



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 57

CA46/19

OPINION OF LADY WOLFFE

in the Commercial Action

BAM TCP ATLANTIC SQUARE LIMITED

Pursuer

against

(FIRST) BRITISH TELECOMMUNICATIONS PLC

First Defender

and

(SECOND) FIRLEIGH LIMITED

Second Defender

and

(THIRD) LEGAL & GENERAL PENSIONS LIMITED

Third Defender

and

(FOURTH) THE KEEPER OF THE REGISTERS OF SCOTLAND

Fourth Defender

**Pursuer: Walker QC, Garrity; Morton Fraser LLP
First Defenders: Massaro; Shepherd & Wedderburn LLP
Second Defenders: Moynihan QC; Rusel Aitken LLP
Third Defenders: No appearance
Fourth Defenders: No appearance**

29 May 2020

Introduction

Contested ownership of a strip of land

[1] The pursuer in this commercial action seeks declarator:

- 1) that it is the sole and exclusive heritable proprietor of the York Street Ramp (“the Ramp”), and
- 2) that the Ramp is not common property.

[2] The comparing defenders, whose interests in the Ramp or in adjacent land I will record shortly, resist this and assert that the Ramp comprises common property and in which British Telecommunications Plc (“BT”) has a right of ownership of a one-half *pro indiviso* share. This dispute gives rise to questions as to the proper interpretation and effect of the competing titles, the impact of the provisions of the Land Registration (Scotland) Act 2012 (“the 2012 Act”) and of prescription.

The parties

The Site Proprietors

[3] The pursuer is the heritable proprietor of land situated between James Watt Street (to the west) and York Street (to the east) in Glasgow (“the pursuer’s Land”) and the associated land certificate is that under title number GLA161133 (“the pursuer’s Land Certificate”) from the Land Register (“the Land Register”). In terms of the plan described as the pursuer’s production 1 (“production 1 plan”) the pursuer’s land is the top-half of what is contained in the pursuer’s Land Certificate and is therefore discontinuous with the Ramp. The third defender, Legal & General Pensions Limited (“L&G”), is the heritable proprietor of land also situated between James Watt Street and York Street and again in terms of the

pursuer's production 1 plan, this is shown lying immediately adjacent to, and south of, the Pursuer's Land ("the L&G Land"). The L&G Land is most of the bottom portion of what is contained in the pursuer's Land Certificate. The L&G Land is immediately to the north of the Ramp. The first defender, British Telecommunications Plc ("BT"), is the heritable proprietor of land also situated between James Watt Street and York Street and situated adjacent to, and to the south of the Ramp ("the BT Land"). The BT Land is registered in the Land Register with title number GLA127617 ("the BT Land Certificate"). An office building with basement car park has been constructed on BT's Land ("the BT Building"). The pursuer is in the process of constructing a new office building with underground parking on L&G's Land. The pursuer, BT and L&G are the parties who have rights of ownership in the Site (as after-defined) in the vicinity of the Ramp. I shall refer to them collectively as "the Site Proprietors".

The other defenders: Firleigh and the Keeper

[4] The second defender, Firleigh Limited ("Firleigh"), has leased the BT Land from BT under a long lease and it has then sub-let it back to BT. BT occupies the BT Building under the sub-lease. The fourth defender is the Keeper of the Registers of Scotland ("the Keeper"). The interests of BT and Firleigh, who both lodged answers and who are the only compearing defenders (and whom I shall collectively refer to as "the defenders"), are essentially aligned. They lodged a joint Note of Argument. Both appeared at the Debate, though Counsel for BT, Mr Massaro, was content to adopt the submissions made by Senior Counsel for Firleigh, Mr Moynihan QC (who made the first reply to the pursuer's senior counsel, Mr Walker QC).

[5] The Keeper is called for her interest because she is entitled in terms of section 83 of the 2012 Act to appear and be heard in any civil proceedings in which the accuracy of the

Land Register is put in question (as is the case here). In this action, BT and Firleigh contend that there was a manifest inaccuracy in the pursuer's Land Certificate with the result that (contrary to the terms of the pursuer's Land Certificate), the pursuer is not in fact the sole and exclusive owner of the disputed areas of the Ramp and turning circle.

The Lands Tribunal proceedings

[6] The pursuer notes that there is presently an application by L&G under the Title Conditions (Scotland) Act 2003 ("the 2003 Act") which is in dependence before the Lands Tribunal for Scotland ("the LT"). In that application L&G seeks to vary the extent of the area over which vehicular access and ancillary pedestrian access and egress may be exercised over an area forming part of the turning circle at the bottom of the Ramp. BT and Firleigh have lodged answers to L&G's application to the LT in terms which reflect their position in these proceedings.

Pardev and the Site

[7] The Site proprietors are collectively the successors in title to Pardev (Broomielaw) Limited ("Pardev"), which originally held the entire plot of land between James Watt Street and York Street ("the Site"). Parties referred to one or more Pardev's dealings (to put it neutrally) with the Site, whether that was by a disposition of part of the land (eg its disposition in 1997 in favour of BT) or the Deed of Conditions (as after-mentioned). It is therefore necessary to note the chronology and means by which the Site proprietors (ie the pursuer, BT and L&G) acquired their respective landholdings comprising the Site. Before doing so, I should note the terms of Pardev's Deed of Conditions as these are referred to in land certificates that fall to be considered and because parties are sharply divided as to

whether it provided for common ownership of *inter alia* the Ramp or only a servitude right of use. (The proper interpretation of the Deed of Conditions is the subject matter of Question 1, considered below.)

The Deed of Conditions

[8] Pardev registered a Deed of Conditions in the Land Register (“the Deed of Conditions”) bearing to relate to the Site. As is clear from the Deed of Conditions, Pardev proposed to develop the Site in two phases. Phase I related to the construction of the BT Building on what is now BT’s Land (which comprises approximately the bottom or southernmost half of the Site). Phase 2 is the area which encompasses the pursuer’s Land (being the northernmost area of the Site) and L&G’s Land (which is to the south of the Pursuer’s Land and immediately to the north of the Ramp).

[9] One of the issues in this case is the effect and import of the Deed of Conditions. I summarise the key passages referred to by the parties. The pursuer emphasised the passages in italics and the defenders emphasised those passages which are underlined.

The recitals

[10] In the recitals it was narrated (i) that Pardev owned the Site and that (ii) it intended to sell Phase 1 for the purpose of constructing the “Phase I Building”, and that it was intended that Phase II would also be developed. Phase I comprises the BT Land. Phase II is the remainder of the Site and includes the pursuer’s Land, the Ramp and the L&G Land. It was also narrated that the Deed of Conditions would contain all of the “various reservations, real burdens, conditions, obligations and others under which the Phase I Land and the Phase II Land *will be held* by their respective Proprietors thereof” and that the Deed

of Conditions would be incorporated into all dispositions or other conveyances or deeds Pardev granted. (The pursuer emphasises the future tense in this passage.)

Definitions

[11] The following definitions (which are also adopted in this Opinion) should be noted:

- 1) “Common Parts” means the Podium [this is a raised platform at ground floor level above the Vehicular Access] and the Vehicular Access and will include all of the common service media...and which will be owned in common by the Phase I and Phase II proprietors subject to the terms of this Deed”;
- 2) “Phase I Land” was defined by reference to the plan and to basement plan appended to the Deed of Conditions (which corresponds with the BT Land) and “being part of the subjects registered in the Land Register under Title Number GLA 2994 GLA29944 but under exception of any part thereof forming part of the Common Parts”;
- 3) “Phase II Land” was defined as “the Site under exception of (1) the Phase 1 Land and (2) the Common Parts”;
- 4) “Phase I Proprietors” and “Phase II Proprietors” was defined as Pardev or its successors in title as heritable proprietors of the Phase I Land and the Phase II Land or any part thereof;
- 5) “Vehicular Access” was defined as “those structures to be constructed pursuant to the works comprising (a) the vehicular ramps leading from York Street to basement level (‘the York Street Ramp’) and the turning circle leading therefrom to serve the Phase I Building and (by means of an access to be created as envisaged by Clause 3.2) to the Phase II Buildings but excluding

the area beneath the York Street Ramp which will form part of the Phase II Land (as indicatively hatched black on the Basement Plan) (b) the vehicular ramp leading from James Watt Street to basement level ('the James Watt Street Ramp') but excluding the area beneath the same as indicatively cross hatched black on the Basement Plan which will remain part of the Phase I Land) and the turning circle leading therefore to serve the Phase I Building and (by the accesses to be created leading from the turning circles and from the Hammerhead as envisaged by Clauses 3.2 and 11.2) to the Phase II Buildings and (c) the structure, sub-structure and means of support of and all load bearing walls and all surfaces of and in relation to the York Street Ramp, the James Watt Street Ramp and the said turning circles and the supporting structure of the Podium together with, to a mutual extent, any walls which are mutual as between the Vehicular Access and Phase I Land on the one hand or the Phase II Land on the other but excluding in each case any area or property right at any level other than (1) at basement level (as aforesaid) and (2) the ramps themselves and declaring that the final layout of the foregoing will be determined by the Works carried out in accordance with this Deed, which Vehicular Access is shown indicatively ...[on the plans appended to the Deed of Conditions]";

- 6) "Works" was defined as "the works to be carried out to form the Common Parts in accordance with the Approved Drawings and this Deed".
- "Approved Drawings" was defined as the drawings approved from time to time by both of the Phase I and Phase II Proprietors relative to the Podium

works, including any amendment or variation with the approval of both of the Phase I and Phase II Proprietors. (Emphasis added.)

The plans appended to the Deed of Conditions

[12] In terms of the definitions, the Common Parts comprise the Podium and the Vehicular Access. Each of these areas is separately delineated and coloured on the basement and ground floor plans (collectively, “the Deed of Conditions Layout Plans) appended to the Deed of Conditions. The third plan appended to the Deed of Conditions illustrates that the Ramp is included within the definition of the Vehicular Access and therefore within the definition of Common Property. While the Podium and the James Watt Street Ramp would also be encompassed within the definition of Common Parts, there appeared to be no issue or claim in respect of these areas.

