SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2020] EDIN 35

EDI-B1202-16

JUDGMENT OF SHERIFF N A ROSS

in the Summary Application by

KAREN LACEY

Pursuer

against

PAUL McCONVILLE and PAULA CARTON

Defenders

Act: MacDougall, advocate
Alt: Wilson

Edinburgh January 2020

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

[1] The pursuer is the heritable proprietor of and resides at 3 Christiemiller Place, Edinburgh. The defenders are the heritable proprietors of and reside at number 4. Those properties are flatted dwelling houses and form respectively the upper and lower floors of the eastmost side of a block of four flats. The pursuer's flat is situated immediately above the defenders' flat. The block of flats was built in the mid- to late-1930s.

[2] The block of flats has a predominantly flat roof. There are parapet walls around the edges. The elevations are formed in brickwork outer leaf with render applied. In terms of the registered title, the pursuer has a right in common with the defender to, amongst other items: "all drains, sewers, rain water conductors, soil, supply and other types, roof, rowans,

chimney heads, gables, outer walls, the railings…", as more fully set out in the relevant land certificate.

[3] The parties' properties have a south (front) elevation, an east gable elevation and a north (rear) elevation. Each elevation is coated in render, which is the original render applied in the 1930s, and which has received a number of patched repairs in the intervening years. The upper flat was formerly served by an original steep concrete external stairway which led from the rear garden to connect with the rear of the pursuer's flat.

[4] The pursuer purchased her flat in 1977. The defenders purchased their flat in about January 2014. In about April 2014 the pursuer applied for and received planning permission to carry out certain alteration works to her property, both internal and external. The external works included the removal of the rear concrete stair and replacement with a metal platform and spiral staircase, together with consequential works to remove a small area of the rear roof and parapet wall to accommodate the new construction. An accurate copy of the planning drawing is lodged at 6/8 of process. The defenders did not object to the grant of planning permission.

[5] On 10 July 2014 the pursuer arranged a meeting with her contractor and the defenders in order to discuss potential works to replace the render on the external elevations. The defenders did not consent to the replacement of the render. In about August 2014 the planned external works to the rear external staircase commenced. The defenders contacted the pursuer to confirm that they did not consent to the replacement of the render on the common elevations. The pursuer offered to pay for the complete replacement of the render coating, on condition of later repayment by the defenders of a one-half share. The defenders declined.

[6] In October 2014 the defenders contacted the pursuer to request removal of the external scaffolding, following completion of the planned works. They confirmed that they did not consent to the proposed re-rendering of the external elevations. The scaffolding was thereafter removed. The pursuer approached the defenders again in 2015, and in July 2015 supplied quotations for the proposed re-rendering of the elevations. The defenders refused permission for such works.

[7] During the works to the external staircase patches of render on the external elevations were removed, or fell off, as a result of those works. Those patches are as follows: the removal of the concrete stair left a large patch of exposed brickwork; patches of render were detached also around the edges of the new metal platform: Those particular patches would, on the balance of probabilities, not have required imminent repair or replacement had it not been for the impact or effect of pursuer's planned works. They form, however, only a minor proportion of the overall defects to the render finish on the parties' common walls. The cost of repairing these is unquantified but minor.

[8] The external render on the parties' common walls is in very poor condition. It is the original render applied in the 1930s. It was applied direct to the brickwork of the external walls. There are numerous and extensive areas where the render has become detached from the brickwork. There are several areas where the render has fallen off. These areas of detached or missing render are shown in the photographs lodged in process. They are also partly shown in the hand-drawn diagram at Appendix B to the report dated 19 February 2019 by David Vince. The latter is incomplete as it does not show such areas above window level at the upper floors. In fact, there are several areas of detached render towards roof level. Detachment creates a risk of render falling to the ground below. There is a path

which extends to the front and rear of the property. Render falling from height poses a significant risk to the safety of those present below.

[9] The said want of repair would be adequately repaired by patch repairs of render to individual areas of detached or missing render. Entire removal and replacement of the render would be economically efficient, but is not necessary to achieve a functioning cosmetic and safe result. Patch repairs are sufficient to remedy any want of shelter to other parts of the building, and to prevent any risk of falling render. The cost of such repair works is not proved.

