SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2025] SC EDIN 9

EDI-A184-20

JUDGMENT OF SHERIFF WALLS

in the cause

MRS ISABELLA PATON KERR LANGSKAILL

Pursuer

against

MS TRACY-ANNE BLACK

Defender

Pursuer: Middleton, Advocate, instructed by Lindsays LLP
Defender: Tosh, Advocate, instructed by Dentons UK & Middle East LLP

Edinburgh 21 February 2025

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

1. The pursuer resides at 2 St Ronan's Terrace, Edinburgh ("2SRT") with her daughter, Ruth Langskaill.

2. The defender resides at 63 Morningside Drive, Edinburgh ("63MD") with her partner Ryan Carter and their son.

3. The pursuer moved into 2SRT with her husband, Robert Langskaill in 1962.

4. Ruth Langskaill was born in 1964 and lived at 2SRT until around 1974 when she moved to a nearby flat. In 1983 she moved to Lasswade and then, in 1990 to Amsterdam. She returned to live at 2SRT in 2010 after Mr Langskaill suffered a stroke.

5. Mr Langskaill died in April 2015.

6. The pursuer is the heritable proprietor of 2SRT pursuant to (i) a disposition granted by her husband in her favour dated 19 November 2011 and recorded in the General Register of Sasines for the County of Midlothian on 28 November 2011 ("the 2011 Disposition"); (ii) a disposition by the pursuer in favour of Robert Langskaill dated 26 December 2011 and recorded in the General Register of Sasines for the County of Midlothian on 9 January 2012; and (iii) confirmation issued by the Commissariat of Edinburgh on 3 December 2015 in favour of the pursuer as executor nominate of said Robert Langskaill, docquetted on 25 January 2016 and registered in the Books of Council and Session on 2 February 2016.

7. The defender is the heritable proprietor of 63MD, whose title is registered in the Land Register of Scotland under title number MID197799.

8. The defender is the successor in title to Robert Foggo. The subjects now known as 63MD were conveyed by the Scottish Heritages Company Limited to Robert Foggo by feu contract dated 12 and 13 July 1880 and recorded in the Division of the General Register of Sasine for the County of Edinburgh on 15 November 1880 ("the 1880 Feu Contract.").

9. From 1962 until at least 1994, 63MD was used by the NHS as a residential home associated with patients of the Royal Edinburgh Hospital. Subsequently, and until 63MD was purchased by the defender, it was used by the NHS as a facility for learning disabled adults.

10. The sole means of access to and egress from the cottage at 2SRT and its garden grounds is taken via a lane which runs east to west from the public road known as St Ronan's Terrace ("the Lane").

11. The Lane is bounded around its western end by the cottage and grounds of 2SRT. Otherwise, the Lane is bounded (i) to the south by 4 St Ronan's Terrace ("4SRT"); and (ii) on the north side by a boundary wall behind which lies *inter alia* the garden of 63MD.

12. The feu contract between the Scottish Heritage Company Limited and William Ballantine dated 16 and 17 December 1885 and recorded in the General Register of Sasines for the County of Edinburgh on 14 January 1886 ("the 1886 Feu Contract") confers on the heritable proprietor of the property now known as 63MD a servitude right of access over the Lane.

13. From 1962 to the present day the Pursuer and members of her family have used the Lane for access to, and egress from, 2SRT.

14. The living room of 2SRT is on the ground floor and looks out onto the Lane towards St Ronan's Terrace.

15. The boundary wall on the north side of the Lane contains a working wooden door or gate, with a lock for which the defender holds a key. This door leads into the rear garden of 63MD. The door was present in 1962 when the pursuer moved into 2SRT.

16. In 1962 the Lane was little more than a dirt track.

17. In 1965 the shrubs and plants in the Lane were not overgrown to the extent of covering the door from 63MD into the Lane.

18. During the 1960s and 1970s Mr Langskaill incrementally improved the condition of the Lane by laying paving over the entirety of the Lane, including up to the door into 63MD's garden. Mr Langskaill and the pursuer maintained existing shrubs in the Lane and planted others. Mr Langskaill created a small rockery in the Lane.

19. In the 1980s, Mr Langskaill laid a water pipe which ran up the Lane to the cottage.

20. In March 1990 Mr Langskaill entered into an agreement with BT regarding access to the Lane for certain works, which were carried out in the Lane.