The Conditions

[13] Condition 2 made provision for the carrying out of the Phase I Building by the Phase I Proprietor. Condition 3 was headed “Use of the Vehicular Access”, and it provided as follows:

- “3.1 The Proprietors shall use the Vehicular Access in all time coming solely for vehicular and ancillary pedestrian access to and egress from the Phase I Land and the Phase II Land and each part thereof and to and from the Phase I Building or the Phase II Buildings or any part thereof and for no other purpose whatsoever without the consent of the Proprietors declaring that the ancillary pedestrian rights will include access for emergency escape for each of the Proprietors and also for the Phase I Proprietor to the substation to be constructed within the Phase I Building and likewise the Phase II Proprietor will be entitled to access to utility or plant rooms.
- 3.2 Whereas the Works (on the basis that these are carried out by the Phase I Proprietor) include the construction of accesses to the turning circles (which are intended to be temporarily closed by the construction of soft panel across the entrance of each access and which are indicatively shown between points

A and B and C and D on the Basement Plan but declaring that the opening on the north west may be created (either as part of the Works or subsequently) at any appropriate section between points A and E (but so as not to prejudice the structural integrity of the Common Parts) (which accesses are hereafter referred to as 'the Phase II Accesses') to give access to the Phase II Land, the Phase II Proprietor shall be entitled at any time or times to carry out all works necessary to break through Phase II Accesses or any one or more of them so as to create vehicular and ancillary pedestrian accesses to the Vehicular Access in to and from the Phase II Land and to carry out all necessary works at the interface of the Phase II Land and the Common Parts to ensure a permanent finish to replace the temporary finish constructed pursuant to the Works, subject to an obligation on the Phase II Proprietors (i) to (a) obtain and comply with and (b) exhibit to the Phase I Proprietors all necessary planning permissions, building warrants and other requisite statutory consents in relation to the said works; (ii) to make good at the cost of the Phase II Proprietor all damage caused to the Common Parts and the Phase I Land and the Phase I Building by the execution of such works and the construction of any Phase II Building; (iii) to carry out such works in such a manner as to cause as little disturbance, damage and destruction as is reasonably practicable (having due regard to the nature and extent of the works that are required to be carried out in implement of this reserved right) to the Phase I Proprietors and any other persons and any other persons entitled to use the Vehicular Access and the occupiers of the Phase I Building; (iv) not to take access through the Vehicular Access for construction traffic but without prejudice to the right hereinbefore conferred to enter upon the Vehicular Access with workmen and equipment and to carry out the works hereinbefore referred to; (v) to permit the Phase I Proprietor and/or its monitoring surveyor or other duly authorised representative to take access on giving reasonable prior notice to the Phase II Proprietor to the Phase II Land to monitor the progress of said works and the Phase II Proprietor shall pay on demand to the Phase I Proprietor the reasonable and proper costs which it incurs in that regard; and (vi) to carry out the construction of each Relevant Building in such a manner as will (a) *not interfere with nor infringe any right of access through the Vehicular Access enjoyed by the Phase I Proprietor or its tenants* and (b) cause as little legal nuisance as is reasonably practicable to the Phase I Proprietor or its tenants; Declaring that in the event that the Works are carried out by the Phase II Proprietor the foregoing provisions of this clause 3.2 shall apply *mutatis mutandis* (so that the Phase II Accesses shall be immediately open and the accesses to the Phase I Subjects (as shown in the approved drawings) ('the Phase I Accesses') shall remain temporarily closed by the construction of soft panel) and the Phase I Proprietor shall be entitled to break through the Phase I Accesses or one or more of them so as to create vehicular and ancillary pedestrian accesses to the Vehicular Access in, to and from the Phase I Land and to carry out all necessary Works at the interface of the Phase I Land and the Common Parts to ensure a permanent finish to replace the temporary finish subject to the same obligations numbered (i) to

(vi) above in relation to the Phase II Proprietor as are imposed in terms of the said foregoing provisions on the Phase II Proprietor in relation to the Phase I Proprietor.”

[14] Condition 5 bound each Proprietor to maintain the Common Parts jointly with the remaining Proprietors, which was to be paid via a Common Charge. Condition 13, headed “Common Property” declared that the Common Parts “will be owned in common by the Phase I Proprietor and Phase II Proprietor”. Finally, by condition 15.6 it was provided that the “obligations and reservations in the Deed of Conditions are hereby *declared to be real burdens upon and affecting the Site* respectively enforceable by the Phase I Proprietors (and each of them if more than one) against the Phase II Proprietors (and each of them if more than one) and *vice versa...*”

Parties’ references to passages in the Deed of Conditions

Passages relied on by the pursuer

[15] The pursuer emphasises three features of the Deed of Conditions. First, it notes the future tense used in the passages it highlighted and it makes the point that the Deed of Conditions is essentially aspirational. The granter’s intention might change by the time it comes to dispoise parts of the Site. Secondly, it submits that the express provision for access rights via the Ramp militates against the Ramp being common property. There would be no need to stipulate express rights if the Ramp were common property. Rather, this language supports its contention that the Deed of Conditions created no more than servitude rights in the Ramp. Thirdly, it notes that the declaration in clause 15.6 that the foregoing obligations are declared to be “real burdens” is a further pointer away from the Ramp being common property.

Passages relied on by the compearing defenders

[16] For their part, the compearing defenders make the following points. First, the recitals make it clear that Pardev's intention was to develop the Site in two phases and that the Common Parts (as defined) clearly envisaged that this would be "owned in common" by the "Proprietors". Secondly, the definition of the "Phase II Proprietor's Land", as excluding the Common Parts, reinforces this. Thirdly, this is put beyond doubt because there is express provision in condition 13 that the "Common Property" (which included the Ramp) "will be owned in common" by the Phase I and II Proprietors.

The registration of the Deed of Conditions had no dispositive effect

[17] Contrary to what the pursuer may have understood the defenders' position to be, the defenders were not arguing that the Deed of Conditions had any dispositive effect simply upon its registration in the Land Register. Rather, they submitted that on registration it created real rights in the land to which it applied: section 17 of the 1979 Act.

The Ramp

[18] The dispute concerns the Ramp (tinted ochre on the pursuer's production 1 plan, which is described as an access ramp leading from York Street to the car park in the basement of the BT Building. The pursuer refers to a turning circle ("the turning circle") located at the foot of the Ramp (ie at basement level) and it avers that the "turning circle extends to the North from the ramp and part of this is thus located in the footprint of the [L&G's] Land". (The turning circle is coloured magenta on the second plan produced with the Summons ("pursuer's production plan 2").) There is, or will be, a second ramp giving

access to the underground parking via James Watt Street to the west of the Site (“the James Watt Street Ramp”). There is also a turning circle at the bottom of the James Watt Street Ramp. The Ramp and the James Watt Street Ramp (collectively, “the Ramps”) are parallel to each other, with the Ramp lying immediately to the north of the James Watt Street Ramp. Viewed from above, the two ramps appear as lollipops laid side by side, but dovetailed. The turning circle of the Ramp (being the lollipop end) is at the west and at basement level, whereas the entry at street level lies to the east. For the James Watt Street Ramp, the entry at street level and the turning circle are reversed (ie they are respectively at the west and east ends). Accordingly, the Ramp is outwith the red line circumscribing the BT Land in the BT Disposition. It is also discontinuous with the BT Land, because the footprint of the James Watt Street Ramp lies between the BT Land (to the south) and the Ramp (to the north).

Chronology of dealings with the Site

Pardev's grant of the Deed of Conditions

[19] Pardev held the whole Site under Title Number GLA29944 (“the Pardev Land Certificate”) and it is the ultimate author in title of the Site Proprietors. Pardev executed the Deed of Conditions on 29 April 1997 which was registered in the Land Register on 10 June 1997, ie prior to Pardev’s grant of the disposition of the BT Lands in favour of BT.

BT's title

The BT Disposition

[20] Pardev disposed the BT Land to BT by disposition dated 30 April 1997 (“the BT Disposition”). The BT Disposition was registered in the Land Register on 2 May 1997.

While the BT Land was formerly part of Pardev's title, the BT Disposition is a break off disposition. The description of the subjects conveyed in the BT Disposition are as follows:

"ALL and WHOLE those subjects lying to the north of Broomielaw, Glasgow being the subjects bounded on the west by the centre line of James Watt Street, on the south by the south by the southern edge of the northern pavement of Broomielaw on the east by the centre line of York Street and generally on the north by other subjects belonging to the disponent which subjects hereby disposed are shown at ground level delineated in red on Plan 1 annexed and signed as relative hereto and at basement level on Plan 2 annexed and signed as relative hereto which subjects hereby disposed from part and portion of larger subjects registered in the Land Register of Scotland together with (1) the whole rights, common, mutual and exclusive pertaining thereto as specified in the Deed of Conditions granted by us in respect *inter alia* of the subjects hereby disposed dated Twenty ninth April 1997 and registered in the Land Register under title number 29944 (2) the parts, privileges and pertinents thereof and (3) our right title and interest present and future in to the said subjects hereby disposed; which subjects form part and portion of the subjects registered in the Land Register under title number GLA 29944 and said subjects are disposed ALWAYS WITH and UNDER the whole burdens, conditions, reservations and others specified as referred to in the said Deed of Conditions."

The pursuer emphasises the words in italics; the defender emphasises the words underlined.

There are two plans appended to the BT Disposition. In neither plan 1 at ground level ("Plan 1") or plan 2 at street level ("Plan 2") does the red line delineating the BT Land include the Ramp.

[21] The defenders submit that the express reference in the first part of the "together with" clause to the Deed of Conditions, in the phrase "whole rights, common mutual and exclusive...as specified in the Deed of Conditions granted by us [ie Pardev] in respect of *inter alia* the subjects hereby disposed", expressly conveyed the rights specified in the Deed of Conditions. Accordingly, the BT Disposition was sufficient to convey to it a *pro indiviso* share of the Common Parts as defined in the Deed of Conditions, and which includes the Ramp. The pursuer submits that the words "pertaining thereto" are, in effect, words of restriction, confining what follows (ie in the parts and pertinents clause) to the scope of what

was conveyed in the description, namely the BT Land. The Ramp lay outwith those boundaries.