And finds in fact and law that:

[1] The parties are co-owners of the external walls of the building, and of the render attached thereto.

[2] The exterior render of the building is not a part that provides, or is intended to provide, support or shelter to any other part. Accordingly no obligation arises on the defenders in terms of section 8 of the Tenements (Scotland) Act 2004.

THEREFORE sustains pleas-in-law numbers 1, 2 and 4 for the defenders, repels the pursuer's pleas-in-law, and assoilzies the defenders from the craves of the summary application; continues the application to a date to be afterwards fixed as a hearing on expenses, unless parties are able to agree an award.

Note:

[1] The parties are neighbours in a two storey block of four flats. Their flats form the eastmost half of the block, the pursuer owing the upper flat and the defenders the lower. The building was built in the 1930s and has a brick-built exterior wall which is dressed with

render. The render is original and in poor condition. It is unsightly and has several missing patches and many areas of bossing (detached from the brickwork). The pursuer wants to replace the entire render. The defenders have no such ambition. The external walls are, in terms of the title deeds, common property. The pursuer has obtained quotes for replacing the render, and has raised proceedings to compel the defenders to pay a one-half share of complete replacement. She relies on section 8 of the Tenements (Scotland) Act 2004. The pursuer and one of the defenders, Mr McConville, gave evidence. They each led expert surveying evidence.

[2] It is not necessary to set out the full evidence, as there was very little dispute on the facts, and I will discuss the relevant elements under particular subject headings. In summary, the pursuer maintains that full replacement of the render is necessary, at joint cost. The defenders recognise that the render requires attention, but maintain that patch repairs are sufficient to remedy any want of repair. They also accept they are liable to pay a one-half share of such patch repairs, but maintain that they should not have to pay for areas of damage caused by external works carried out by the pursuer to her property.

[3] This action is brought under the Tenements (Scotland) Act 2004 (the "2004 Act"), section 8, and not on any wider common law basis. That section imposes rights and duties in relation to support or shelter of other parts of the building. The defenders do not accept that the render works are required for reasons of support or shelter. Accordingly, even though they accept that some repair work is now required, they say there is no remedy under the 2004 Act, and accordingly that this action, in its present terms, must fail.

[4] The essential points are set out in the findings in fact.

The statutory provisions

[5] Section 8 of the 2004 Act provides:

> "8(1) Subject to subsection (2) below, the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.
> (2) An owner shall not by virtue of subsection (1) above be obliged to maintain any part of a tenement building if it would not be reasonable to do so, having regard to all the circumstances (and including, in particular, the age of the tenement building, its condition and the likely cost of any maintenance).
> (3) The duty imposed by subsection (1) above on an owner of a part of a tenement building may be enforced by any other such owner who is, or would be, directly affected by any breach of the duty.
> (4) Where two or more persons own any such part of a tenement building as is referred to in subsection (1) above in common, any of them may, without the need for the agreement of the others, do anything that is necessary for the purpose of complying with the duty imposed by that subsection."

[6] The pursuer seeks declarator that she is entitled to carry out remedial works to the common outside walls (which she identifies as complete replacement of the render). In order to succeed, the pursuer requires to prove that:

(i) the relevant part (namely the common external walls, or alternatively the render) provides support or shelter to any other part of the building;

(ii) the defenders are owners of that part, and that the pursuer is an owner directly affected by any failure to ensure continued shelter or support;

(iii) some action is required to maintain the supporting or sheltering part for the purposes of "ensuring" that it continues to provide such support or shelter;

(iv) the particular works identified by the pursuer are "necessary" to maintain the supporting or sheltering part.

[7] There is no dispute that the 2004 Act can apply, that (i) the common walls provide support or shelter, or (ii) that the parties are in the qualifying proprietorial relationship. The defender maintains, however, that section 8 of the 2004 does not apply, because the external

render does not affect the shelter or support of the building. The factual dispute concerns the purpose and condition of the external render. For section 8 to apply, it is not enough to claim that the render poses a risk to health and safety, or that it is unsightly. Only support or shelter are relevant. The present case raises no issues of support.