21. Mr Langskaill made and kept a key which unlocked a box relating to a street lamp in the Lane. Since his death the key has been held by the pursuer.

22. From 1962 to 1975 Mr Langskaill paid feu duty in relation to the Lane and did not believe he was the owner of the Lane. The feu was redeemed in 1975.

23. In August and September 1993, NHS staff used 63MD's door in the Lane.

24. In August and September 1993, NHS staff at 63MD were told not to leave vehicles parked in the Lane.

25. In August and September 1993, NHS vehicles would enter the Lane to pick up and drop off items at 63MD's door in the Lane.

26. From 1998 to 2016, on at least a two weekly basis, NHS staff used 63MD's door in the Lane and NHS vehicles would enter the Lane to pick up and drop off items at 63MD's door.

27. From 1962 to 1998, from time to time, NHS staff used 63MD's door in the Lane and NHS vehicles would enter the Lane to pick up and drop off items at 63MD's door.

28. Elizabeth Johnston, a visitor to 4 St Ronan's Terrace believed in the 1960s that the Lane belonged to the owner of 2SRT.

29. Mr Langskaill thought he owned the Lane from 1975 following the redemption of the feu.

30. The pursuer believed she owned the Lane from 1962 to 2010.

31. In 2020 Mr Langskaill wished to defend possession of the Lane by interdicting the owners of 4SRT from carrying out certain perceived wrongful acts in the Lane.

32. In 2010, Mr Langskaill discovered that he was not the owner of the Lane and was unable to obtain interdict against the owners of 4SRT. To resolve the title position, he granted the 2011 Disposition to the pursuer to include an *a non domino* title to the Lane.

33. The property conveyed by the 2011 Disposition is described by *inter alia* an attached plan which includes the Lane and a verbal description contained in the dispositive clause. That description incorporates by reference the disposition by Mrs Elizabeth Austin in favour

of Mrs Elizabeth Hardie dated 11 May 1922 and recorded in the Division of the General Register of Sasines for the County of Edinburgh on 12 May 1922.

34. The intention of Mr Langskaill in granting the 2011 Disposition and of the pursuer and Mr Langskaill in recording it, was to confer ownership of the Lane on the pursuer.

35. In 2011 the pursuer and Ruth Langskaill installed a gate and a CCTV camera at the western end of the Lane to prevent the residents of 4 St Ronan's Terrace from manoeuvring cars outside 2SRT and to monitor and record activity in the Lane.

36. The Langskaills' CCTV camera records footage of activity in the Lane, including at 63MD's door into the Lane.

37. On 3 November 2015 the pursuer granted a power of attorney in favour of Ruth Langskaill. The power of attorney was registered with the Office of the Public Guardian on 16 November 2015.

38. The defender and her family used the door into the Lane after they moved into 63MD in February 2018. Initially, the pursuer was unaware of this. When the pursuer became aware, through CCTV footage, Ruth Langskaill told the defender and Mr Carter that that they did not have a right to use the Lane at a meeting in March 2018. At this meeting she did not mention prescription.

39. Miss Langskaill wrote to the defender on 21 March 2018 explaining why in her view the defender could not use the Lane.

40. When the defender moved into 63MD all the doors in the property, including the door into the Lane could be locked and unlocked by a master key.

41. The master key and a suite of locks were supplied to the NHS as the then owners of 63MD in March 2010.

42. After the defender moved in to 63MD but prior to 17 July 2018, a portion of the paving in front of the door into the Lane was removed and a shrub was planted in the soil in front of the door.

43. The defender maintains that she has a servitude right of access over the Lane.

44. On 17 October 2019 the defender applied to the City of Edinburgh Council for planning permission in relation to proposed works at 63MD.

45. The pursuer and Ruth Langskaill objected to the defender's planning application and sought to recruit neighbours and from nearby streets and Patrick Maclean to oppose the application.

46. The defender's planning application was granted by City of Edinburgh Council on 11 December 2019. A building warrant for the works was approved on 6 February 2020.

47. On 4 March 2020 the pursuer was granted interdict *ad interim*, preventing the defender (i) from entering or encroaching onto the Lane and causing any vehicle to enter the Lane; and (ii) from removing any flower, shrub, plant or flora from the Lane.