The plans appended to the BT Disposition

[22] There are two plans appended to the BT Disposition (collectively, “the BT Disposition Plans”). The Deed of Conditions Layout Plans are clearly the source of these as the hatching and cross hatched areas are the same (eg showing the Podium and Hammerhead), although the key (explaining the colours, hatching and other markings) has been omitted.

The BT Land Certificate

[23] BT’s title was registered in the Land Register on 2 July 1997 under Title Number GLA157916 (“the BT Land Certificate”). The property section of BT’s Land Certificate describes the subjects as follows:

“Subjects ALEXANDER BAIN HOUSE, 15 York Street, Glasgow G2 8LA within the land edged red on the Title Plan, which subjects are shown edged red at ground level on Supplementary Plan 4 to the Title Plan [ie this is Plan 1 of the BT Disposition] and edged red at basement level on Supplementary Plan 5 [ie Plan 2 of the BT Disposition] to the Title Plan, together with the rights specified in the Deed of Declaration of Conditions in Entry 3 of the Burdens Section [which is the Deed of Conditions]”.

The Deed of Conditions is repeated in its entirety at entry 3 of the Burdens Section.

The title plan and supplementary plans of the BT Land Certificate

[24] The title plan to the BT Land certificate (“the BT Title Plan”) shows the whole Site “within” which the BT Land sits. The BT Land is as shown edged in red at ground level and at basement level in supplementary plans 4 and 5, respectively. The Ramp is outwith the areas delineated red on supplementary plans 4 and 5 of the BT Land Certificate. In the

Notes at the end of entry 3 of the Burdens section, it narrates that supplementary plans 1 and 2 to the BT Title Plan reproduce the basement and ground floor plans comprising the Deed of Conditions Layout Plans, and that supplementary plan 3 reproduces the Site plan from the Deed of Conditions. These notes are not strictly correct, in that the descriptions of supplementary plans 2 and 3 have been transposed; supplementary plans 2 and 3 are actually the Site plan and the ground floor plans, respectively. Further, supplementary plans 1 and 3 are produced on a finer scale than the Deed of Conditions Layout Plans and the key is transposed to different part of those plans. However, nothing turns on this, as supplementary plans 1 and 3 to the BT Land Certificate correspond in all material respects with the Deed of Condition Layout Plans.

Parties' submissions on the BT Land Certificate

[25] The pursuer's position is that the Ramp falls outwith the Title Plan or description in the BT Land Certificate. The defenders submit that, as section 3(1) of the 1979 Act was in force at the time, BT acquired ownership of what was noted in the BT title sheet, including rights of common ownership noted in the Deed of Conditions) on the date of registration, 2 July 1997. They submit that the express reference to the Deed of Conditions in the property section incorporates the whole of the Deed of Conditions by reference and is sufficient to constitute it as a *pro indiviso* owner of the Ramp, as provided for in the Deed of Conditions. The defenders also note that the words "pertaining thereto" are omitted from the description in the Property Section of the BT Land Certificate. (It will be recalled that the pursuer argued that these were words of restriction.) They submit that (on its reading of the Deed of Conditions) it is clear on the face of the BT Land Certificate that the Ramp was part of the Common Parts and that the Common Parts are common property.

The Leases of the BT Land between Firleigh and BT

[26] BT let the BT Land to Firleigh under a 175 year lease, commencing on 8 June 2001 (“the Head Lease”). Firleigh’s title as tenant under the Head Lease is registered under Title Number GLA157916. Firleigh’s sublet to BT is registered under Title Number GLA157929 (“the Sub-Lease”). The apparent relevance of these deeds is the pursuer’s point that no third party, such as proprietor or proprietors of the remainder of the Site, consented to the Head Lease or Sub Lease (collectively, “the Leases”). The pursuer argues that if the Common Parts had been common property, as the defenders contend, the other *pro indiviso* owners would have required to consent to the Leases. They did not. It submits that the position BT adopts in these proceedings is inconsistent with its dealings in respect of the Leases. The pursuer makes the same point in respect of its own dealings with its own land (the grant of standard securities over it) and to which BT did not consent.

L&G’s title

[27] L & G own the plot of land immediately to the north of the Ramps and to the south of the pursuer’s Land (“the L & G Land”). It forms the southernmost half of what corresponds to Phase II in the Deed of Conditions. L & G acquired its land, which was formerly part of title GLA161133 (the pursuer’s Title Number), from the pursuer by disposition dated 26 January 2018. L&G’s title also is presently undergoing first registration in the Land Register.

The pursuer’s title

The pursuer’s Land Certificate

[28] The pursuer acquired ownership of the pursuer's Land in April 2002. Its title is registered in the Land Register under title GLA161133 ("the pursuer's Land Certificate"). The defenders note that the pursuer's predecessors in title to the pursuer's Land (of which there were four) first acquired the pursuer's Land from Pardev in October 1999 and after the BT Building and the Vehicular Access had been built.

[29] The area edged in red on the title plan to the Pursuer's Land Certificate ("the pursuer's Title Plan"), and which is a larger area than that indicated on the pursuer's production 1 plan, includes the Vehicular Access (and therefore the Ramp). The Deed of Conditions is set out in full in entry 2 of the burdens section. The Notes at the end refer to supplementary plans 1, 2 and 3, and the same transcription error noted contained in BT's Land Certificate (noted at the end of para [24], above) are made. Nonetheless, the Vehicular Access and Podium are clearly delineated.

Parties' submissions on the pursuer's Land Certificate

[30] The pursuer relies on the pursuer's Land Certificate as conferring exclusive ownership of the Ramp. The pursuer's Title Plan bears to show the pursuer as sole owner of the Vehicular Access. The pursuer's position is that this is conclusive.

[31] In relation to the pursuer's Land Certificate, the defenders submit that it also includes the Deed of Conditions (entry 3 in the burdens section). The Deed of Conditions as incorporated (in its entirety) defines the "Vehicular Access" with reference to the plans attached to the Deed of Conditions and which are contained in the pursuer's title sheet as supplementary plans. The pursuer's Land Certificate includes clause 13, which makes it clear that the Vehicular Access is owned in common. The defenders submit that it is

therefore apparent from the pursuer's Land Certificate that the pursuer does not have exclusive ownership of the Vehicular Access.

Possession of the BT Land and the Ramp

[32] Possession is relevant to the issue of prescription and also to whether a proprietor has the status of being a "proprietor in possession" for the purposes of the rectification of any inaccuracy in the Land Register. BT avers (in Answer 6) that it proceeded to build the structure referred to as the "Phase I Building", including the Vehicular Access. This is referred to in the pleadings as "the BT Building". BT avers that the BT Building includes a car park and that the Vehicular Access forms part of the Ramp. BT avers that it has been in possession of the Vehicular Access from around 1997 up to the point when the pursuer started construction work in 2018. It also avers that at no time during that period has the pursuer been in possession of the Vehicular Access. (Firleigh adopt these averments in its answers.) The pursuer meets these averments with a "not known and not admitted" response. Accordingly, BT submits that it has possessed the Vehicular Access since 1997, that is, for a period in excess of 10 years.

Outline of the parties' positions

Parties' submissions and motions

[33] Parties lodged notes of arguments, notes on title, a joint bundle of productions, reading lists and in advance of the second day of the Debate each lodged an additional bundle of authorities (and notes referring to the passages relied on). I have had regard to all of these materials, as well as to parties' oral submissions. I do not propose to repeat these

materials. Parties' positions will be noted during my discussion of the issues. At debate, at which the pursuer led, it moved for decree in terms of its first declarator and for the Court to uphold its plea to the relevancy of the defences. The defenders moved for decree of absolvitor, on the basis that the pursuer's averments were irrelevant, which failing for a proof before answer.

The pursuer's position

On its own title

[34] The pursuer's position is that it is the sole owner of the Ramp by virtue of its Land Certificate. In terms of the Land Registration (Scotland) Act 1979 ("the 1979 Act"), ownership of property was determined by registration in the Land Register. The pursuer has a registered title to the Ramp under and in terms of the 1979 Act. There is no application for rectification of its Title Number. The Ownership sections of both the pursuer's title (as it currently stands prior to registration of L&G's title) and BT's title make no reference to any co-ownership. These land certificates disclose that the heritable property covered by each of the respective titles is held exclusively by the respective owners. BT's title did not therefore give BT any *pro indiviso* ownership rights along with any third party at the date of its registration.

The pursuer's position on BT's title

[35] In any event, the pursuer submits that the existence of any inconsistency between the pursuer's Land Certificate and BT's Land Certificate (or, more accurately, between their respective Title sheets in the Land Register) does not necessarily mean that the pursuer's title sheet contains any inaccuracy. Finally, the pursuer founds on the fact that its title was

registered after BT's title. It clearly discloses (at present) that the pursuer is the sole exclusive proprietor of the Ramp and the whole of the turning circle.

The defenders' position

On its own title

[36] The defenders' position is that BT's title to the BT Land was derived from the BT Disposition. The BT Disposition expressly conveyed to it *inter alia*:

“...(1) the whole rights, common, mutual and exclusive pertaining thereto as specified in the Deed of Conditions granted by us in respect *inter alia* of the subjects hereby disposed dated Twenty ninth April 1997 and registered in the Land Register of Scotland under Title Number 29944...”

Accordingly, under reference to the definition of “Common Parts” in the Deed of Conditions, they submit that BT's proprietary rights include the common and mutual rights narrated in the Deed of Conditions, and further, that the “Vehicular Access”, which is within the definition of “Common Parts”, is therefore the common property of the Phase I Proprietor (being BT) and the Phase II Proprietors (the pursuer and L&G). At the very least, they argue that the pursuer and the other Site Proprietors, as singular successors of the granter of the Deed of Conditions, are the owners of the “Vehicular Access” as common property. BT therefore is a *pro indiviso* owner of *inter alia* the Ramp and turning circle, in common with the pursuer and L&G.

