relates to a different right, namely to exercise common law remedies in order to prevent obstruction of the servitude. In the absence of further activity forthwith, such as an action for interdict, the burdened proprietor is given no notice this right is to be asserted."

[382] The pursuer ought to have known about the servitude, if it existed. He made no assertion regarding it until, at the very earliest, the call between his agents and the first defender on 31 January 2018. The first defender did not understand that the pursuer was asserting that there was an existing servitude right of access, and the pursuer's solicitors did not suggest that construction should not proceed. The proposal for a ventilated cavity was apparent throughout the planning permission process. The pursuer engaged solicitors in relation to the planning process not later than May 2017. Work did not begin until 12 February 2018. It was only after an inquiry made by the first defender to the pursuer's solicitors on 9 April that he was asked, on 10 April, to stop the works.

[383] The communications objecting to planning permission were of no assistance to the pursuer in this context, because they proceeded on the premise that the disputed area was owned in common. The defenders were entitled to treat the communications as proceeding on a fundamental misunderstanding. A proprietor would not normally be entitled to require that his neighbour's land be sterilised to facilitate repairs to the former's property, and the defenders had no knowledge themselves of any servitude right of access. There was in any event no further objection until the letter of 8 January 2018.

Decision

[384] The law relating to the plea of mora, taciturnity and acquiescence as stated in *Portobello Park Action Group Association* and *Kenman Holdings* is correctly summarised in the submission of the defenders recorded above.

[385] So far as the meeting between the pursuer and the first defender is concerned, I have been unable to make a finding as to when that occurred. I did not regard either of them as reliable as to the date of that meeting. I accepted the pursuer's account of what happened when the two met, namely that the pursuer attempted to speak about the planned extension, but that the approach was politely rebuffed. Nothing turns on this so far as the matter of mora is concerned. Whenever the meeting took place, I am satisfied that no substantial discussion of the extension took place.

[386] There is no dispute as to the terms of the correspondence in writing relating to this matter. The relevant passages in it are quoted elsewhere in this opinion. So far as the position before 18 January 2018 is concerned, there is no evidence that the pursuer or his agents on his behalf asserted that he had a servitude right of access over the disputed property. The two letters of objection relating to planning permission – that from the

pursuer's agents on his behalf and the letter from Mrs Robertson personally – related that access was taken from land owned in common. The letter sent by agents for the pursuer refers to a lane, but reading it as a whole, and in particular in the context of the reference to the "issues caused by the … glass conservatory", it is clearly referring to an area to the south of the common passage. Mrs Robertson's letter refers to an "alley", but again is clearly referring to an area south of the common passage, by virtue of the reference in the letter to painting windows. I accept that the letters fell to be construed as referring to the disputed area, rather than the common passage. That does not mean that they involved any assertion about a servitude right, or that they ought to have been construed as doing so. Their plain meaning was that the pursuer and Mrs Robertson were asserting that they used the disputed area for repairs, and that it was an area that was owned in common. The letters are reasonably to be read as proceeding on a misapprehension that the land in question was owned in common.

[387] The communications did in fact proceed on that misapprehension. So did the letters sent by Mr Mitchell on the pursuer's behalf in November 2017 and January 2018. The defenders never received the letter dated 8 November, because it was sent recorded delivery and they were not at the property at the time. That letter, and the one dated 8 January referred to encroachment into the "lane". Although there was a reference in a footnote to a title deed which was said to demonstrate that the "lane" was held in common, there was no positive contention in the proof that it actually did so, and it was not produced.

[388] The pursuer and his agents continued to operate under the misapprehension that the disputed area was owned in common. The next communication of significance was the telephone contact and emails between the first defender and Mr Mitchell on 19 January 2018. Put shortly, the first defender produced material that demonstrated that only the common

passage was owned in common. It was then that Mr Mitchell consulted colleagues with expertise in property law and litigation. Those colleagues reached the view that the pursuer had acquired a servitude right of access through the passage of time.

[389] I accept the evidence of Mr Mitchell and Ms Hepburn that during the telephone call with the first defender, Ms Hepburn told the first defender that the pursuer was asserting that he had an existing right of access which he had acquired because of the passage of time. The discussion was not limited to the possible grant of a deed of servitude in relation to a right of access over the roof of the extension, although it included that matter. I regarded Mr Mitchell and Ms Hepburn as credible and reliable witnesses in relation to this matter. Their evidence was consistent with the detailed file note made by Ms Hepburn. The first defender's evidence on this matter was unsatisfactory. He recalled most of the significant features of the conversation other than the mention of an existing right acquired by virtue of the passage of time. There is no evidence that anything was said to the first defender at that time to the effect that the existence of a servitude might bar construction of the extension, or to the effect that he might want to take independent advice about the risk of proceeding with it.