48. The works proposed by the defender will not require the use of the Lane.

Finds in fact and law:

1. That the 2011 Disposition is habile to include the Lane;

2. That the pursuer has possessed the Lane since 1962;

3. That the defender as heritable proprietor of 63MD has a heritable and irredeemable servitude right of access by the Lane to the back entrance of 63MD and that this right has not been extinguished by the operation of negative prescription.

Finds in law:

1. That the servitude right of access conferred on 63MD by the 1886 Feu Contract, on a proper construction, includes access for both pedestrians and vehicles;

2. That the pursuer is not entitled to interdict against the defender (or anyone acting on her behalf) from entering or encroaching into the Lane, the defender having a servitude right of access into the Lane.

3. That the pursuer is not entitled to interdict against the defender (or anyone acting on her behalf) from removing any flower, shrub, plant or flora from the Lane, the defender having a servitude right of access and there being no evidence of intention on the part of the defender to remove flowers, shrubs, plants and flora from the Lane.

NOTE

Introduction

[1] The pursuer has lived at 2 St Ronan's Terrace in Edinburgh ("2SRT") since 1962 when it was purchased by her late husband, Robert Langskaill. The only means of access to 2SRT and its garden grounds is via a lane which runs east to west from the public road known as St Ronan's Terrance ("the Lane"). The Lane is bounded on the north side by, *inter alia,* a boundary wall. On the north side of this wall lies the garden of 63 Morningside Drive ("63MD"). For many years, and since at least 1962, 63MD and the neighbouring property of 65 Morningside Drive ("65MD") were owned and used by the NHS.

[2] On the south of the Lane is 4 St Ronan's Terrace ("4SRT"). The gable wall of 4SRT extends up the Lane, before giving way to a stone garden wall. At the top of the Lane, on the south side, is a garage owned by the heritable proprietors of 4SRT. The owners of 4SRT have a servitude right allowing them to take vehicular access up the Lane.

[3] In around 2010, the Langskaill family became involved in a dispute with the owners of 4SRT regarding use of the Lane. The pursuer's late husband sought to interdict the proprietors of 4SRT from carrying out certain apprehended wrongs, but was unable to do so

because he discovered that his title to 2SRT did not include the Lane. To resolve this position, in 2011, he granted a disposition in favour of the pursuer which included an *a non domino* title to the Lane ("the 2011 Disposition"). The description of the property intended to be conveyed by the 2011 Disposition is set out below. The plan referred to is annexed to the disposition.

> "ALL and WHOLE that area or piece of ground with the dwellinghouse known as Two St Ronan's Terrace, Edinburgh, and other buildings erected thereon being the subjects described in Disposition by Mrs Elizabeth Austin in favour of Mrs Elizabeth Hardie dated Eleventh and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh (now Midlothian) on Twelfth, both days of May Nineteen Hundred and Twenty two and which subjects are shown delineated in red on the plan annexed and assigned as relative hereto"

[4] A subsequent disposition by the pursuer recorded in 2012, re-conveyed a one half *pro indiviso* share of the property (including the Lane) to Mr Langskaill. His share reverted to the pursuer upon his death in 2015 by virtue of confirmation in favour of the pursuer as executor nominate.

[5] In 2018, the defender purchased 63MD from the NHS with a view to converting it into a domestic home. The boundary wall at the rear of 63MD contains a locked door or gate which opens onto the Lane. The titles for 63MD are registered in the Land Register of Scotland under title number MID197799. The defender, as proprietor of 63MD, is the successor to Robert Foggo, to whom 63MD was conveyed by the Scottish Heritages Company Ltd by feu contract dated 12 and 13 July 1880 ("the 1880 Feu Contract").

[6] The 1880 Feu Contract provides *inter alia:*

> "(Second) The second party and his [heirs and assignees] shall be entitled at any time to erect on the back ground of the area or piece of ground before disponed a stable and coach house for the use of the occupant of the said dwelling house.
>
> (Fourth) The second party and his [heirs and assignees] shall be bound to enclose the said area or piece of ground hereby disponed as follows viz on the east, south and west sides thereof so far as not already done with a rubble stone wall…and on the

> north side with a dwarf stone wall…and having a proper iron entrance gate or gates in the said parapet wall and railing of a pattern to correspond with the said railing and also a close wooden or doors [sic] in the south boundary wall giving access from the said back lane…
> […]"

(Both parties in their pleadings and notes of arguments erroneously state that the second clause was the eighth clause.)