The defenders' position in relation to the pursuer's title

[37] In relation to the pursuer's title, the defenders' position is that the fact that the pursuer's title was registered under the 1979 Act does not (contrary to the import of the pursuer's averments) render its title beyond challenge. The defenders rely on the fact that the 2012 Act abolished (and did not otherwise re-enact) the so-called “Midas Touch” of the

Keeper which had resulted from registration (see Schedule 5, paragraph 19(2) of the 2012 Act). The pursuer's title, as registered, is inaccurate insofar as it purports to show that the pursuer is the sole or exclusive owner of all of the subjects described therein. The defenders identify two inaccuracies in the pursuer's title:

- (1) the pursuer's Land Certificate purports to show that the pursuer's is the sole or exclusive owner of the Ramp; and
- (2) it also purports to show that the pursuer is the sole or exclusive proprietor of the James Watt Street Ramp.

On the issue of the pursuer's possession (or want of possession) of the Ramp, the defenders' position is that since taking title to the pursuer's Land, the pursuer has not possessed (far less has it possessed exclusively) the Ramp (or, for that matter, the James Watt Street Ramp). Rather, the Ramp (and turning circle) was possessed by BT and those deriving right from it. (Reference was made to BT's averments anent such possession in Answer 6 of its Defences (as adjusted).) Accordingly, the pursuer was not a proprietor in possession *quoad* the Ramp (or for that matter *quoad* the James Watt Street Ramp). The pursuer's title was thus liable to be rectified by the Keeper in terms of section 9 of the 1979 Act. Consequent on the 2012 Act, the pursuer's title is now in law regarded as being inaccurate for the purposes of paragraph 17 of Schedule 4 to the 2012 Act.

[38] In response to the pursuer's understanding of BT's position, the defenders submit that the reason the Ramp is common property is not that it was conveyed "through the Deed of Conditions" (as the pursuer appears by its averments to suggest) but, rather, because such property rights were conveyed by the grant of the relative disposition, that is, in the case of BT, the BT Disposition. The defenders submit that its *pro indiviso* interest in the Ramp as

common property is not determined or affected by the manner in which the Keeper has registered the various titles.

The operation of prescription on BT's title

[39] Separately, the defenders contend that by virtue of positive prescription BT re-acquired its *pro indiviso* ownership rights in respect of *inter alia* the Ramps (if it had lost title following the registration of the pursuer's title).

The fundamental issue and the questions to be answered in resolving that issue

[40] The fundamental issue between the parties is whether the pursuer owns the Ramp and the associated turning circle as its "sole and exclusive" property, and to which the compearing defenders have only a servitude right of access (as the pursuer contends) or whether the Ramp and the associated turning circle is owned as common property (as the compearing defenders contend).

[41] The resolution of this fundamental issue will depend upon the answer given by the Court to the following questions:

- 1) The Deed of Conditions: Properly construed, did the Deed of Conditions provide for the Ramp to be part of the Common Property of the Site proprietors (as the defenders contend) or did it confer no more than a servitude right of access over the Vehicular Access (as the pursuer contends)?;
- 2) The BT Disposition: Did the BT disposition convey a *pro indiviso* share of the Common Parts to BT (as the defenders argue) or did it provide only for servitude rights?;

- 3) The BT Land Certificate: Did BT's Land Certificate encompass a *pro indiviso* share to *inter alia* the Ramp (as the defenders contend but the pursuer denies)?;
- 4) The registration of the pursuer's title: What was the effect, if any, on BT's title of the subsequent registration of the pursuer's title in the Land Register?;
- 5) Is there any inaccuracy in the pursuer's title?: Was there a relevant inaccuracy for the purposes of the operation of the 2012 Act on the designated day?;
- 6) Is the pursuer a proprietor in possession?: On the hypothesis that there is a relevant inaccuracy, at least in respect of the pursuer's title, is it a proprietor in possession? An ancillary issue is the pursuer's reliance on the statutory presumption of possession in the transitional provisions in Schedule 4 to the 2012 Act (noted below);
- 7) Is BT's title habile to include the Common Parts?: *Separatim*, even if questions 3 and 4 are answered against BT (but which supposes favourable determinations of questions 1 and/or 2), was BT's Disposition habile to found prescription in respect of the Ramp; and
- 8) The operation of prescription: If the answer to 7 is affirmative, did the operation of prescription perfect BT's title to the Ramp?

Discussion

Question 1: What rights did the Deed of Conditions propose in respect of the Common Parts?

[42] I have noted above those passages of the Deed of Conditions parties found on to argue that it conferred no more than a right of servitude (as the pursuer contends) or that it intended to constitute the Common Parts as common property (as the defenders contend).

[43] In my view, the Deed of Conditions intended to constitute the Phase I and Phase II Proprietors as the common owners of (ie holding *pro indiviso* rights of ownership in) the Common Parts. This is expressly provided for in the definitions of Common Parts (“...which will be *owned in common* by the Phase I Proprietors and Phase II Proprietors subject to the terms of this Deed” (emphasis added)). This is also reflected in division of the Site into three separate parcels: Phase I Land, the Phase II Land and the Common Parts. The negative definition of the Phase II Land (ie the Site under *exclusion of inter alia* the Common Parts) further reinforces this. Moreover, this is in my view put beyond doubt by the terms of condition 13.1: “The Common Parts *will be owned in common* by the Phase I Proprietor and the Phase II Proprietor” (emphasis added), a clause which the pursuer’s Senior Counsel did not address in submissions.

[44] I am not persuaded that the features of the Deed of Conditions that the pursuer identifies support a different interpretation. The use of the future tense, which the pursuer relies on to assert the revocable quality of the granter’s intent, ceases to be relevant once the Deed of Conditions is implemented or given effect to by Pardev (whether it has effectively done so arises under consideration of the BT Disposition). In relation to the argument that detailed provisions for use of Vehicular Access would not be necessary if the Phase I and II Proprietors owned the Vehicular Access in common (as part of the Common Property), in my view this submission does not stand up to scrutiny. If the Phase I and Phase II Proprietors did own the Common parts as common property, then, in the absence of the

provisions in the Deed of Conditions governing its use, the proprietors would have to be in complete agreement about the use of the Common Parts. The scope for disputes is obvious and rights of access are particularly susceptible to generating disagreements. Rather than being a factor that militates against the Common Parts as common property, the detailed provisions governing access are entirely consistent with the Common Parts being owned in common as common property.

[45] The detailed provisions ensure that the Vehicular Access can be used as intended and it removes the veto which the other *pro indiviso* owner could otherwise exercise in the event of disputes arising from use of the Ramp. Given the purpose of the Common Parts in affording access, it was prudent to make express and binding provision of the kinds of uses which the *pro indiviso* common owners were bound to permit by the other *pro indiviso* owners. The detailed provisions constitute restrictions on the otherwise untrammelled use of property an outright owner is otherwise entitled to enjoy. In other words, while the Phase I and Phase II Proprietors owned the Common Parts, they did not enjoy unrestricted use or, conversely, they could not block the other common owners from exercising the prescribed uses, chief of which was access. The terms of 3.1, governing the use of the Vehicular Access “in all time coming” (cf clause 3.2, which regulates access during the construction of the Works) and the *reciprocity* of the obligations militate against this being only a right of servitude.

[46] Other features of the Deed of Conditions reinforce this reading. So, for example, the definition of “Common Parts” ends with the stipulation that the Common Parts will be “owned in common by the Phase I Proprietors and the Phase II Proprietors *subject to the terms of this Deed*” (emphasis added). The qualification is important: the *pro indiviso* rights of

ownership conferred are enjoyed “subject to the terms of [the Deed of Conditions]”, and of which those governing Vehicular Access are the most significant use impinging on the rights of the *pro indiviso* owners.

[47] While I was not referred to it, clause 2, governing the “Works”, would be unworkable if the Phase I Proprietors and the Phase II Proprietors were not common owners. The definition of “Works” means the works to be carried out on the Common Parts. Clause 2 requires the Phase I Proprietor to carry out the Works (meaning the formation of the Vehicular Access comprising the Common Parts) in terms of the Approved Drawings within a stipulated period, which failing it was open to the Phase II Proprietor to do so. Condition 2.3 provided that the Approved Drawings will not be amended or varied without the approval of each of the Phase I Proprietors and the Phase II Proprietors, each of whom “will act reasonably”. Condition 2.4 provided that the Proprietor who carried out the Works will be entitled to reimbursement of 50% of the costs from the other Proprietor. These provisions, for reciprocal rights to construct the Vehicular Access and to be reimbursed a 50% share of the cost, are entirely consistent with the Phase I and II Proprietors being *pro indiviso* owners of the Common Parts.

[48] A reading of the Deed of Conditions as creating no more than servitude rights does not accord with these provisions. Indeed, if the Deed of Conditions had intended to create no more than a servitude in respect of the Vehicular Access, there is none of the language one would expect defining which is the dominant tenement (on the pursuer’s approach, this would be the Phase I Proprietor (ie BT)) or the servient tenement. The heritable interest of the Phase II Proprietor is not expressed as being subject to restrictions in favour of the Phase I Proprietor (see, eg clause 13.2, noted below, which provides to the contrary). Rather,

the Proprietors are under *like* restrictions, which mirror their *like* rights as common owners. If the Deed of Conditions were doing no more than constituting a servitude right over the Common Property in favour of the Phase I Proprietor, one would have expected the language of the Deed of Conditions to frame that as a *right*. Instead, the language of condition 3.1 frames this as a *restriction*, that is, a restriction on the rights that *each* of the *pro indiviso* owners would otherwise enjoy *qua* owners.

[49] While the pursuer refers to the single instance where there is a reference to not infringing any “rights of access” enjoyed by the Phase I Proprietor, where this appears in condition 3.2 (“(vi) and to carry out the construction of each Relevant Building in such manner as will (a) not interfere with or infringe any right of access through the Vehicular Access enjoyed by the Phase I Proprietor or its tenants...”), when that passage is construed in the context of the clause, it is clear that that is directed to the period during which the Phase II Proprietor is constructing the Phase II Access (which is the subject matter of clause 3.2). It is the sixth qualification (“...subject to an obligation on the Phase Proprietors...”) as to the manner in which the Phase II Proprietor is to undertake the Works (which, it will be recalled, are essentially the construction of the Vehicular Access). Construed in that context, the phrase the pursuer relies on is to protect the integrity of the access during a period of likely disruption; it is not the definition of the nature of the rights that subsist in the Common Parts.