[390] I accept also that on 6 February 2020 Ms Hepburn had a conversation with Mr Cameron, then the defenders' agent, in the terms reflected in her file note. That included an acceptance by Mr Cameron that the pursuer had an existing servitude right. The detail that he referred to the case that Ms Hepburn came to realise was *Brydon* v *Lewis* is a compelling one in supporting that account, although the case relates to a servitude apparently by necessity rather than one acquired by virtue of prescription. Ms Hepburn's evidence about this telephone call was uncontradicted. Mr Cameron was on the defenders' list of witnesses but was not called.

[391] I do not regard the evidence about the conversations between Mr Vince and Mr Fitzgerald in early February as having any bearing on the question of mora. While I accept that nothing was said by Mr Vince about the assertion of a right or to the effect that the development should not proceed, I would not expect someone instructed on the basis that Mr Vince described to be communicating assertions or requirements of that sort to the defenders through Mr Fitzgerald.

[392] After the telephone conversation of 31 January 2018, there was no communication in writing with the defenders or their agents until the letter of 10 April 2018 from the pursuer's agents. That was the first occasion on which the pursuer or anyone on his behalf had asserted, in writing, that he benefited from a servitude right. The letter contained an expression of view that the pursuer would be successful if he were to seek interim interdict, but narrated that he was prepared not to raise proceedings providing certain conditions were met, which included the grant of a deed of servitude, and an undertaking that the defenders would not "commence their development work" until the deed had been submitted for registration and acknowledgement received from Registers of Scotland.

[393] That the pursuer was not prepared to accept a deed of servitude was communicated for the first time by letter of 25 April 2018. I accept that what caused this change of attitude was the pursuer's discovery that the construction of the ventilated cavity would involve some degree of attachment to his property. I accept that the planning drawings do not make it obvious how the attachment was to be effected. They do, however, make it clear that the gap would be covered, and use the expression "ventilated cavity" (JB31, page 18). It was or ought to have been apparent that whatever the extent of the gap between the properties at ground level, it would not be an open gap. The pursuer did not understand that sealing the capping detail against the wall of Seven Gables would involve connecting the two

properties. He did not realise that it would be necessary to drill into the wall of his property and attach battens to it to form the sealed and ventilated cavity. It is unfortunate that no permission was sought from him for this aspect of the work. The defenders' architect must have known that work of this nature could not proceed without the consent of the pursuer, as it involved encroaching on his property, and his consent should have been sought.

[394] Leaving aside the question of the battens, it is difficult to understand how sealing the capping detail against Seven Gables – a proposal actively advanced on the pursuer's behalf by his agents on Mr Vince's advice – could ever have resulted in anything other than the properties being attached to each other, at least at the level of the capping detail at the point where it was sealed against Seven Gables. In May the offer to accept a deed of servitude was withdrawn, and shortly afterwards negotiations broke down altogether.

[395] On the basis of that history of events, the defenders cannot succeed in their plea of mora, taciturnity and acquiescence in respect of events on or after 31 January 2018. On that date the pursuer, through his agents, did assert that he had a right of access founded on use over many years. From the point at which a servitude right was asserted, the defenders were put on notice of it, but chose to continue with the building project. A servitude right of access is one which they were not entitled to obstruct, and they proceeded at their own peril, in the knowledge that the right had been asserted. I accept that the pursuer's agents knew from 31 January 2018 that the defenders intended to start work in early February. That interdict or an undertaking not to proceed with the work was not sought at that point does not, however, give rise to an inference of acquiescence. The assertion of right, this time explicitly referring to a servitude right, was repeated in a conversation with the defenders' then agent, Mr Cameron, on 6 February. Mr Cameron accepted that there was a servitude right.

[396] It would have put the nature and timing of the assertion beyond any doubt if it had been repeated in writing following the conversation of 31 January or that of 6 February. That that was not done is, therefore, regrettable, but it does not detract from the circumstance that the assertion of an existing right was made in those conversations. There was no threat of interdict, or request to desist from starting or continuing work until 10 April 2018. It was, however, clear that matters remained unresolved. The first defender in fact appreciated that matters remained unresolved, as is apparent from his having contacted the pursuer's agents on 9 April.

[397] I do not regard the circumstance that there were discussions as to the potential to settle the dispute by the grant of a servitude right of access over the roof as supporting the defenders' plea. The defenders' then agent had communicated to Ms Hepburn an apparent acceptance that the pursuer had an existing servitude right. Although there was a proposal as to how matters might be resolved which was discussed in the conversations on 31 January and 6 February, I am satisfied that the conduct of the pursuer through his agents put the defenders on notice that there was a dispute about an existing servitude right of access, and that they ought to have been aware as they proceeded with their building project that that dispute remained unresolved. Negotiations or proposals to settle a dispute are not necessarily, and were not in this case, inconsistent with an assertion of right.

[398] I turn then to whether the defenders can rely on the conduct of the pursuer before 31 January 2018 in support of their plea. The earliest point at which the relevant period begins is the date on which there was notification to the pursuer as a neighbour in relation to the planning application. I do not know precisely what that date was, but accept the pursuer's evidence that he became aware of the matter in April 2017. Timeous objections were presented in the pursuer's name through his agents.