[8] The defender's position is that remedial works are required, but it is not necessary to carry out a complete removal and replacement of the existing harling. Patching will be adequate to remedy any want of repair. In addition, the defenders point to recent external alterations to the north (rear) wall in installing the new metal balcony and stair, and cutting back the roof gable wall. Their position is that the pursuer ought to pay to repair render which has been damaged as a result of the pursuer's works. The history of events is set out by the defenders in their letter of 12 October 2015 (6/4/9) and is not materially disputed, and so I will accept that as a credible and reliable account of the surrounding events.

Expert inspection

[9] Both sides led evidence from building surveyors about the condition and design purpose of the harling.

[10] **Greig Adams** is a building surveyor and chartered engineer. He spoke to a written report he prepared (5/2 of process) at the pursuer's instruction, following his inspection of the building in January 2016. His qualifications are set out therein.

[11] Mr Adams inspected all three external walls from ground level, and then went onto the roof. He carried out a tap-test on the harling. That test reveals by sound if areas of harling are bossed, as bossed harling sounds hollow. "Bossing" involves detachment of the harling from the substrate or external brickwork, and is a want of repair. He reached above

head-height while standing on the ground, and reached about 1 metre over the top of the parapet wall.

[12] He noted a number of areas where render had detached and fallen off, most notably on the east gable, north (rear) wall and wallhead chimney stack on the south (front) elevation. He noted a number of large historic patch repairs, particularly at low level on the east gable, south wall and on the parapets and chimneystacks.

[13] For the render which remained attached, the key or adhesion is critical. Once adhesion is lost further tension is placed on the bonding of adjacent render. Any water ingress allows the freezing and thawing cycle to cause further detachment. There were "quite considerable" areas of the whole external wall where significant render had failed and become bossed. This included areas of previous repair work. In addition, the finishing coat was flaking, which exposed the undercoat of the render to the elements. There was also localised cracking. In his opinion, the render finish was in a very poor condition, with "substantial and significant failures". His research showed that such render had a statistical life expectancy of 53 years. This render was in excess of 70 years old. The condition would justify a Repair Standards Enforcement Order under the relevant legislation.

[14] **David Vince** gave evidence for the defenders. He is a building surveyor and his report, and a supplementary report, are lodged, and set out his professional qualifications. He inspected the building in 2018. His findings as to the quality of the render were not materially different to those of Mr Adams. He noted a number of areas of missing, cracked and boss render. He carried out a comprehensive review of the elevations and prepared a chart of the defective areas. He used a short ladder from ground level. He was able to carry out inspection and tap-testing to window level on the upper floor, but not above that level.

He inspected the roof level, but did not tap-test downwards. He would expect the weakest part of the rendering to be at the top of the building.

[15] He prepared a plan of where he had inspected and tap-tested the render (see Appendix B to report 6/2/3). This plan was incomplete, as he had not been able to test above the window level of the upper storey. The plan shows, as areas of hatching, many and extensive areas of defective render. These areas required repair, but not in his view for the purposes of waterproofing or shelter.

The expert witnesses' views on the function of the render coating

[16] Mr Adams gave evidence about whether render contributed to "shelter or support" for the purposes of the 2004 Act. In his view, the render provided a rainwater jacket, to prevent the substrate getting wet. The primary and sole function was weatherproofing. Any cosmetic effect was secondary. 1930s render was applied straight onto the brickwork, which provided the necessary key. If the render was not present, the waterproofing of the building would require to rely on the cavity between external and internal walls. That cavity was a failsafe only. Before reliance can be placed solely on the existence of a cavity wall to provide a barrier to water, it is necessary to specify an adequately high quality of brickwork. He was unable to say that the brickwork here was of such quality. To do so would require removal of the render. He noted that this building had been specified with a render finish. The areas of exposed brickwork he had seen had been saturated and delaminating. Corrosion to the wall ties was inevitable. In his view render was definitely required if this building were to be made weatherproof.