[7] Shortly after moving into 63MD in early 2018 the defender and her partner started to use the door to move between their garden and the Lane. In December 2019 the defender obtained planning permission to carry out certain works to 63MD and in February 2020 a building warrant was granted.

[8] The Lane forms part and portion of the subjects conveyed by a feu contract between Scottish Heritage Company Ltd and William Ballantine dated 16 and 17 December 1886 ("the 1886 Feu Contract"). The 1886 Feu Contract provides *inter alia:*

> "…the second party and his [heirs and assignees whomsoever…] shall be bound when called upon by the first party and their successors […] to make and construct the back lane shown on the plan annexed hereto, and coloured brown thereon; and to allow the said Robert Foggo and James Macpherson, and their successors proprietors [sic] of the feus adjoining the ground before disponed, on the north, access by the said back lane to the back entrances of their said feus."

[9] In March 2020 the current proceedings were raised in which the pursuer seeks declarator that the 2011 Disposition is, for the purposes of prescriptive possession, habile to include the Lane (crave 1). She also seeks declarator that any servitude right of access over the Lane in favour of 63MD has negatively prescribed (crave 2). In addition, the pursuer seeks interdict against the defender or others acting with the defender's permission from entering or encroaching into the Lane and interdict against such persons from removing any flower, shrub, plant or other flora from the Lane (craves 3 and 4). Interdict *ad interim* was

pronounced on 4 March 2020. The action was sisted from April 2020 to February 2022 as a result of the Covid-19 pandemic.

[10] The defender challenges the pursuer's title and interest to pursue the action and, *esto* the defender does have title and interest, argues that the servitude right has not been extinguished by prescription.

[11] In addition, the defender has a counterclaim in which she seeks remedies which are essentially the mirror image of those sought by the pursuer. Further, she seeks declarator that the servitude right is for both pedestrian and vehicular traffic over the Lane.

[12] Subsequent to the record closing, a debate was fixed on the defender's preliminary pleas, the pursuer having offered proof before answer. The debate was heard before Sheriff Mundy. He issued his judgment on 21 October 2022 and allowed a proof before answer. The defender appealed. On 27 April 2023 the Sheriff Appeal Court ("SAC") upheld Sheriff Mundy's decision. (The terms of the previous decisions are discussed later in this judgment).

[13] The matter called before me for a proof before answer. I heard evidence on 3, 4 and 5 December 2024 and was provided with a series of affidavits and a Joint Minute. I benefitted from helpful written submissions by counsel for both parties. There was a hearing on submissions on 16 December 2024, after which I made *avizandum*. On 8 January 2025 I issued two supplementary questions to counsel, who responded on 29 January 2025.

Pursuer's Evidence

Ruth Langskaill

[14] Ruth Langskaill is the daughter of the pursuer and the late Robert Langskaill. She was the main witness for the pursuer and spoke to a number of matters relevant to the

disposal of this case. It is appropriate, therefore, that her evidence is summarised in some detail.

[15] She was born in 1960 and has two younger siblings, neither of whom gave evidence (although her sister was on the pursuer's list of witnesses). She lived at 2SRT until she was 18 when she moved into a nearby flat, although she would often go home for dinner. In around 1983 she moved to Lasswade and then in 1990 to Amsterdam. In 2010 she returned to Edinburgh to look after her father, who had suffered a stroke. Since then she has lived at 2SRT although she maintains a property in Amsterdam. Mr Langskaill died in April 2015.

[16] She explained the layout of the Lane and the cottage and gardens comprising 2SRT. She said that 2SRT is a small home and that the main room on the ground floor is used both as a living room and a dining room and has a clear view all the way down the Lane. She said that from this room you can hear everything because the lane is a "funnel" for sound.

[17] She explained that there was shrubbery along the boundary wall of the Lane. She was shown a photograph (5/16 of process, page 4) which showed the door from 63MD into the Lane just before some shrubbery began and another (5/16, page 3) showing shrubbery reaching almost half way up the door. She said she had taken these photographs after the defender purchased the property and definitely before the current proceedings were commenced in March 2020.