[50] The terms of Condition 13.2 further reinforces this reading of the Deed of Conditions providing for the Common Parts to be common property. This provides that:

“13.2 For the avoidance of doubt, subject to the terms of this Deed (a) the Phase I Proprietor shall be entitled to utilise, enjoy and deal with the Phase I Land (including any part thereof falling beneath or above the Common Parts) at its discretion and (b) the Phase II Proprietor shall be entitled to utilise, enjoy and

deal with the Phase II Land (including any part thereof falling beneath or above the Common Parts) at its discretion.”

This clause follows immediately after the provision that the Common Parts are common property. While it is a “for the avoidance of doubt” provision, the point is that both 13.1 and 13.2 are addressed to the exercise of rights *qua* owners: in clause 13.1 it is the rights *qua pro indiviso* owners of the Common Parts; and in condition 13.2 it is the rights *qua* owners of their respective parts (ie Phase I and Phase II) held exclusively by each. Furthermore, the entitlement of the Phase II Proprietor “to utilise, enjoy and deal with” the Phase II Land at its discretion is wholly inimical to the subsistence of a servitude over it (or some part of it) in favour of the Phase I Proprietor.

[51] Finally, there is the wording of Condition 15.6, which the pursuer also relies on. In my view, this provision does not displace the interpretation of the Deed of Conditions as conferring rights of ownership in the Common Parts as common property. It is clear that there are other features of the Deed of Conditions that do create obligations or burdens - the obligation to maintain the Common Parts and the liability to meet the common charges are but two examples. The declaration in clause 15.6 that the “obligations and reservations herein” are “declared to be real burdens” is directed to these obligations. It does not mean, however, that the Deed of Conditions was confined to such matters or that it is to be construed as precluding other conditions in the Deed of Conditions from providing “positive” rights as it were (eg of common ownership) that go beyond “negative” rights such as servitude rights (ie a restriction on rights of ownership). For these reasons, I find that, properly construed, the Deed of Conditions intended to constitute the Phase I and Phase II Proprietors as the common owners of the Common Property. Parties are of course correct that the registration of the Deed of Conditions itself was not sufficient to convey any

rights of ownership. The next question is whether the intentions of the granter of the Deed of Conditions were realised in the subsequent dealings with the Site.

Question 2: Did the BT Disposition convey any right of ownership of the Common Parts?

[52] The short point is whether the reference in the BT Disposition to the Deed of Conditions was sufficient to convey a *pro indiviso* right of common property in the Common Parts to BT. The pursuer argues it did not, because (i) the Common Parts were not included within the description (the “ALL and WHOLE...”, which is set out in full, in para [20], above); (ii) they were not within the area delineated in red on the ground floor and basement plans appended to the BT Disposition, and (iii) the words “pertaining to” are words of restriction. Whatever followed in the parts and pertinents clause was restricted to the subjects disposed and lying within the areas delineated red. The Common Parts were outwith those areas.

[53] In essence, this argument turns on the phrase “pertaining to”, where they appear (just after the description of the subjects to be conveyed):

“together with (1) the whole rights, common, mutual and exclusive *pertaining thereto* as specified in the Deed of Conditions granted by us in respect *inter alia* of the subjects hereby disposed dated Twenty ninth April 1997 and registered in the Land Register under title number 29944 (2) the parts, privileges and pertinents thereof and (3) our right title and interest present and future in to the said subjects hereby disposed”. (Emphasis added: the pursuer refers to the words in italics, the defenders to the words underlined).

The words “pertaining thereto” are words requiring that what follows relates to what they precede. It does not follow that those words require that what follows in the “together with” section must fall *within* the boundaries of the subjects described.

[54] The pursuer’s interpretation of “pertaining to” applies to all of the addenda.

However, the pursuer’s construction of these words as they apply to the second addendum

(of the parts and pertinents) is not consistent with the generally understood definition of the phrase “parts and pertinents” in legal glossaries. So, for example, that phrase is construed as “[e]verything connected with or forming part of the lands conveyed (except the regalia) that is not specifically reserved from the grant” (*Glossary of Legal Terms*, 4th ed, O’Rourke); cf the definition of “pertinent” in Robert Bell’s *Dictionary and Digest of the Law of Scotland*, 7th ed, edited by Watson, and reprinted in 2012 by the Edinburgh Legal Education Trust (“*Bell’s Dictionary*”), “this term is used on our charters and dispositions in conjunction with the word *parts*. Thus, lands are disposed with *parts and pertinents*; and that expression may carry various rights and servitudes connected with the lands”. (While this entry in *Bell’s Dictionary* cross refers to “parts and pertinents” in the same volume, curiously, that phrase was omitted from *Bell’s Dictionary*.) The same point that “pertinents” can include servitudes is made by Professors Gretton and Reid in their work on *Conveyancing* (5th ed, at para 12-27), who in the fields of conveyancing and property law, are (it might be suggested) as authoritative as George Joseph Bell, the younger brother of the author of *Bell’s Dictionary*. In any event, whatever might be said as to the generally accepted meaning of the phrase “pertaining to”, the specific words of incorporation in the BT Disposition point beyond the subjects conveyed: immediately before the registration details of the Deed of Conditions are referred to, there are the words “in respect *inter alia* of the subjects hereby disposed”. The *inter alia* points beyond the subjects themselves.

[55] If the pursuer’s interpretation of “pertaining to” were correct, then it would be impossible to convey a right under the parts and pertinents clause that was extrinsic to the subjects described. However, this is plainly inconsistent with the general law. It is well established that a servitude right in favour of the property being disposed may be conveyed

by the parts and pertinents clause (on the Gretton and Reid analysis just noted, this would be carried as a pertinent). A common servitude is one providing a right of access *to* the subjects being conveyed over the land of a neighbouring proprietor. In other words, the servitude right over the servient tenement is *necessarily* extrinsic to the subjects conveyed (being the dominant tenement). The pursuer's restricted reading of "pertaining to" would exclude this. Other factors which may inform whether a heritable right is carried with a parts and pertinents clause are whether their exercise is ancillary to the subjects conveyed or, in the case of corporeal heritable rights, if they are contiguous to the subjects being conveyed. Both of those features are present in the Common Parts: the Vehicular Access (as part of the Common Property) is essential to the use of the car parking situated in the basement of the BT Building and that Vehicular Access is contiguous with the BT Land.

[56] Considering the structure of the addenda in the BT Disposition, the drafter intended that the rights in the Deed of Conditions (however interpreted), which are the subject of addendum (1), were intended to be granted to the disponee, and which was not to be left to the parts and pertinents clause (in addendum (2)). That is suggestive (I put it no higher) that the rights in the Deed of Conditions were something more than servitude rights (and for which the parts and pertinents clause would likely have been sufficient). Addendum (1) incorporates the Deed of Conditions by reference. This is sufficient for its whole terms to be read into the BT Disposition at this point, including the plans. Having regard to the interpretation of the Deed of Conditions, discussed in the previous section, this sufficed to convey a *pro indiviso* interest in the Common Parts. The Common Parts were identified with sufficient particularity in the Deed of Conditions (no party suggested otherwise), and

Pardev's intent that the Common Parts were common property was effected by the inclusion of the Deed of Conditions at this point in the BT Disposition.

[57] In the description in the BT Disposition the subjects are defined by reference to the plans of the ground floor and basement and on which they are delineated in red. The description is also a bounding one. In my view, these features do not have the effect of excluding the Common Parts, situated as they are outwith the subjects described (albeit they are contiguous with those subjects), where the Common Parts are delineated on the plans appended to the Deed of Conditions and where the Deed of Conditions is incorporated by reference in the BT Disposition. If it is prudent separately to describe individual or discontinuous parcels of land which are to be conveyed in a single deed, the incorporation by reference of the plans in the Deed of Conditions delineating the Common Property comprised of the Vehicular Access is the visual equivalent of a separate verbal description and in my view it suffices to include, and therefore to convey, a *pro indiviso* right in the Common Parts to BT.

[58] Finally, in relation to the pursuer's point that BT has dealt with its land (ie the Leases) without obtaining the consent of the common owner, as would be required if the Common Parts were common property, I do not find this argument persuasive. This may be no more than a reflection of parties' understanding at the time or an oversight by their advisers. It was not suggested that this gave rise to any question of personal bar or acquiescence. In any event, BT's point is well made that dealings in land with a right to common property do not require the consent of the other common owners. Accordingly, I find that the BT Disposition conveyed to BT rights as *pro indiviso* owners of the Common Parts as defined in the Deed of Conditions (and which includes the Ramp). The next

question to consider is whether registration of the particulars of the BT Disposition created a real right of *pro indiviso* ownership in respect of the Common Parts.

Question 3: Did the BT Land Certificate include a right to the Common Parts?

[59] I have noted the terms of the property section of BT's Land Certificate above (at para [23]). The defenders note that the words "pertaining to" are omitted, but this is of no moment given that I have not upheld the pursuer's narrow construction of that phrase. It should be noted that the entirety of the Deed of Conditions appears on the face of the BT Land Certificate and, further, that the "rights specified in" the Deed of Conditions are contained in the property section. While the Common Parts (including the Ramp) are not within the area delineated in red on the title plan to BT's Land Certificate, the title plan is endorsed with the phrase "see supplementary plan(s)". The 3 plans corresponding to those appended to the Deed of Conditions are included as supplementary plans 1 to 3 of the BT Land Certificate depicting the basement, the Site, and the ground floor. The import of those plans is disclosed in the notes to the entry on BT's Land Certificate containing the terms of the Deed of Conditions, and the rights which are included in addendum (i) in the property section. The Vehicular Access is clearly delineated at ground and basement levels, respectively, on supplementary plans 1 and 3 (ie corresponding to the Deed of Conditions Layout Plans) to the BT Land Certificate. In other words, the Common Parts as defined in the Deed of Conditions (referred to in the property section of the BT Land Certificate) have themselves been mapped on the supplementary plans. Construing the supplementary plans and the title plan consistently with the property section of the BT Land Certificate, it is in my view clear that, upon registration in the Land Register, the real rights BT acquired included *pro indiviso* rights in the Common Parts (as defined in the Deed of Conditions).