[17] Mr Vince came to a different view. In his view, were the render to be stripped off the brickwork the weatherproofing would be "just as good". He did not agree that the render

formed a rainwater jacket. That would be the case if the construction were in solid brick or stone, but not where cavity brickwork was used, as it was here. There was no risk of water ingress, as that was the function of the cavity. It would allow the outer leaf to be saturated, but no migration of water across to the inner leaf. Even a damaged outer leaf, if it were correctly and solidly constructed, would not permit water ingress. He accepted that brickwork could deteriorate over time, but there was no evidence of sufficient deterioration here to cause water ingress, and in any event brickwork can be repaired. The mere fact that render was applied did not demonstrate that it was an integral part of the waterproofing of the building - in his view it was primarily cosmetic. The building was a good-quality building when it was built. It is not known what the design intent of the render might have been.

[18] Mr Vince's main point was that the render is damaged or missing in an extensive number of areas all across the external faces of the building. If it were truly an integral part of the waterproofing of the building, it would be expected that there would be corresponding areas of water ingress. There is, however, no water ingress, save in the three areas indicated in the roof, which have a separate explanation.

[19] The evidence was led by reference to a number of issues. While it is common ground that the render now requires some element of remedial works, the issues between the parties include (i) whether the pursuer's works caused a material element of the render defects; (ii) whether water ingress in the pursuer's flat is caused by defective render; (iii) the relevance of a lack of safety; (iv) what works have been identified, and their cost.

Impact of pursuer's works

[20] Mr Adams compared the areas of disrupted render to the planning drawings for the pursuer's works. He would expect an element of damage to external render, but only of a minor nature. Because, however, the external render was in such poor condition, damage had occurred well beyond any directly affected area. There were also numerous defects in the render which could not have been caused by such works. In his view, the pursuer's works had not, at least to any material extent, caused the extensive defects in the render. Had the render been sound, only simple minor patching would have been required.

[21] The defenders' position is that much of this work was rendered necessary by the pursuer's external works. That is clearly true to an extent. There is a bare patch where the concrete stair was removed. There are missing patches around the edge of the new balcony, and logically they are likely to have been displaced during the works.

[22] I have been much assisted by a hand-drawing by Mr Vince, forming Annexe B of his report dated 19 February 2019 which bears to show the areas of bossed and missing render. These areas are many and widespread. Render is missing or bossed at many locations over the external wall areas of the entire house. This drawing is consistent with the evidence of Mr Vince and Mr Adams. The drawing is, in fact, incomplete, because Mr Vince did not tap-test above upper-floor window level. Mr Adams' evidence was that there were a number of areas which he detected by testing to arm's length from roof level. The evidence is consistent with the photographs of the building which are lodged and were spoken to in evidence.

[23] The defects in the external render are so widespread that most are in areas which were not affected by the pursuer's works. There is no logical link between those defects and the pursuer's works. It is therefore likely that, while the pursuer's works served to expose

an unharled area, and cause other small areas of harling to detach, the harling was in the same poor condition as the harling elsewhere on the house. Accordingly, it is likely that these areas would have required at least an element of repair in any event, even had they not been disturbed by the pursuer's works.

[24] The newly exposed area behind the removed staircase is not in that category, but there was no evidence about whether it would amount to any significant increase in cost to repair that area. I will therefore make no separate findings about that patch. It forms part of the general want of repair.

[25] Further, I accept Mr Adams' evidence that the pursuer's works are only likely to have affected those areas immediately adjacent to the balcony or other works. These defects form a very small proportion of the overall defects.

[26] For all these reasons, I do not find that the pursuer's works made any significant or material contribution to the overall requirement of repair, or have materially increased the likely cost thereof. Any effect of these was minor, and in any event I do not have evidence to allow any meaningful quantification of such minor works. Accordingly, the underlying requirement in the titles, for each party to contribute equally to any such works, is unaffected by these events.

Water ingress

[27] The pursuer has identified water ingress in her property. Her position is that this is caused by the want of repair of the render. If so, it was not disputed that this would demonstrate that the render was a "sheltering part" for the purposes of section 8(1) of the 2004 Act.