[18] She believed that 63MD and 65 Morningside Drive ("65MD") were used by the NHS as homes for "mentally handicapped" young adults and that she would often hear them screaming and crying. She understood the residents in the home to be inmates who were kept under "lock and key" although she also said that she had seen and heard patients playing in the gardens of both properties.

[19] As a child, she played in the Lane. Before she started learning to drive on the open road, she would practice clutch control in the Lane and drive up and down it.

[20] She explained that her father had laid all the paving and slabbing in the Lane and that prior to this, it had essentially been a muddy path. Her father installed a small rockery in the Lane, but there had been some plants in the Lane when he purchased it. Her mother had maintained the plants as her father preferred mowing the lawn.

[21] Miss Langskaill was referred to an agreement between BT and Mr Langskaill from March 1990 (5/11 of process). She maintained this was a "wayleave" whereby Mr Langskaill granted permission to BT to carry out work including, *inter alia*, running an underground cable up the Lane. She explained that the work included creating a manhole cover near the top of the Lane and slight modification of a telegraph pole.

[22] Miss Langskaill also referred to a photograph of a street lamp in the Lane (5/16 of process, page 8). She explained that her family are the only people who have a key to the box which controls the timer for the lamp, the council having repeatedly lost their key. She said the key was made by her father.

[23] Miss Langskaill explained that as a child, she knew from her father that he did not own the Lane, but that he paid a feu duty. In discussing her father she said he was a deeply religious man who would never tell a lie. She said she had understood there was a burden over the Lane and that he had a servitude with access rights. She had always understood from him that one other party had access to the Lane and that was the owner of 4SRT who had a scullery door that opened onto the bottom the Lane and garage or shed at the top, near the cottage.

[24] In 2010 she had learned from her father that it had been made clear to him when he purchased 2SRT that he had the burden of maintaining the Lane, whereas the owner of 4SRT

had access rights but no responsibility for maintenance. However, Miss Langskaill also stated that father believed he owned the Lane from 1975 onwards, when the feu was redeemed, and referred to written confirmation of the redemption (5/8 of process).

[25] Matters regarding the title to the Lane became focused in around 2010 after she returned to live at 2SRT. Miss Langskaill explained that there were "a lot of problems" with the residents of 4SRT, the Mesbahs, who had sought planning permission to create a garage on their land near the top of the Lane. Miss Langskaill said that "we tried to interdict them" – by which I understand her to mean her late father did. In any event, it transpired that Mr Langskaill was not the owner of the Lane and the action was unsuccessful.

Miss Langskaill sought to investigate the title issue herself at this stage, and put the matter down to the redemption of the feu not having been completed properly. She tracked down the nephew of the late feudal superior, a Mr Alan Bailey. In a letter dated 9 November 2010 to the late superior's solicitors, Brodies (5/9 of process), Mr Bailey indicated that the Langskaills were keen to acquire title to the Lane and that he was happy in principle to "see this matter tidied up." Miss Langskaill explained that Mr Bailey's solicitors were Murray Beith and Murray and that their advice was that the only way to rectify the position was by way of an *a non domino* disposition. She said this was completed in 2011 (5/4 and 5/5 of process).

[26] Another product of the dispute with the Mesbah family was the installation by the Langskaills of a gate and CCTV equipment at the top of the Lane, immediately in front of the cottage. Miss Langskaill explained that the area at the top of the lane was too tight for cars to turn and that there was a problem with "the neighbours at number 4 who would reverse and traverse over our boundary right up to our front window." She said that she had instigated the installation of the gate and CCTV camera at the "boundary" of 2SRT.

[27] Miss Langskaill was asked a number of questions about the door from the back garden of 63MD into the Lane. She was asked if she could *recall* the door every being used. Her answer to this question was more definitive than called for by the question and was to the effect that the door had *never* been used and that it was always locked.

[28] At some stage after her father's stroke, water to 2SRT was cut off due to a burst pipe. Water was needed for the central heating system to operate. She said she had been trying neighbours to see if anyone had a stand pipe or a hose she could use. She went round to 63MD because she thought she could run a hose from 63MD through the door into the Lane and then up to the cottage. She said that the NHS manager at the time told her that he did not have a key to the door, but maybe a hose could go over the wall. She said she went into the garden and that it was overgrown at the boundary wall and not possible to get the hose over.

[29] Although Miss Langskaill had seen deliveries being made to 63MD and 65MD, these were always made to the front of the properties.