[399] The pursuer stated objections to the construction. He was not silent when planning permission was sought. He did not, however, assert that he had a servitude right. He asserted that he had access rights over the "land" and owned the land in common. The plea of mora, taciturnity and acquiescence is "necessarily protean": *Singh* v *Secretary of State for the Home Department* 2000 SLT 533, Lord Nimmo Smith, paragraph 11; quoted with approval *Somerville* v *Scottish Ministers* 2007 SC 140, Lord President (Hamilton) delivering the opinion of the court at paragraph 92; and in *Portobello Park Action Group Association*, paragraph 14. Whether it is established depends on all the circumstances of the case. With that in mind it is legitimate not only to consider whether the pursuer was literally silent, but what right he actually asserted. A party relying on a servitude right of access is reasonably to be expected to assert explicitly that his objection to the construction is founded on that right. The erroneous assertions about common ownership do not assist the pursuer. Even if they had been of assistance to the pursuer's case, I would require to consider whether the conduct of the pursuer after the grant of permission would be such as to give rise to the inference that he acquiesced.

[400] Following the grant of planning permission, which occurred on 1 June 2017, the pursuer was silent for a period of nearly 7 months. He did not attempt to indicate that he was asserting a right of access on any basis, until his solicitor wrote in November 2017. The pursuer through his agents knew or ought to have known that that communication had been ineffective, as it was sent by recorded delivery, and was not delivered. The first effective communication was in January, and again it was on the erroneous basis that the area over which access was taken was owned in common. During the months in question, the defenders had sought tenders and engaged a contractor, who was due to start work in early February.

[401] Before 31 January 2018 the pursuer made no assertion that there was a servitude right of access. Such assertions as he did communicate were in the planning objection dated 1 May 2017 and in the letter of 8 January 2018. I require to consider whether, in those circumstances, the pursuer was barred by mora, taciturnity and acquiescence from objecting to obstruction of a servitude right of access before 31 January 2018, when the servitude right of access was positively asserted. I have concluded that he was not. I accept that following the grant of planning permission the pursuer was placed with knowledge that a physical obstruction which would prevent him from exercising what he later asserted to be a servitude right of access. As at 31 January 2018, however, no physical obstruction had been created. No building warrant had been granted. Contractors were not yet on site. Had the pursuer stood by and waited to assert the servitude right until after construction work had begun, I would have reached a different conclusion. The situation is different from that of a proprietor who has stood by and watched the obstruction actually being erected. I note that that is the sort of situation that Blackie and Reid contemplate might found a plea of personal bar. Put another way, had the pursuer sought interdict on 31 January on the basis of an apprehended interference with a servitude right of access, in a situation in which contractors had not yet taken possession of the site, I would not have held that he had lost the right to rely on that right because he had not mentioned a servitude right of access before that date.

Has the construction of the extension given rise to a nuisance?

Submissions – pursuer

[402] The pursuer submitted that the building of the extension constituted a nuisance. The court required to consider whether the defenders were using their property so as to occasion the pursuer serious disturbance, substantial inconvenience or material damage, and in such

cases it was generally irrelevant that a defender was making a normal and familiar use of his own property. The balance had to be held between the freedom of a proprietor to use his property as he pleased and his duty not to inflict material loss or inconvenience on adjoining proprietors or property. In every case the answer depended on consideration of fact and degree: *Watt* v *Jamieson* 1954 SC 56, Lord President (Cooper), 57. There was no requirement to fault, and it was sufficient to show that harm would be caused: *The Shotts Iron Company* v *Inglis* (1882) 9 R (HL) 78, Lord Blackburn, 88. The extension would prevent the pursuer from maintaining his property properly. It was likely to cause damp, damage and deterioration, and was therefore a nuisance.

Submissions – defenders

[403] The defenders submitted that the correct test was that set out in *Watt* at 57-58. The question was whether what the pursuer had been exposed to was plus quam tolerabile when due weight had been given to all the surrounding circumstances. That the defenders were using their property lawfully was a relevant factor to be taken into account: Whitty, Nuisance, Stair Memorial Encyclopaedia (Reissue), paragraph 68. There was no liability in nuisance without culpa: *Kennedy* v *Glenbelle* 1996 SC 95.

[404] The case of nuisance depended on there not being a servitude right of access. If there was such a right the pursuer's complaint must be one of obstruction of a servitude, and not one of nuisance: Stair Memorial Encyclopaedia, Nuisance, paragraph 19. It followed that the pursuer's case regarding nuisance must be approached on the basis that the pursuer had no right of access, and that considerations about obstruction do not arise. The nuisance case depended on proof of damage to Seven Gables. The defenders accepted that the risk of

progressive deterioration to Seven Gables could be a nuisance, but did not accept that that risk had been established on the evidence.