[28] There was no dispute that the water staining was present at (i) the top of the east (side) gable wall, in the lounge, at the junction between wall and ceiling, and (ii) the top of the north (rear) elevation, over the window of the rear bedroom. The pursuer stated these had been present for approximately 10 years and 5 years respectively. An additional inspection by Mr Vince in November 2019 revealed a third area of staining within the bathroom (north elevation).

[29] Mr Adams was unable to attribute water ingress solely to defective render alone, even on the balance of probabilities. He noted that one cause may be penetration through copes or cope joints. He accepted that vertical cracking between the wall and render on the parapet wall was a likely cause. Further disruptive investigation would be necessary to provide a clear answer.

[30] Mr Vince pointed out that the water ingress did not coincide with the widespread defects in the render. On one area, the rear bedroom window, there was no external evidence of cracking or bossing at the site of the water ingress. The staining was on the ceiling, not the wall. It was therefore likely that the leak was caused by the bituminous felt finish to the roof. In the bedroom and lounge, while there was evidence of external render defects, there was also evidence of a defective parapet wall directly above the staining. Pointing was missing, which would permit ingress. The upstand detail was poorly formed and likely to permit water ingress. Water would ingress down the inner face of the parapet wall. His view that these defects, not an absence of render, caused ingress.

[31] Critically, the detailed plan of defective render (see Appendix B to report 6/2/3) shows many areas of defective render. These bore almost no correlation to areas of water ingress. The defenders' property has many areas of defective render. They have not identified any water ingress. That plan does not show further areas of defective render

above the base of the windows on the upper floor. I accept, given the defects shown in the photographs, that there are more such areas which do not appear in the plan. Mr Adams confirms the poor state of render at roof level.

[32] For these reasons, the pursuer has not proved that the three areas of ingress are attributable to defective or missing render. I accept the evidence that the three areas of water ingress in the pursuer's property are not caused by defective render. That is because they do not all coincide with areas of defective render, there are clear and more persuasive alternative explanations for such ingress, there are multiple areas of defective render which have not resulting in water ingress; and Mr Adams was not prepared to exclude an alternative cause.

Health and safety

[33] The pursuer spoke to returning from dog-walking one day to see that a whole patch of render had fallen off the east gable wall onto the adjacent walkway. She saw the dust from three streets away. It would be been highly dangerous, in her view. No maintenance had been carried out. She identified the patch which fell off in photograph 15 of 6/6 of process.

[34] Mr Adams spoke to a risk aspect, in sudden failures of adhesion. He had experience of seeing entire sheets of render fall off buildings, to sudden and catastrophic effect. It posed a safety risk, and is a concern. Mr Vince pointed out that in the 21 months between his reports no further render had fallen off, so it was unknown. He accepted, however, that there was a potential for it to fall. It would be hazardous if falling from high level.

[35] I accept that falling render poses a risk to health and safety, and that such risk increases with the degree of detachment from the wall. The risk is likely to be greater the

greater the height from which it will fall. I accept Mr Adams' assessment that the render at first floor level is in very poor condition. In my view, the render is likely to be in such a condition that it poses, at best, an unknown risk to the safety of passers-by and, at worst, an urgent danger. It is not possible to know the degree to which the evident want of repair has progressed. It is not possible to say that the render is in a safe condition. That fact alone indicates that repair is urgently required. If render should fall off and cause injury, it is likely that both proprietors would be liable in damages, because the external wall is common property for which they are equally responsible.

[36] However, for present purposes, the possibly dangerous condition of the render is not relevant. That is because, for present purposes, the question is framed specifically in relation to support or shelter. The wording does not encompass safety issues. Danger to passers-by affects neither support nor shelter. There are likely to be other common law or title remedies open to the pursuer, but in my view a want of safety does not trigger any remedy under section 8 of the 2004 Act.

Necessary works

[37] Neither side produced a valuation of the cost of patching works alone. The pursuer did not produce any expert costing, but instead presented three quotations from local tradesmen, the middle of which in value she selected and for which sum (£18,000) she sues. I am therefore unable to apply accurate figures for the parties' works. It is evident, in general terms, that patch repairs will be cheaper than complete replacement. Mr Vince thought that it would not be necessary to erect full scaffolding. Patching could be done from ladders, and if scaffolding were required, only a few lifts would be necessary. The worst damage was at low level. Mr Vince had not been asked to cost such repair work, but in

evidence was prepared to hazard an estimate of between £5,000 to £10,000. It was recognised that this was a very rough estimate.