[60] This determination reflects the defenders' primary position. In the event that the BT Land Certificate is construed as the pursuer contends, with the result that Question 3 was answered in BT's favour, two possible consequences follow. First, this would give rise to an inaccuracy in BT's title (because the real rights vested in it disclosed in the BT Land Certificate are less extensive than the land conveyed to it in the BT Disposition), although I did not understand this to be the inaccuracy the defenders found on. Secondly, a determination of Question 3 in favour of the pursuer would not be conclusive of the discrete issue of whether, nonetheless, prescription has operated to perfect BT's title (which is the subject of Question 7).

Question 4: What was the effect of the registration of the pursuer's Land on the BT Land Certificate?

[61] In determining the effect on BT's title of the registration of the pursuer's title in the Land Register, it is necessary to consider the extent of the rights contained in the pursuer's Land Certificate and whether there is any inconsistency between the pursuer's Land Certificate and BT's.

Was the pursuer constituted the sole and exclusive owner of the Common Parts in terms of its Land Certificate?

[62] The description of the interest in land in the pursuer's Land Certificate is brief, simply narrating that the subjects are on the east side of James Watt Street, on the west side of York Street and are edged red on the Pursuer's Title Plan. The pursuer makes the point that there is no reference to ownership of any part being restricted to those of a *pro indiviso* owner. The Pursuer's Title Plan bears to include the Common Parts (comprising the James

Watt Street Ramp at the western half of the southern boundary, the Ramp at the eastern part of the southern boundary and the totality of the Podium) within the boundaries delineated.

However, the pursuer's Title Plan is also endorsed with the notation "See Supplementary Plan(s)". Supplementary plans 1, 2 and 3 are the same as those included in the BT Land Certificate, and these correspond to the three plans appended to the Deed of Conditions.

[63] Parties made no submissions on (i) the status of a supplementary plan, (ii) how the title plan was to be read in conjunction with any supplementary plan, or (iii) the approach to be taken in the event of a conflict between the title plan and any supplementary plan. (Any practice or provision governing supplementary plans under the 2012 Act has no application, because the pursuer acquired its land more than a decade before the 2012 Act came into force.) Nor was I referred to any text or guidance, for example, in the form of the Registration Manual for the 1979 Act ("the Keeper's 1979 Act Manual"). I note that paragraph 13.7 of the Keeper's 1979 Act Manual states: "A supplementary plan is used in conjunction with the Title plan for the purpose of detail or providing a method of reference to areas of land mentioned in the register which, for reasons of scale, size or complexity, cannot conveniently or satisfactorily be shown on the Title Plan." In the absence of Counsel's submissions on these matters, the views I express are necessarily provisional. (However, as will be seen, the determination of the question of whether the pursuer's Land Certificate constituted the pursuer as the sole owner of the Common Parts is not conclusive of the fundamental issue between the parties.) While the Keeper's 1979 Manual is of course not determinative as to the extent and effect in law of any particular land certificate, it is helpful as indicating the Keeper's purposes in using supplementary plans. *Prima facie*

supplementary plans are used to enhance the detail of the land, not to detract from its extent.

[64] In considering the proper approach to reading a title plan and supplementary plan it is also helpful to note the features of the Land Register that may inform the appropriate approach. One of the legislative purposes of the 1979 Act was to enable ownership of any particular land to be ascertainable from the face of the Land Register and without the need to consider prior titles (the “curtain” principle). The Land Register is a map-based system in which the title boundaries of the interest in land to be registered are plotted onto an Ordinance Survey-based cadastral map. Section 6 of the 1979 Act provides for what may and what must be included in the title sheet. The form of the title sheet for each registered unit of land has a number of sections, but for present purposes it suffices to note the “property” and the “burdens” sections governed, respectively, by section 6(1)(a) and section 6(1)(e), read together with section 28. Consistently with section 6(1)(a) (“a description of the land which shall consist of or include a description based on the Ordinance Survey map..”), the subjects in the land certificate may be briefly described in the property section but they are always defined by reference to the title plan forming part of the title sheet of the land certificate. *Prima facie* the title plan takes primacy in determining the extent or boundaries of the interest in land.

[65] Among the matters to be included in the title sheet is “any enforceable real right pertaining to the interest or subsisting real burden or condition affecting the interest” (section 6(1)(e)). The definition in section 28(1)(i) should be noted of “overriding interest”: “means, subject to sections 6(4) and 9(4) ... , in relation to any interest in land, the right or interest over it of... (i) “any other person under any rule of law relating to the common

interest or joint or common property including the exclusion therefrom ...” but which exclude a “right or interest constituting a real right, burden or condition” entered in the title sheet under section 6(1)(e) and “any subsisting burden or condition enforceable against an interest in land entered into its title sheet under section 6(1)” of the 1979 Act. The defenders noted that a *pro indiviso* right in common property fell within the definition of an “overriding interest” and, accordingly, such interests are registrable or capable of being recorded in a title sheet.

[66] By virtue of section 3(1)(a) of the 1979 Act, the effect of registration was to vest in the person a real right in the interest in land registered, “subject only to the effect of any matter entered into the title sheet of that interest under section 6 of this Act so far as adverse to the interest whether noted under that section or not”. The defenders stress that qualification and it submits that the Deed of Conditions is just such a matter.

[67] Turning to consider the pursuer’s Land Certificate in light of these submissions, it is patent that the Title Plan included the Common Parts as part of the interest in land the real right to which was to be vested in the pursuer. Was there any effective qualification of this in respect of the Common Parts? The pursuer’s submission is that there is no qualification stated in the property section to the effect that the interest in land was no more than a *pro indiviso* interest in the Common Parts. What, then, of the notation in the pursuer’s Title Plan to “See Supplementary Plan(s)”? So far as the guidance in Keeper’s 1979 Act Manual is concerned (quoted at para [63], above), supplementary plans are used to provide more detail than is capable of being shown on the title plan (eg because of the limitations of scale) or to indicate the layout or boundaries at spatially distinct levels, such as is done in supplementary plans 1 and 3 showing the basement and ground floor levels. There is

nothing on the face of those plans that in terms describes the Vehicular Access or the Podium as “Common Parts”. It is implicit in the pursuer’s approach that a person reading the pursuer’s Land Certificate need not delve beyond the description of the interest in land in the property section and the delineation of the boundaries of the interest in land as shown on the title and any supplementary plans. On that approach, there is no inconsistency as between the title sheet and the supplementary plans, and nothing to qualify the pursuer’s interest in land in relation to the Common Parts.

[68] However, on a fuller reading of the supplementary plans, regard is had to the notations or key on them. The notations on those plans can only be understood if one reverts to the terms of the Deed of Conditions set out in full in entry 3 of the burdens section (and at the end of which the supplementary plans are referred to) and, having done so, the dissonance between the provisions for Common Parts in the Deed of Conditions (and the delineation of the Common Parts on the supplementary plans) and the delineation of the subjects of the pursuer’s Title Plan is apparent. In particular, it is patent that certain areas delineated on the supplementary plans (the Podium and the Vehicular Access) are defined (in the Deed of Conditions) as Common Parts, and stipulated (by condition 13.1 thereof) to be common property.

[69] Having considered parties’ approaches, I prefer the defenders’ as more consistent with the 1979 Act provisions. The pursuer’s focus solely on the property section and the title plan is, in my view, too narrow. This is not the place to consider whether or to what extent a supplementary plan can qualify a title plan. In this case, the supplementary plans may be read consistently with the pursuer’s Title Plan, as they do not seek to qualify the boundaries on the Title Plan delineating the interest in land vested in the pursuer. There is nothing to

preclude a supplementary plan being used to indicate any “enforceable rights pertaining to the interest” (to quote section 6(1)(c)). In any event, the qualification in section 3(1) of the 1979 Act of the real right vested is defined by reference to “the effect of any matter referred to in the title sheet of the interest under section 6 of this Act” (emphasis added). The defenders’ holistic approach has the virtue of adhering to terms of section 3, as the refer to the entries in the burden section and which the pursuer effectively ignores.

[70] Nonetheless, the full terms of the qualification in section 3(1) of the 1979 Act are to “the effect of any matter of any matter in the title sheet...in so far as adverse to the interest or that person’s entitlement to it” (emphasis added). I return to the question of the effect of the registration of the Deed of Conditions which, generally, creates real rights – or at least, certain kinds of real rights. In respect of the Common Parts, the registration of the Deed of Conditions alone did not constitute the intended common owners *as* common owners on registration. The Deed of Conditions had no dispositive effect. Further, the registration of the Deed of Conditions did not bring into existence two discrete interests of *pro indiviso* ownership (ie one for each intended common owner) in respect of the Common Parts. No separate *pro indiviso* real rights in the Common Property were created at that point; BT acquired such rights only upon the grant of the BT Disposition (as I have construed it). On balance, therefore, I conclude that, while the terms of the pursuer’s title sheet would have put the pursuer on notice of the terms of the Deed of Conditions, reference to it in the pursuer’s Title sheet did not have the effect of constituting BT a *pro indiviso* owner of the Common Parts. Judged on the face of the pursuer’s Title sheet, the mere reference in entry 3 of the burdens section to the *proposed* creation of *pro indiviso* rights did not itself have any effect in respect of the Common Parts. The reference to the Deed of Conditions therefore did

not have an “*effect... which was adverse to*” the pursuer’s interest and so the qualification in section 3(1) was not thereby engaged. For completeness I note that if the Deed of Conditions did trigger the qualification in section 3(1), and the Deed of Conditions fell to be construed as the pursuer contends, then the servitude rights created would qualify the pursuer’s title, which I understand to be the pursuer’s position.