Decision

[405] The test for establishing nuisance is that set out by the Lord President in *Watt* v *Jamieson* at 57-58:

> "…the proper angle of approach to a case of alleged nuisance is rather from the standpoint of the victim of the loss or inconvenience than from the standpoint of the alleged offender; and that, if any person so uses his property as to occasion serious disturbance or substantial inconvenience to his neighbour or material damage to his neighbour's property, it is in the general case irrelevant as a defence for the defender to plead merely that he was making a normal and familiar use of his own property. The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property; and in every case the answer depends on considerations of fact and of degree. I cannot accept the extreme view that in order to make a relevant case of nuisance it is always necessary for the pursuer to aver that the type of user complained of was in itself non-natural, unreasonable and unusual. Especially when (as in this case) the so-called 'locality' principle applies, it must be accepted that a certain amount of inconvenience, annoyance, disturbance and even damage must just be accepted as the price the pursuer pays for staying where he does in a city tenement. The critical question is whether what he was exposed to was plus quam tolerabile when due weight has been given to all the surrounding circumstances of the offensive conduct and its effects. If that test is satisfied, I do not consider that our law accepts as a defence that the nature of the user complained of was usual, familiar and normal. Any type of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, is prima facie not a 'reasonable' use."

[406] Culpa is a necessary element in nuisance. That is clear from *Kennedy* v *Glenbelle,* and from the following passage in the speech of Lord Fraser of Tullybelton in which he comments specifically on in *RHM Bakeries (Scotland) Limited* v *Strathclyde Regional Council* 1985 SC (HL) 17 at 43-44.

> "But the fact that the proper approach is from the standpoint of the victim does not mean that the question of fault on the part of the alleged offender can be completely disregarded, so as to make him an insurer—see the third of the modern cases cited by

> Lord Cooper, *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 , per Viscount Maugham at p. 887 , and especially per Lord Atkin at p. 896 , where he said this: 'For the purpose of ascertaining whether as here the plaintiff can establish a private nuisance, I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, which is connoted in my definition by the word "use." This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance.' (Emphasis added.) *Sedleigh-Denfield* was a case where the victim was suing for damages. In a case when the only remedy sought was interdict the position might be different; I think that a defender might be liable to be interdicted from using some artificial work on his land, even although he had no personal responsibility for putting it there in the first place and had not begun to use it, if there was reason to believe that he was likely to use it in the future. But that question does not arise here. Accordingly, I do not regard Lord President Cooper's opinion in *Watt v. Jamieson* 1954 S.C. 56 as giving any support to the view that a defender is liable for damages for nuisance merely ex dominio and without fault on his part."

[407] I am not satisfied that any nuisance has been created by the extension, or that any is likely to be created by it, for the following reasons. The pursuer apprehends that material may gather in the gap between the buildings and that the western wall of Seven Gables may become damp. The evidence from the pursuer, Mr Vince and Mr Clarkson, was that there has not, thus far, been any such build-up of material, with the exception of some pieces of tile. No witness gave evidence of any nearby source of leaves which would be likely to be blown into the gap. I did not accept Mr Vince's evidence about his impression that the appearance of the wall had changed over the months as reliable evidence that any nuisance had been created. His evidence was of a subjective impression that the wall looked more damp. He had seen the wall most recently in early February 2020, and compared it with pictures taken at an earlier time and by another witness. There is no secure basis for the comparison as to lighting conditions, timing, or the weather conditions in the hours or days preceding the observations or the photographs. Mr Vince accepted in cross examination that

all property deteriorates over time. He could not say definitively that the rate of deterioration was any better or worse than it would have been had the extension not been built. There was no evidence that any witness had carried out investigative work to provide empirical evidence one way or the other as to any alteration in the rate of deterioration that resulted or was likely to result from the presence of the extension.

[408] The evidence of Mr Oliver about a build-up of material on his property does not assist the pursuer. His evidence did not disclose the location or nature of the area on his property where he said that material would gather and from which he said it had to be cleared. As I have already indicated, I place no reliance on Mr Oliver's evidence.

[409] Mr Vince's evidence about the risk of deterioration was, in part, predicated on the proposition that the cement based render, which is designed to act as a form of waterproofing, would deteriorate if it were not painted. For the reasons I have already given, I am satisfied that it is possible to paint the whole of the western gable wall of Seven Gables with the extension in place. Further, I accept Mr Clarkson's evidence, which is that the masonry of the buttress is very thick, and much thicker than the masonry elsewhere on the building, with the result that it does not require the protection of render. Mr Vince also gave evidence that he was concerned that the tiling at the top of the buttress would deteriorate. There is nothing to prevent that relatively modest section of tiling being inspected and maintained by taking access from the extension roof.

[410] I am not satisfied that the proximity of the buildings will prevent dampness from drying out. Insofar as there is a difference between Mr Vince and Mr Clarkson regarding the flow of air into the gap and its sufficiency to protect the wall of Seven Gables from becoming damp and deteriorating more quickly than it would otherwise have done, I prefer the evidence of Mr Clarkson, which was to the effect that wind around the buildings would

create suction and pressure forces and ensure that air flow was maintained. That is because Mr Clarkson gave evidence, and Mr Vince did not, from the point of view, and with the experience of, an engineer experienced in considering and calculating the effect of air and wind on a building. Mr Vince did not indicate that any similar experience or expertise informed the view he had taken as to the insufficiency of air flow into the gap.