Decision on the facts

[38] In my view, the pursuer has failed to prove that the render performs a rainwater jacket function for this building. No information or evidence is available about the original design or specification of the 1930s construction. In my view it has not been proved that the render provides, or is intended to provide, shelter to any other part of the building, for the following reasons:

[39] First, the experts are of opposite views as to the function of a cavity wall. Mr Adams considers that is a last resort defence against water ingress. Mr Vince considers that it represents the whole defence, and no other coating is necessary. I have been unable to prefer one view over the other. Both experts acknowledged that their views may be changed by disruptive investigation. I understood them both to accept that high-quality, selected brickwork would present an effective barrier to water ingress, and could allow a design which would not require the application of render. It is not, however, possible to ascertain the quality of such brickwork here. While there was some evidence of damage to bricks, such damage would also happen over time to high-quality external bricks, and could be expected to be met with a localised repair. The mere existence of damaged brickwork is, accordingly, not determinative. The pursuer has not discharged the onus of proving that render has the function of waterproofing the building.

[40] Second, there are a very large number of defective areas of render. These areas do not correlate to areas of water ingress. Indeed, the defenders have no complaint of water ingress, despite having the preponderance of such defective render. This appears clear

evidence that the defects have not, in developing over approximately 80 years, led to water ingress. No causal connection has been proved.

[41] Third, those areas of water ingress identified are at ceiling level on the upper floor, and are capable of alternative and more compelling explanation. They are attributable to defects either in the roof or in the surrounding parapet wall construction. One such area, in the bedroom, does not correlate with any patch of damaged render.

[42] On the evidence (and both experts required to work without full disruptive inspection) the pursuer has failed to prove that the render has any more than a cosmetic purpose. It is not enough that there may be a collateral benefit to waterproofing, because if the building was not designed to depend on render for shelter, it cannot be said to be necessary for the continued shelter of the building.

The necessity of replacement

[43] For reasons discussed below, there is insufficient evidence to allow a finding that replacement is necessary. There is sufficient evidence to find that repairing is necessary.

The cost of replacement

[44] The pursuer has led evidence of three quotations obtained for the replacement works. There are no quotations for patch repairs, and the only evidence is Mr Vince's response, to a question he had not previously been asked to consider, that the cost of repairing might be in the range of £5,000 to £10,000. It is not possible for me to make findings as to the likely cost of replacement of the entire render coating, or of the cost of patch repairing the defective areas of render. At best, it is clear and I accept that it will be materially less expensive to carry out the latter rather than the former.

Decision

[45] Parties accepted that I could only grant the remedy of declarator and payment if repair works to the external render could be brought within section 8 of the 2004 Act. The summary application does not seek any other statutory or common law remedy. Neither party sought to engage the discretionary power of the court to order necessary or expedient acts under section 6. This dispute is narrowly focused.

[46] Section 8(1) requires an owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, to maintain it for those purposes. Counsel for the pursuer submitted that the render was by itself such a part. Under that analysis, the pursuer would require to prove that the render (as opposed to the wall) was common property, and that it provided shelter to another part, or was intended to. The render is not stated in the titles to be common property, but it is affixed to common property. The status of the render is not in dispute, and I will treat it as common property. The question in law is whether it provides, or is intended to provide, shelter to any other part.

[47] On the facts, the pursuer has failed to prove that the render is intended to perform a waterproofing function to the building. It follows in my view that the pursuer has therefore failed in law to prove that the render provides shelter, within the meaning of section 8 of the 2004 Act. There is no information about the original design intent, and for the reasons set out above I am unable to prefer the evidence of the pursuer's expert evidence over that of the defender. It is therefore not proved that the render was intended to provide shelter, as opposed to being applied for cosmetic reasons.