[71] For these reasons, I find that the effect of registration of the pursuer’s interest in land in these terms conferred on it a real right of sole and exclusive ownership of *inter alia* the Common Parts, including the Ramp. While BT complains that its *pro indiviso* right of common ownership in the Common Parts was “wrongly taken” from it, that is to say no more than that section 3 gave effect to the pursuer’s registration of title (as I have construed it) and which supersedes BT’s title insofar as inconsistent with it. I address below whether the inconsistency between BT’s title (as I have construed it) and the pursuer’s constitutes a *bijural* inaccuracy within the meaning of the transitional provisions of the 2012 Act.

Notwithstanding the subsequent repeal of section 3 of the 1979 Act, which provided for vesting of a real right in the interest in land on registration, the pursuer submits, under reference to the savings provision in section 16(1) of the Interpretation Act 1978, that “unless the contrary intention appears” that provision preserves rights accrued under the repealed provision. I will address the impact of the 2012 Act, including whether the transitional provisions do evince a “contrary intention”, under Question 5, below.

Was there an inconsistency between the pursuer’s and BT’s Land Certificates?

[72] The defenders submit that the later title prevails only if, and only to the extent that, there is a conflict. It contends that, on a proper construction of the pursuer’s Land Certificate (and having regard to the inclusion of the full terms of the Deed of Conditions),

there is no conflict between its title and the pursuer's Land Certificate, and therefore there was no extinction of its rights in respect of the Common Property upon registration of the pursuer's title. In light of my determinations of Question 4 (in favour of the pursuer) and my determinations of Question 3 (in favour of BT), it follows that the two Land Certificates are inconsistent *quoad* their treatment of the ownership of the Common Parts.

The operation of the 1979 Act upon registration of the pursuer's interest in land

[73] It next falls to determine the consequences of the pursuer's later registration of title in accordance with the 1979 Act (prior to its amendment by the 2012 Act). It is undoubtedly the case that the later Land Certificate would prevail and the pursuer would have title to the Common Parts (assuming the pursuer's Land Certificate was construed as the pursuer contends). This is because registration of the pursuer's title in the Land Register was sufficient to confer upon the disponee title to the subjects. Possession of the subjects in question was not a pre-requisite for "perfecting" the real right; registration itself created the real right: see section 3 of the 1979 Act and KGC Reid *The Law of Property in Scotland* (1996), para 673). This effect of registration is the Keeper's so-called "Midas touch". In the event of any conflict between two (or more) titles registered under the 1979 Act, the last-registered title prevails. As Professor Reid put it: "In Land Register titles the normal rule is inverted and the party who is last to register prevails... [subject to any rectification of the title under the 1979 Act]" (*ibid* at para 685).

[74] Accordingly, to the extent that the two Land Certificates are inconsistent, the pursuer's Land Certificate prevailed at the moment of its registration: section 3(1). The pursuer became the sole and exclusive owner of the Common Parts contained within the boundaries of the area delineated on the pursuer's Title Plan.

[75] Whether that remains the position in law depends on the application of the 2012 Act and, on the facts of the present case, whether there was a rectifiable inaccuracy before the designated day. This is the subject of questions 5 and 6.

Question 5: Was there a relevant inaccuracy immediately before the designated day for the purposes of the operation of the 2012 Act?

[76] The answer to this question involves consideration of the following: (i) impact of the 2012 Act, (ii) whether there is an inaccuracy in the relevant sense, and (iii) whether any inaccuracy is rectifiable. I begin with a consideration of the 2012 Act.

The impact of the 2012 Act on any inaccuracy in the Land Register

[77] The provision in the 1979 Act giving the Keeper the Midas touch was repealed by the 2012 Act, which came into force on 8 December 2014. In addition, the 2012 Act introduced transitional provisions. In particular, paragraphs 17, 18 and 22 of Schedule 4 to the 2012 Act provided as follows:

“17 If there is in the register, immediately before the designated day, an inaccuracy which the Keeper has power to rectify under section 9 of the 1979 Act (rectification of the register) then, as from that day—

(a) any person whose rights in land would have been affected by such rectification has such rights (if any) in the land as that person would have if the power had been exercised, and

(b) the register is inaccurate in so far as it does not show those rights as so affected.

18 For the purpose of determining whether the Keeper has the power mentioned in paragraphs 17 and 22, the person registered as proprietor of the land is to be presumed to be in possession unless the contrary is shown.

[...]

22 If there is in the register, immediately before the designated day, an inaccuracy which the Keeper does not have power to rectify under section 9 of the 1979 Act, then on that day it ceases to be an inaccuracy.”

The “designated day” is 8 December 2014. I shall refer to paragraph 18 as “the statutory presumption”.

[78] The purpose of these transitional provisions was to bring an end to bijural inaccuracies, meaning a discrepancy between the rights as recorded in the Land Register and the rights as understood by operation of the ordinary property law (ie extrinsic to the Land Register). Where the rights do not coincide, there is a “bijural” inaccuracy. The technique adopted in the 2012 Act to remove bijural inaccuracies, which Professors Reid and Gretton colourfully describe as the “transitional miracle” on the designated day (in *Land Registration, cit supra* at p 201), was as follows. First, if the inaccuracy is one that could have been rectified by the Keeper under the 1979 Act immediately before the designated day, then as from the designated day the real rights of the parties concerned became what they would have been had the inaccuracy been rectified. (The party with the rectifiable right prevailed over the party who’s right had hitherto been measured in terms of the Land Register.) While there is no longer a “bijural” inaccuracy, in practical terms the relative entry of the Land Register became inaccurate on the designated day, to the extent that the entry did not reflect the new (ie now deemed-to-be-rectified) position effected on the designated day. Secondly, if the inaccuracy was not one that could have been rectified by the Keeper under the 1979 Act immediately before the designated day, then again, the bijural inaccuracy ceased to exist, but with the critical difference that what was now deemed to be the correct position in law was the entry in the Land Register in its uncorrected form. The person whose right was measured in terms of the Land Register is now entrenched in the Land Register, to the detriment of the person whose right subsisted under the ordinary property law. In other words, the pre-designated day *de facto* position (as found in the Land Register)

became the *de jure* position on the designated day. It is for this reason that at this stage of the argument, parties focused on the issue of whether any inaccuracy was rectifiable (and which resolves itself as a question of whether the pursuer was a proprietor in possession). If it were a rectifiable inaccuracy, as the defenders contend, then this effectively superseded any answer to Question 4 adverse to BT, and BT has a *pro indiviso* share of the Common Parts. If, however, any inaccuracy was not rectifiable, as the pursuer contends, then this supersedes any answer to Questions 1, 2 and 3 adverse to the pursuer, and the pursuer's sole and exclusive title to the Common Parts becomes unchallengeable.

[79] The definition of inaccuracy in terms of section 65 of the 2012 Act is a broad one: a title sheet is inaccurate in so far as it "misstates what the position is in fact and law" (section 6(1)(a)) and a cadastral map is inaccurate to the extent that it "wrongly depicts or shows what the position is in law or in fact" (section 6(2)(a)). I shall refer to an inaccuracy falling within section 65 of the 2012 Act as a "relevant inaccuracy". (While section 65 is subject to section 66(3), no party suggested that there was anything in that subsection that affected the issues in this case and that provision was not placed before the Court.) Section 80, headed "rectification of the register", provides that where the Keeper becomes aware of a "manifest inaccuracy" in a title sheet or in the cadastral map, then the "Keeper must rectify the inaccuracy if what is needed to do so is manifest" (section 80(2)).

Is there a relevant inaccuracy?

[80] The pursuer made two points in relation to the 2012 Act. As noted above (in the discussion of Question 4), the pursuer relies on the savings provision in section 16(1) of the Interpretation Act, and argues that its title is "absolute and outright" subject to a relevant event. The latter might include a determination that there is a relevant inaccuracy.

Separately, under reference to the opening phrase in paragraph 17 (italicised above, at para [77]) of the transitional provisions in schedule 4 to the 2012 Act, the pursuer argues that the operation of paragraph 17 is conditional on there being an inaccuracy in the Land Register on the day before the designated day. However, it submits that the defenders do not specify how or in what way the cadastral map or any part of the title sheet wrongly depicts ownership as a matter of law on that date. There has been no determination of any inaccuracy in respect of the pursuer's title in the Land Register. In its submission, the pursuer was (and remains) the sole owner of the Ramp. The pursuer rejects the defenders' argument that there is an inaccuracy, on the basis that the defenders' interpretation of its Land Certificate is incorrect and that, correctly construed, BT never had a registered interest of a *pro indiviso* ownership in the Vehicular Access.

[81] As noted above, the defenders' primary position is that there is no conflict between BT's title in the Land Register and the pursuer's Land Certificate, so there is no question of the pursuer's title prevailing. On the hypotheses (i) that I rejected the defenders' submission on the pursuer's Land Certificate (which I have), (ii) that the pursuer's interpretation of its own Land Certificate is accepted (which it is), and (iii) which carries with it the consequence of extinguishing BT's *pro indiviso* right, BT has a fall-back position. It is that there is an "inaccuracy" in the pursuer's title in that the Title Plan of the pursuer's Title sheet shows the pursuer as the sole owner of the Vehicular Access, whereas in ordinary property law (ie as judged by matters extrinsic to the Land Register), BT was entitled to only a one-half *pro indiviso* ownership of the Common Parts. In these circumstances, the defenders submit that the pursuer's title is voidable, within the meaning of para 601 of Reid, *The Law of Property in Scotland*. To the extent that the pursuer's title purported to constitute it the sole owner of the

Vehicular Access (as part of the Common Parts) it was an *a non domino* disposition *quoad* the one-half share that had already been conveyed by Pardev to BT (if the Court has accepted the defenders' construction of the BT Disposition and the BT Land Certificate, which it has). This gave rise to a bijural inaccuracy, namely, the real right flowing from registration of the pursuer's title to the whole (ie undivided) of the Common Parts (as judged from the Land Register) and the position in terms of property law that the pursuer's title should not have conveyed the whole of the Common Parts to it. This is a relevant inaccuracy.