[411] Although the pursuer made averments relating to diminution in value, he led no evidence in support of that case.

If there is a servitude right of access, or the extension gives rise to a nuisance, ought the court to exercise its discretion to grant a remedy requiring that the extension be taken down

Submissions – pursuer

[412] The origins of the courts power to refuse to make an order requiring the removal of the extension were explained by Lord Watson in *Grahame* v *Swan* (1882) 9 R (HL) 91 at 91-2. Although the court had the power to decline on equitable grounds to enforce a legal right, that power was exercised only rarely. It should be exercised only in exceptional circumstances. The encroachment must be made in good faith in the belief that it was unobjectionable; it must not materially impair the pursuer in the enjoyment of his property; and the removal must be attended with unreasonable loss and expense disproportionate to the advantage to the pursuer: *Anderson* v *Brattisanni's* 1978 SLT (Notes) 42 at 43.

[413] The defenders were aware of the pursuer's objections, which were first raised at the planning stage. Although they proceeded on an erroneous basis, it was clear that the pursuer had a concern as to his ability to maintain Seven Gables if the extension were built. The court should accept the pursuer's account of having spoken to the first defender early in 2018 and having attempted to start a conversation about the extension. Mr Mitchell and

Ms Hepburn had communicated the existence of the servitude right to the first defender on 31 January 2018. Mr Cameron, the defenders' then solicitor had expressed the view that a prescriptive right existed when he spoke to Ms Hepburn on 6 February. The defenders were aware well before work started of the rights being asserted and the impact the pursuer said the extension would have. When the pursuer's agents wrote to the defenders on 10 April, they had offered to compromise. It would have been less expensive, as Mr Fitzgerald acknowledged in evidence, to modify the design than it would have been at a later stage. The defenders decided to carry on with the work. The gutter detail to be attached to Seven Gables was not something of which either the pursuer or Mr Vince was aware. It would in any event not have been effective in protecting Seven Gables from dampness, and would have inhibited inspection. The pursuer had made a realistic offer to settle, by paying £40,000 towards the costs of moving the extension. Mr Tulloch's evidence was that the estimated cost of moving the eastern wall by 900mm in June 2018 was £30,854.

[414] The encroachment was not of minor effect in relation to the pursuer's right. The cost of its removal would not be disproportionate. It would cost around £58,000 to move the eastern wall by 900mm. That was the figure produced by Mr Munro and agreed by Mr Tulloch.

Submissions – defender

[415] The court's discretion not to order removal of the extension was a discretion that was frequently exercised: Reid, The Law of Property in Scotland, paragraph 178. The first case regularly cited was *Sanderson* v *Geddes* (1874) 1 R 1198. The facts of *Jack* v *Begg* (1875) 3 R 35 were instructive in the present case. The court had declined to order removal of a wall in circumstances where the defender had warned that the work would amount to an

encroachment, but had not insisted on his desisting and instead sought to negotiate. Lord Gifford explained that there was an equitable power in the court to decline to order restoration of things to their former condition where that was impossible or would be attended with unreasonable loss and expense, and could say upon what equitable conditions the building should be allowed to stay where it was. Lord Gifford's exegesis in *Jack* of the equitable power was approved in *Grahame*, although not the remedy the court had selected. In *Wilson* v *Pottinger* 1908 SC 580, the pursuer had initially given permission. The plans changed, and the pursuer then objected, but the defender continued. The Lord Ordinary ordered removal, holding that the pursuer had done nothing to bar himself from the remedy. The defender reclaimed successfully. The leading modern authority was *Anderson*. What was meant by good faith in that case must be consistent with the approach to that concept in the earlier cases. The court in *Anderson* did not purport to overrule or modify the law stated in the earlier cases, and could not do so in relation to *Grahame*. A party was not in bad faith simply because he had notice of an asserted right.

[416] The cost to move the eastern wall of the conservatory only was £58,803, plus VAT. That was a significant cost. The works would not be straightforward. They would reduce the size of the extension from 34 square metres to 28 square metres. The first defender's view was that it would be better to move the whole conservatory. The part of the cost of the building project attributable to the extension had been £170,000. Ordering removal would be wholly disproportionate to the advantage conferred on the pursuer. The pursuer was the author of his own misfortune. He had refused to accept a ventilated cavity which would have avoided the need for maintenance at ground level, and had refused to accept a servitude right of access over the defenders' roof.