[30] Miss Langskaill said she was unaware of NHS vehicles ever using the Lane. She explained after her father's stroke, white vans delivered specialist equipment to 2SRT twice a week from a company called Atec.

[31] Miss Langskaill was asked about a planning application lodged on behalf of the defender (5/21 of process) and explained that part of the proposal was for the defender to create an opening in the boundary wall near her gate. She was referred to a photograph of a piece of machinery being manoeuvred through 63MD's door into the Lane (5/16, page 2) and said she had taken this photograph after the defender had moved into 63MD.

[32] She was asked, under reference to the defender's planning application, how the works would impact on 2SRT. She began to answer this question by discussing possible

landslip into the Lane from 63MD, at which point an objection was raised by counsel for defender that this was opinion evidence and there was no suggestion that the witness had any engineering qualifications. I allowed Miss Langskaill to answer the question under reservation. She explained that considerable damage had already been caused to the Lane and that further damage would be caused by traffic, which would go through any newly created opening in the wall. She said there would be landslip of soil between the back of 63MD and the Lane. I have allowed this answer to form part of the evidence in this case as although the witness is not qualified to offer opinion evidence on construction matters, her answer is relevant to her views on the defender's proposed works and my overall consideration of her credibility and reliability as a witness.

[33] In cross examination, Miss Langskaill accepted that as a child she would not have been in 2SRT during school hours - although she pointed out that she came home for lunch when at primary school.

[34] She was shown a photograph of the Langskaill family in the Lane in around 1964/65 (5/10 of process), but refused to accept that it showed a gap in shrubbery at the door in the Lane.

[35] In relation to the 1990 agreement with BT she maintained that this was a "wayleave" document, although this term does not appear in the document itself which is drafted as a letter. Her position was that BT would not have entered into the agreement with her father unless they knew that he was the owner of the Lane. She said BT did not give wayleaves "willy-nilly" and that her father was not merely the occupier, but the owner of the Lane.

[36] When pressed on how she could be sure that 63MD's door into the Lane had not been used after she left home in 1978, she said she knew as a fact that the door had never

been opened as that would have set a "precedent" and her family would have told her. She maintained that this would have been true even when she was living in the Netherlands.

[37] She accepted that after the defender moved into 63MD, Gavin Carter, had started to use the door. She said one night he had forced his way in the door causing her mother consternation, who had called her to say that she thought there was a burglar in the Lane. When she looked at the CCTV footage it showed someone "grubbing about in the bushes" and going through the door carrying a piece of wood. The pursuer noticed the lights were on at 63MD and assumed that the person in the CCTV footage was the new occupant of 63MD.

[38] The following day she went round to 63MD and told Mr Carter he could not take access through the Lane because of the law of prescription. She accepted this was followed up with a letter dated 21 March 2018 (6/11 of process) in which she stated:

> "…I am so sorry it must have come as a bit of a shock that you don't have access over our property into the back of your garden and I can appreciate completely that anyone would presume that if you have a back door you should be able to use it. Unfortunately, it is often the case that these things were founded on verbal agreements between parties, sometimes over a hundred years ago. As I said yesterday we have been aware of the existence of the back door since my parents bought 2 St Ronans Terrace in 1962, however, since then it was never used, it was never an issue.
>
> The door was always locked, due to the 'high security' nature of the building and the safety of the inmates.
>
> We have always been under the presumption that it would only be unlocked and used in the event of a fire.
>
> …"

[39] Miss Langskaill maintained that although not referred to in the letter, she had explained to Mr Carter about prescription when she met him. When asked about the verbal agreement reference, she said that she meant that since 1929 there had been no agreements

to use the Lane. She said that she never believed there was any right of access through the door in the whole of the time the NHS owned 63MD.

[40] Miss Langskaill was referred to her email of 21 February 2019 to the defender's architect (6/10 of process) who was acting as her agent in the planning application. In this email Miss Langskaill wrote

> "...there is a mis-representation on the Land Ownership Certificate Section of the Planning Application…. [the defender] is not the sole owner of the mutual boundary wall and this is quite clearly stated on the property details in the Land Register of Scotland (Title Number MID197799)…I suggest you contact [the defender] for clarification as it may have some consequences for you, as her representative architect in the proposal."

She denied that her email contained an allegation that the architect had misrepresented matters in his planning application form.