[48] Alternatively, it might be argued that the render provides a degree of shelter, even though that may not have been the original intention. That would require extending the effect of section 8 to include an incidental benefit. It would logically require to be extended to any external shelter, for example a coat of paint, or an overhanging decorative architectural feature. In my view, the provision is not intended to encompass incidental benefit. If it did, it would operate to create duties in relation to parts of the building which were never designed to fulfil such a function. It would run contrary to the intentions set out in the Scottish Law Commission report which led to the Act, a truncated copy of which was produced by counsel, which refers throughout to "essential" repairs. It would be difficult to regard repairs to an otherwise non-essential part of the building as essential repairs. Similarly, the duty in section 8(1) to "ensure" shelter would be at odds with repairing a part which was never intended to provide shelter. In my view, an incidental and unintended (or at least not principally intended) benefit of shelter, as opposed to an intended purpose, is not sufficient to found any duty or trigger any obligation under section 8.

[49] Another alternative argument might be that the part referred to in section 8 is the external wall, not the building, and that the render provides shelter to the wall. There could be no doubt that there is a duty to maintain a common external wall so as to provide support or shelter. However, on the facts, the render has not been proved to be a necessary element for providing shelter for either the wall or the wider building, and therefore the pursuer has not shown that render forms part of the maintenance of the wall for the purposes of providing shelter. On that analysis too, the pursuer must fail.

[50] Even if the pursuer cleared these hurdles, in my view she has not in any event led sufficient evidence to succeed. The power to act is set out in section 8(4), and allows any

common proprietor to "do anything that is necessary for the purpose of complying with the duty…". Notably, the power is limited by necessity, not reasonableness.

[51] Mr Adams stated that the existing render finishes are beyond their useful life expectancy, and that it would not be financially viable to patch repair these, compared to the costs of re-rendering. I accept that evidence. His report does not cover, and he was not asked about, the cost of such works. The pursuer seeks declarator that the reasonable cost of such works is £18,600. She bases that claim on the middle quotation of three obtained for the works. There was no evidence as to whether this sum was reasonable, only that it was quoted.

[52] On the other hand, Mr Vince gave evidence that patch repair of the render was viable. His broad assessment of the cost would be in the region of £5,000 to £10,000 for the entire task. I do not have any evidence on which to prefer one to the other - patch repairs are not evidently better or worse than entire replacement. I therefore cannot hold that the pursuer has proved that replacement is necessary.

[53] In my view, insufficient attention has been paid to the test of necessity. "Necessity" is different from economically sensible. I can accept that patch repairs will only ever be a temporary solution, and that at some (indeterminate) point it will be cheaper to carry out a full repair. Mr Adams' position is that that point has now been reached. I accept that his view amounts to a commercial, common sense solution. That is not the same as necessity. Full repair is more expensive and more extensive than patching. Mr Adams did not say that patching would not work, only that it was not financially viable. In doing so it is evident that he was not referring only to the immediate costs, but the long-term costs, presumably of the repeated need to patch-repair as the old render continues to degrade. In my view, the test of necessity is a different test, and much more restrictive. One owner cannot force

another owner to be financially astute. It is clear from Mr Vince's evidence that patching in the short term is considerably cheaper. It might be a false economy, but the test is one of necessity, not reasonableness. It is necessary to patch repair. It cannot be said to be necessary to replace. For a party for whom funds are limited, it may not be financially possible to carry out any more than short-term repairs. There may be other reasons for not wanting to carry out long term remedies. The law does not force a co-proprietor to do so.

[54] In summary, the render on this building requires repair, not least because it is unsafe. However, the pursuer has not proved that this action can be maintained under section 8 of the 2004 Act. In any event, she has not proved that her preferred solution is necessary, either in form or in cost. Because section 8 is not triggered, I cannot exercise any powers under section 6. Even if I had power to make an order, there is insufficient information to identify the likely cost of repair, or otherwise to make a sufficiently clear and reasonable order which might be enforceable.

[55] I will therefore pronounce decree of absolvitor. Parties did not address me on expenses, and the matter will be continued for parties to discuss same. If they are unable to agree expenses, they should contact the clerk and a hearing will be arranged.