Decision

[417] So far as the history of communications between parties is relevant to this chapter of submissions, my findings are set out in the part of this opinion dealing with mora, taciturnity and acquiescence. Otherwise the facts potentially relevant to the exercise of the court's discretion are not really the subject of dispute. Although both Mr Tulloch and Mr Munro gave evidence, there was very little difference between them as to the costs that would be involved in moving the eastern wall of the extension 900mm to the west. As at the date of proof those costs would be in the region of £58,000. I accept that the alteration of the structure in that way would be attended by risk, and that the cost might well be higher than that. It would reduce the space in the extension in the way that the defenders contend. I do not regard the costs involved in demolishing and rebuilding the extension in its entirety as relevant. I accept that the defenders would prefer that course to reducing the area of the existing extension. The cost of the existing extension – which I accept was £170,000 – is probably, broadly, a reasonable estimate of what that exercise would cost. I am, however, asked only to provide a remedy in relation to the provision of a passage 900mm in width, and I therefore confine myself to considering the work necessary to achieve that end.

[418] So far as the law is concerned, the parties differed as to how I should construe the requirement, which appears in some of the authorities, that the party seeking the exercise of the discretion should have proceeded in good faith, and whether I should regard the defenders having done so. They differed also as to what the evidence demonstrated regarding the proportionality of granting the remedy sought by the pursuer.

[419] In *Sanderson* two cottages were separated by a clay gable that was 4 feet thick. The proprietor of the cottage to the west pulled down his cottage. He built a new house, and its gable wall was erected entirely on the eastern half of the space formerly occupied by the clay

gable. The reasoning of the Lord Justice-Clerk (Moncrieff) so far as removal is concerned, is as follows:

> "The first complaint in the present action is that the gable was erected without authority, and wholly on ground belonging to the pursuer, and, therefore, that it ought to be taken down. The erection took place in the full knowledge of those who had right on either side. It is therefore out of the question to compel the defender to take down this gable which he had erected without objection. The pursuer has suffered no injury. He has got as good a gable as before, and indeed a better one, and he loses nothing by the two feet which the defender has thrown into his house."

The expression "good faith" does not appear in the opinions of the Lord Justice Clerk. It is, however, a case in which the pursuer had not objected to the construction.

[420] The report in *Jack* relates to two actions. The one in which a question as to whether a building or part of it should be removed is *Begg and others* v *Jack*. The defender took down part of a mutual garden wall between his property and that belonging to the pursuers as trustees of the deacon's court of a Free Church. He began to put up a building three or four stories high, the gable wall of which extended along the line of the old wall. The deacon's court warned him that he was encroaching on their property. They did not insist on his desisting, and 2 months was spent negotiating terms on which they might consent. The negotiations failed, and the gable wall was nearly complete by the time they raised proceedings for interim interdict. The court proceeded on the basis that the pursuers did not consent to the building (Lord Gifford at 42-43):

> "In the next place, I think it is clear that the pursuers never consented, either expressly or by implication, to the gable in question being erected partly upon their ground. On the contrary, I think that the correspondence and evidence shews that the pursuers all along objected and warned the defender that he was proceeding at his own risk, while at the same time they were negotiating terms of agreement or arrangement. No agreement, however, was ever come to, the parties having differed as to the responsibility for any damage which might be occasioned to the schoolroom. It was on the failure of these negotiations for arrangement that the pursuers on 10th May 1873 obtained interdict against the defender, stopping him from proceeding farther with the erection of the gable, but this interdict was not obtained until the gable was very nearly completed. It is plain, however, that the

pursuers, although they delayed their application for judicial interdict till towards the end, never consented to the erection, but extra judicially objected, and reserved all their rights.

…

If I am right in the opinion I have expressed, that the defender Jack had no right to build the gable in question so as to encroach upon the property of the pursuers, and if the defender erected it at his own risk, and notwithstanding the opposition and warning of the pursuers, the logical result is that the Court might order it to be taken down and set back, and there are cases when this course, severe although it be, may be necessary to do justice between the parties; but in all such cases there is an equitable power vested in the Court in virtue of which, when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense, quite disproportionate to the advantage which it would give to the successful party, the Court can award an equivalent,—in other words, they can say upon what equitable conditions the building shall be allowed to remain where it is, although it has been placed there without legal right. This equitable power has often been exercised by the Court when slight encroachments have been made by a builder upon his neighbour's property, it being unreasonable in such cases to insist on the demolition of the whole building. An example of this occurred in the case cited in argument, Sanderson v. Geddes, 1 Rettie, 1198, but there are many other and stronger instances."

[421] Lord Watson's speech in *Grahame* contains the following in relation to *Jack*, at 92-93:

"The last authority to be found in the books is *Begg v. Jack*, and in regard to that decision I desire to say that, whilst it may fairly be accepted as an authority in favour of the equitable jurisdiction of the Court in such cases, I am not satisfied that the result at which the Court arrived is such as your Lordships ought to approve. […] The Court held that one-half of the site of the wall was the exclusive property of the pursuers, but they refused to ordain the removal of the new gable, and allowed it to stand upon the condition that the pursuers should be entitled, if they chose, to use it as a mutual gable, without making the customary payment … in respect of that privilege. The pursuers had, unfortunately for themselves, expressed their willingness in the course of the dispute to compromise it upon the terms ultimately forced upon them by the Court, and that seems to have been one of the leading grounds of the judgment against them, which humbly appears to me to trench upon private rights of property to an extent altogether unwarranted by any previous authority in the law of Scotland. The practical effect of the judgment was that the Court gave the wrongdoer compulsory powers to acquire part of his neighbour's property, which, <u>in spite of remonstrance</u>, he had illegally appropriated." (Emphasis added.)