[41] Miss Langskaill also wrote to all residents of Morningside Drive, St Ronan's Terrace and St Fillan's Terrace inviting them to object to the defender's planning application (6/4 of process, undated). The letter stated that (councillors) "Nick Cook and Mandy Watt have already lodged their concerns with the Planning Department..." It was put to her that this was not true. When shown an email from Councillor Cook to the defender dated 12 March 2019 (6/5 of process), she accepted that the councillor had not responded to the application. However, she explained that she meant that the councillor had passed on the concerns of others, rather than his own. She was then shown an email dated 13 March 2019 from Councillor Watt to the defender (6/6 of process) which said "I hope you find it helpful to know that I do not intend to make an objection to this application nor interfere in any way". Miss Langskaill explained that "concerns" were different from objections.

[42] In her letter to the architect and local residents, Miss Langskaill had stated that the title to 63MD (MID197799 in the Land Register) confirmed that the defender was not the

owner of the boundary wall. Counsel for the defender referred her to the Title Information for MID197799 (5/7 of process). It was put to Miss Langskaill that the title did not state that the boundary wall was mutually owned. Miss Langskaill's position was that there was a different document which stated the boundary wall was mutually owned and wanted that other document to be put to her. She wanted to answer the question under reference to that document. I instructed her to answer under reference to the document she had been referred to and pointed out that there would be an opportunity for Mr Middleton to re-examine, if advised. (In the event, in re-examination she was not referred to an alternative title document).

[43] After some deliberation, she referred to burden 3 on page 9. When counsel for the defender suggested to her that she was mistaken, and that this related to a different wall, an objection was taken to this line of questioning, on the basis that the witness was not qualified to answer legal questions. I allowed the question under reservation, although ultimately Miss Langskaill's position was that she could not comment because the question was too legal. Following this answer, she was asked whether this meant she had been careless or deliberately untruthful in her letters which contained statements regarding the title to 63MD. She maintained that she gave the best information and was not careless.

[44] Miss Langskaill was shown photographs of the Lane taken by Google Maps (6/8 of process) and she accepted that they showed the paving on the Lane extending to the foot of the door (The Joint Minute records that these images were taken in May 2011). She was then shown images comprising 6/14 of process. She was asked whether these photos showed the paving having been removed. She confirmed that they did, and without a follow up question went on to explain that she believed it had been removed by the defender or Mr Carter and that she (Miss Langskaill) had not removed it. She believed it had been

removed at around the time the forestry equipment had been manoeuvred through the door. She disagreed with the suggestion that she had removed the paving to fit with her narrative that the door had never been used.

[45] Miss Langskaill was asked about the dispute with the Mesbah family and she confirmed one cause of that had been them reversing cars too close to the cottage. She was referred to the Title Information for 4SRT (6/23 of process) and agreed that the description of the subjects referred to an attached cadastral map and included the words "…Together with a servitude right of access over the ground forming the lane or passage tinted brown on the said cadastral map". She was referred to the cadastral map which showed the area right up to 2SRT being shaded brown but maintained that the Title Information was incorrect.

[46] Miss Langskaill was shown a photo of a van in the Lane at the west end facing out onto the main St Ronan's Drive (6/3 of process). The photo was headed "NHS van in the Lane" and she was asked whether she could agree that it was taken on 27 November 2011 or did she not know. She said she did know about the van and that there was no NHS signage but she was adamant this was van from Atec (whose records she spoke to earlier in her evidence) and that the photo was taken on the day they were delivering a particular type of chair to her father.

Isabella Langskaill

[47] The pursuer, who is aged 89, gave affidavit and brief parole evidence. Her affidavit dealt only with possession of the Lane and did not address use of the door.

[48] She confirmed she had lived at 2SRT since 1962. She said that from her sitting room she can see right down the drive.

[49] She said that after moving in she and her husband planted shrubs, flowers and bushes in the Lane. She did not comment on whether there were bushes and shrubs in the Lane when 2SRT was purchased. She said that her husband carried out substantial maintenance to the Lane including slabbing of the Lane, which has been upgraded on several occasions.

[50] When asked by counsel for the pursuer who she thought owned the Lane after the Langskaills moved in in 1962 her eventual answer was "I thought I owned the Lane."