[82] In relation to the pursuer's reliance on the savings provision in section 16(1) of the Interpretation Act, I begin by noting that the savings of any right accrued is displaced "if the contrary intention appears". The effect of the 2012 Act, and the "miracle" of the designated day, was to purge the Land Register of all extant bijural inaccuracies. I find that there is a "contrary intention" in the form of the transitional provisions of the 2012 Act. Where the bijural inaccuracy was rectifiable, the effect of the transitional provisions was to alter the rights of the person with the bijurally inaccurate title on the Land Register (here, the pursuer), in favour of the person whose rights were judged according to the ordinary law extrinsic to the Land Register (here BT, by virtue of the BT Disposition). Having regard to my determination of Question 1 and 3 in favour of BT, and my determination of question 4 in favour of the pursuer, it follows that I find that there is a "bijural inaccuracy" (to use the language of the 1912 Act) in the pursuer's Land Certificate immediately prior to the designated day. The next question that arises is whether that is a rectifiable inaccuracy.

Question 6: Is the inaccuracy a rectifiable inaccuracy?

[83] The defenders submit that if the Land Register is inaccurate it can be rectified, unless to do so would prejudice a proprietor in possession (section 9 of the 1979 Act, as then in force). This follows from the transitional provisions in the 2012 Act.

[84] The transitional provisions, which are less than straightforward, are contained in Schedule 4 to the 2012 Act (“Schedule 4”). Parties referred to paragraphs 17, 18 and 20.

Paragraph 17, which is headed up “*Bijural inaccuracies*”, provides as follows:

“If there is in the register, immediately before the designated day, an inaccuracy which the Keeper has power to rectify under section 9 of the 1979 Act (rectification of the register) then, as from that day-

- (a) Any person whose rights in land would have been affected by such rectification has such rights (if any) in the land as that person would have if the power had been exercised, and
- (b) The register is inaccurate in so far as not does not show those rights so affected.”

It is necessary to consider section 9 of the 1979 Act in determining whether there is any inaccuracy in the pursuer’s Land Certificate capable of rectification. Section 9(1) confers a power, and in certain circumstances imposes a duty, to rectify any inaccuracy in the Land Register, subject to subsection (3). So far as relevant to the issues in this case, subsection 9(3) provides as follows:

“(3) If rectification under subsection (1) above would prejudice a proprietor in possession –

- (a) The Keeper may exercise his power to rectify only where –
 - (i) The purpose of the rectification is to note an overriding interest or to correct any information in the register relating to an overriding interest;”

It will be immediately apparent that being a proprietor in possession is a protected status, as it precludes rectification except in the circumstances provided for in section 6(3). Those restrictions do not apply to a proprietor who is not in possession of the interest in land affected by the proposed rectification of the inaccuracy.

[85] The defenders maintain that if the title to the pursuer's Land was voidable when first conveyed to the pursuer's predecessors in title (it will be recalled that the conveyance in favour of the pursuer is the fourth transfer), it would continue to be voidable when transferred to successors who were in bad faith (paras 3.6 – 3.7 of the SLC Discussion Paper and page 692 of Reid, *The Law of Property in Scotland*). The defenders essentially found on the incorporation of the whole terms of the Deed of Conditions in the pursuer's Land Certificate and it submits that the pursuer and its predecessors had notice of the Deed of Conditions from the Register in the sense discussed in *Trade Development Bank v Warriner and Mason (Scotland) Ltd* 1980 SC 74 ("*Trade Development Bank*") by Lord President Emslie (at p 90). Accordingly, the pursuer and its predecessors in title were in bad faith in the way explained in the *Trade Development Bank* case and in *Rodger (Builders) Ltd v Fawdry* 1950 S 483 ("*Rodger (Builders) Ltd*") (per Lord Jamieson at p 499). The pursuer's title was vulnerable to rectification on grounds that the Register was inaccurate. Further, BT averred that the pursuer was at no stage a proprietor in possession, and therefore was not protected from rectification. (This raises the issue of possession, which I will address below.)

[86] The pursuer's primary position was to rest on its interpretation of the deeds. If it was correct that none of the Deed of Conditions, the BT Disposition or the BT Land Certificate conferred any *pro indiviso* right in the Common Parts to BT, then there was no inaccuracy and no question of rectification arose. It did not advance a submission to meet the defenders' argument that the pursuer's title was voidable by reason of what was disclosed in the pursuer's title.

[87] There is in my view a difference between the determination of the legal effects of a deed such as the pursuer's Land Certificate (the import of question 4, above), and

consideration of the features of the deed to put one on notice that its legal effects may not be consistent with third party rights. The defenders' submission is premised on the proposition that the pursuer would have knowledge of what was contained in its Land Certificate. I did not understand the pursuer to gainsay that proposition.

[88] I accept the defenders' submissions that the knowledge to be imputed to the pursuer included the whole terms of the Deed of Conditions in the burdens section of its Land Certificate, and that this included knowledge of the delineation of the constituent elements of Common Parts (as defined in the Deed of Conditions) on the supplementary plans to the pursuer's Title Plan. The notations on those plans can only be understood if one reverts to the terms of the Deed of Conditions in entry 3 of the Burdens Section (and at the end of which the supplementary plans are referred to) and, having done so, the dissonance between the provisions for Common Parts in the Deed of Conditions (and the delineation of the Common Parts on the supplementary plans), on the one hand, and the delineation of the subjects of the pursuer's Title Plan, on the other, is apparent. I have no hesitation in accepting the defenders' submission that this was precisely the kind of notice described by Lord President Emslie in *Trade Development Bank* and to which the offside rule in *Rodger (Builders) Ltd* applies. I therefore find that there is a relevant, ie bijural, inaccuracy in the pursuer's title and that it is susceptible to rectification, subject to satisfaction of the other elements governing the Keeper's powers of rectification.

Question 7: Is the pursuer a proprietor in possession?

[89] I have found that the inaccuracy is a relevant inaccuracy. Whether it is rectifiable turns on whether the pursuer enjoys the protected status of being a proprietor in possession in respect of whose title rectification is permitted in only limited circumstances. The pursuer

relies on the statutory presumption whereas BT offers to prove that the pursuer was never in possession. It is clear that the presumption is a rebuttable one, “unless the contrary is shown”. BT has positively averred a contrary position. It avers (in Answer 6) that it has possessed the Ramp and the turning circle exclusively, up to the point where the pursuer began construction works in 2018 and that prior to that point the Ramp and the turning circle were treated exclusively as part of BT’s car park. The question of whether the pursuer is in possession such as to be a “proprietor in possession” is a question of fact as well as law. Determination of that matter may involve consideration of further questions such as the degree or nature of possession required, or the extent to which possession of part of a property may infer possession of other parts or the whole of it. None of this can be determined on the basis of the submissions and materials placed before me at debate. In my view, BT has sufficient averments to have this matter remitted to proof.

Question 8: Is BT’s title habile to found possession for the purposes of prescription?

[90] Another of the changes introduced by the 2012 Act was to permit the operation of prescription in respect of interests in land recorded in the Land Register, as this had been excluded by the 1979 Act. Until 28 November 2014, section 1(1) of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”) provided that a title registered in the Land Register could not found a basis for prescription unless the Keeper had excluded indemnity. Consequent upon the 2012 Act, that section had been amended (with effect from 28 November 2014) so that it was now possible for a title habile to include a “real right in land” and registered in the Land Register to found a basis for prescription. The phrase “a real right in land” includes a *pro indiviso* right of ownership: see section 1(3) of the 1973 Act as amended and Reid, *The Law of Property in Scotland* at paragraph 22.

[91] Accordingly, the question is whether BT has possessed the Ramp for 10 years on the basis of a title (in this context, meaning the BT Disposition) habile to found possession for the purposes of prescription? Is the BT Disposition habile to found prescription in respect of the Ramp? This issue is a rehearsal of the arguments considered under Question 2, above. The defenders submit that it matters not that BT's right is not reflected in the pursuer's title sheet (*per* Lord Tyre in *Willemse v French* 2011 SC 576 at para 21). Accordingly, even if the pursuer acquired an unqualified title to the Common Parts in 2002, and which (on this hypothesis) had the effect of extinguishing BT's *pro indiviso* rights thereto (as I have determined in answer to Question 4), BT re-acquired its *pro indiviso* right in 2014 through positive prescription. The pursuer's position is that BT's title was never habile to include the Vehicular Access. It submits that this is so because BT's title (and the effect of any prescription) is restricted to what is shown on the cadastral map. Even if BT possessed the Vehicular Access, this was therefore of no moment standing BT's title in the Land Register. BT's reliance on positive prescription was therefore misconceived.

[92] In my view, the pursuer's reference to the BT Land Certificate in this context is inapt, as the correct deed that falls to be considered is the BT Disposition (being the title on which BT founds its possession for the purposes of prescription). In any event, in light of my answer to Question 2 (or on the pursuer's approach, in light of my answer to Question 3), I find that BT's title is habile to include the contested element of the Common Parts (ie the Ramp).

[93] In relation to possession, BT offers to prove that it was in possession of the Vehicular Access on 28 November 2014 for a period in excess of 10 years prior to that date, and thereafter; that that possession was founded upon a registered deed (namely, the BT

Disposition); and that its possession was open, peaceable and without judicial interruption. The defenders submit that BT's possession prior to 28 November 2014 falls to be included for the purposes of calculating whether section 1(1) of the 1973 Act has been satisfied (see section 120 of the 2012 Act and Reid and Gretton, *Land Registration* at para 17.11). The effect of possession for the prescriptive period, if established, would render BT's title "exempt from challenge". While I find in favour of the defenders in respect of the possibility of prescription operating on the BT Disposition, the question of possession cannot be resolved on the materials and submissions at debate. Accordingly, the issue of BT's possession will require proof.

Miscellaneous matters

[94] The defenders submit that the pursuer's averments that BT had a servitude right of access over the Vehicular Access was lacking in specification, and the relative averments in article 4 of condescendence should be excluded from any probation. In light of my determination of Question 1, which was to reject the pursuer's construction of the Deed of Conditions as conferring a right of servitude, then the pursuer's averments in support of that contention fall to be excluded as irrelevant.

Disposal

[95] For the reasons provided, none of the parties has succeeded in obtaining the decree it sought. In light of my resolution of the questions, a proof limited to the question of possession for the purposes of Questions 7 and 8 is necessary. I shall issue an interlocutor reflecting my determination of the issues. I reserve meantime all question of expenses.