[422] Lord Blackburn concurred in the doubts expressed by Lord Watson as to whether the equitable power of the court had always been properly exercised. The defenders are correct

to say that it was the remedy upon which the Second Division settled in *Jack* that Lord Watson disapproved. The existence of the equitable power was affirmed in *Grahame*, and exercised. It is not entirely clear, however, from the passage just quoted whether, so far as remedy is concerned, Lord Watson was deprecating the decision of the Second Division to decline to require that the gable be removed, or whether his objection was only to the terms on which the court had allowed the gable to remain. Although Lord Watson did not expressly comment on the relevance of the circumstance that the trustees in *Jack* had asserted a right, I am not persuaded that he was approving the exercise of discretion not to order removal where that circumstance obtained. On the contrary, he indicated clearly that he did not approve of the course the court had taken. My view is informed by his use of the words underlined in the passage above, and by other passages in his speech, to which I refer below.

[423] *Grahame* is not a case involving two private proprietors. It related to the erection by magistrates of stables on a piece of ground held by them for the benefit of residents of the burgh as a bleaching ground and place of recreation. The pursuer was seeking interdict not merely for his own interest, but in the interests of the wider public. The work to erect the stables had begun by the time interdict was sought. No interim interdict was granted, and the defenders completed the work before interdict came to be granted. Lord Watson expressed the view that if the controversy had been between private parties he would not have withheld a remedy. The considerations that influenced him were the interests of the wider community "on both sides of the … litigation", and the circumstance that the land which the magistrates offered to the community in lieu of that on which the stables were built had not been its property at the time when the pursuer obtained interdict. Essentially, the funds expended on the stables were public money, and if the stables were removed they would have to be built again elsewhere, at public expense. At page 95 Lord Watson said:

> "Were the appellant seeking to enforce a decree which he held in his own private right and interest, I do not think the considerations of inconvenience and pecuniary loss to the respondents arising from the position in which they had placed themselves, by their own acts, would have afforded a relevant answer to his demand in the present action. But these considerations assume a very different aspect when the necessary result of disregarding them will be to inflict that loss and inconvenience upon the community whose interest the appellant represents."

He went on, in the context of an argument that the magistrates might be personally liable for the cost of restoring the ground and building the stables elsewhere:

> "I cannot regard the proceedings of the respondents in building upon ground which they were under a duty to keep open for the use of the inhabitants as at all praiseworthy; and they were certainly not *bona fide* in any proper sense of that term. The most that can be said for the respondents is that they did not act *mala fide*..."

[424] It is relevant to observe that Lord Watson expressed the opinion that he would have granted the remedy sought as between private proprietors. That was notwithstanding that the pursuer sought interdict only after the defenders had started building operations and incurred some expense.

[425] In *Wilson* the pursuer had initially given permission for the work to take place. The Dean of Guild then required the work be done in a manner which caused an overhang of 4.5 inches over the pursuer's property, and to which the pursuer took objection. The grounds on which the Lord President (Dunedin) determined to exercise the discretion included these (p 585):

> "Looking to the whole surrounding circumstances, it seems to me perfectly clear that the meaning of the consent to the building on the gable was to a building on the gable of which the Dean of Guild Court should finally provide the authorised plans. Then there is no doubt the plans were altered, and I think it was clearly proved that the signature of the pursuer, which was adhibited to those plans, was adhibited after the alterations had been made. I agree that it may very well be that the pursuer, being a man unskilled in plans, did not, if I may use the cant expression, wake up to the fact that the alterations had been made, and that these 4½ overhanging inches were upon his property; but I do not think he can take any benefit from that. If he chooses to put his signature to a plan authorised by the Dean of Guild Court, I think he takes his chance as to what this plan precisely shewed. In other words, I do not, as the Lord Ordinary has done, first of all conclude that the agreement was for a

> gable wall of 9 inches, and then that there was a new arrangement for a gable wall of 14 inches. I look upon the agreement as for such gable as the Dean of Guild authorises, and then I find that what the Dean of Guild authorised was fairly brought to the pursuer's notice by the production of the plans."

Lords McLaren and Kinnear proceeded on the basis that the original agreement between the parties in which the pursuer gave permission for the work was subject to an implied term that the building was to be in such form as the Dean of Guild Court should order. It is clear, therefore, that the court exercised its discretion not to order removal in circumstances where it was satisfied that the pursuer had consented to the work done. Lord McLaren made reference to a requirement of good faith at 586-7:

> "… I think there is sufficient authority in the region of decision to shew that we have to a certain extent at least adopted the principle of the Roman law, that a person who builds in good faith on another man's property is not necessarily to be compelled to take down his building. If the value of the building greatly exceeds that of the ground he occupies, the case can be explicated by paying compensation, whatever may be the agreement."

[426] *Anderson* concerned a flue from a fish and chip restaurant attached to the rear gable of a tenement. It was not disputed that it was an encroachment. No objection had been made when the flue was installed in 1966. On appeal from the sheriff court, the First Division gave the following account of the law at 43:

> "The general rule is that a proprietor is entitled to have any structure erected upon his property removed.
>
> There is, however, an equitable power in the court, in exceptional circumstances, to refuse enforcement of the proprietor's right at least in a question of encroachment by a neighbouring proprietor. In this case we are now told that the defenders are merely tenants, but we do not require to decide whether this equitable power is, in law, available in a question with an encroaching tenant because we were expressly invited by counsel for the pursuer to assume for the purpose of this chapter of the appeal that the power may be exercised by the court even in the case where the encroacher is a tenant and not a proprietor. The existence of this power has been recognised in cases such as *Sanderson v. Geddes* (1874) 1 R. 1198 ; *Begg v. Jack* (1875) 3 R. 35; *Grahame v. Mags. of Kirkcaldy* (1882) 9 R. (H.L.) 91; and *Wilson v. Pottinger*, (1908) 15 S.L.T. 941, 1908 S.C. 580 . From these cases it is clear that the power may be exercised when the exact restoration of things to their former condition is either

> impossible or would be attended with unreasonable loss and expense quite disproportionate to the advantage which it would give to the successful party. The power will, however, be exercised sparingly and it may be deduced that because it is exercised the court will have to be satisfied that the encroachment was made in good faith in the belief that it was unobjectionable, that it is inconsiderable and does not materially impair the proprietor in the enjoyment of his property, and that its removal would cause to the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor."

The court declined to order removal of the flue. The court recorded both that the flue was installed with the knowledge and consent of those who had at the time rights in the gable wall, and that it was not at the time of the appeal disputed that it was erected in good faith and in the belief that it was unobjectionable: 43-44. Although these matters are recorded together in the opinion, I note that in the absence of dispute on the matter, the court did not have to concern itself directly with what did or did not constitute good faith in that case. The flue was "an inconsiderable if not insignificant" encroachment, not visible from within the property and not interfering with the pursuer's enjoyment of the property. Without the flue the restaurant would not be able to operate.

[427] I proceed on the basis that the prerequisites for the exercise of the discretion are those set out in the passage just quoted from *Anderson*. The defenders are bound to fail in invoking its exercise, because they have not proceeded in good faith and in the belief that it was unobjectionable. The requirement that defenders have proceeded in good faith will not in my view be satisfied where they have proceeded to build in the face of objection. The pursuer's objection and its basis in an assertion of a servitude right of access was made clear before the defenders started building. The only case to which I have referred between private proprietors in which the court exercised its discretion not to order removal where construction proceeded in the face of objection is *Jack*. As I have explained, Lord Watson in *Grahame* disapproved of the exercise of the court's discretion in that case. I am not bound by

the approach of the court in *Jack*. Further, as Lord Watson points out, it appears to have been influenced by a concession made by the trustees.

[428] Although Lord Watson took the view in *Grahame* that the magistrates had not proceeded in good faith, the argument about that matter was in the context of the potential personal liability of the magistrates. The public interest conditions that bore on the court's disposal of the case are such, as Lord Watson made clear, that it is not directly comparable to a private law case such as the present.

[429] Had I been satisfied that the defenders had proceeded in good faith, I would have required to consider whether the exact restoration of things to their former state was impossible, or would be attended with unreasonable loss and expense quite disproportionate to the advantage which it would give to the successful party. I would have to consider whether the interference with the servitude caused by the presence of the extension is inconsiderable and does not materially impair the proprietor in the enjoyment of his property, and whether its removal would cause to the defenders a loss wholly disproportionate to the advantage which it would confer upon the pursuer.

[430] The restoration of things to their former state is not impossible. A passage could be restored by moving the wall of the extension to the west. That would be extremely disruptive. It would be expensive, costing not less than £58,000 plus VAT. It would result in loss of amenity for the defenders in respect of a significant area of the extension. I have, however, found that, had there been a servitude right of access, its exercise is materially more difficult, at least so far as access for the purposes of inspecting, repairing and maintaining the lower part of the wall of Seven Gables is concerned. I am not, therefore, satisfied that the interference caused by the presence of the western wall of the extension in its present condition is inconsiderable. The requirement regarding proportionality is an

exacting one. The loss to one proprietor must not merely be disproportionate to the advantage to the other, but "wholly disproportionate". In the context with what I have held is a material interference with his rights, I am not satisfied that the advantage to the pursuer would be wholly disproportionate to the loss to the defenders were I to grant the order sought.

Conclusion

[431] I sustain the defenders' fifth, sixth, seventh, eighth, and ninth pleas and grant decree of absolvitor in respect of all of the conclusions of the summons.