[51] Her husband paid feu duty on the Lane and that the feu was redeemed on 17 October 1975 (5/8 of process). She said that it was when they found out that her husband was not the owner of the Lane, the title position was investigated and the 2011 Disposition granted.

[52] She also referred to the BT "wayleave" in 1990 and said this had been granted by her husband as landowner. She said that in 2011 the gas supply which ran up the Lane was replaced - she had a grant in order to upgrade her central heating in advance of her husband returning home from hospital and that the Gas Board kindly arranged for the work to be done as part of the grant. This involved breaking parts of the paved Lane, but that this was made good. She confirmed that planning permission was sought for the installation of a gate on the Lane near the cottage, which straddles the Lane. She also confirmed that there are street lights in the Lane for which she holds the only key.

[53] She recalled the door into the garden of 63MD but maintained she was unaware of it ever having been used. She said if there were building works in the Lane she would be stuck in her house. The Lane is the only means of access and egress to 2SRT.

Patrick Maclean

[54] Patrick Maclean was a 13 year old schoolboy when he first met Robert Langskaill in around 1969. He had gone to get a watch fixed. Mr Langskaill saw that he was interested in watchmaking and tools generally and took him into his workshop to show him around. When he was around 14 he started being given things to repair by Mr Langskaill. He would go round to 2SRT after school and at the weekends.

[55] He estimated that he was there 3 days a week. He eventually became Mr Langskaill's apprentice and worked for him until around 1978, before forming his own business in 1984.

[56] He also helped Mr Langskaill in the garden, fixing motorbikes, slabbing the Lane and laying a water pipe along the trench on the north of the Lane.

[57] He recalled the door and said to the best of his recollection he had never seen it opened. He said there were overgrown shrubs at the door and it did not look like it had ever been opened.

[58] In cross examination he accepted he was close to the Langskaill family. He was shown the photograph of the family in the Lane in around 1965 and said this was what he remembered the Lane as looking like when he first saw it in 1969. He was shown the images from Google Maps and although he said the door shown was different, he agreed the paving went up to the door. He said the shrubs "came and went." He accepted he had been asked to oppose the defender's planning application even although he lived a fifteen minute walk away and had not received a statutory notification.

Susan Johnston

[59] Susan Johnston was born in 1949. She lived in Dunfermline, but visited her aunt and uncle who lived at 4SRT every couple of months when she was a schoolgirl in the 1960s. She continued to visit occasionally after she completed school and remembered going on a week long course in Portobello and staying at 4SRT rather than commuting from Fife.

[60] She was shown photographs (5/16 of process) from which she identified 4SRT. She recognised the Lane but said she did not remember it being as neat and tidy and did not remember seeing a door in the Lane. When she visited it was more like a dirt track. She had assumed the Lane belonged to the cottage (2SRT).

[61] She did not speak to ever having actually entered the Lane and said that after marrying in 1975 she visited less frequently.

Andrew Wills

[62] Andrew Wills is a clinical advisor for NHS Lothian. He is a registered mental health nurse and from 1984 worked at the Royal Edinburgh Hospital at various satellite locations around the Morningside and Craiglockhart areas including "hostels" at 63MD and 65MD. He said he worked in the hostels from around 1989 to 1994, progressing from staff nurse, to deputy charge nurse and then senior nurse. He explained that 63MD and 65MD were adjacent to one another and that there was a pathway between the gardens for each, which ran through an opening in a stone wall.

[63] Mr Wills was shown the marketing schedule for the sale of 63MD (6/25 of process) and said that while he recognised the garden, it was tidier than it was when he worked there when the back of the garden was fairly overgrown. He said the garden was not used much and was not suitable for recreation.

[64] He said that supplies from the Royal Edinburgh Hospital were delivered to the front of number 65 as that was the main building. His office was at the front door and he would sign off some deliveries so was aware of what was coming in. He said waste was stored close to the path between the two properties. As I understood his evidence, there were gateways at the back of the garden, but the garden was overgrown and there was no need to use them. He was not sure if there were keys for the gates, but they would certainly have been locked.

[65] He was not aware of waste being removed via the back garden of 63MD and was not sure how that could be done anyway, given the state of the garden. He thought most NHS vans would have struggled to get into the Lane.

[66] In cross examination he did not agree that the residents were inmates who were kept under lock and key. When directed to the two sheds in the garden in the sale particulars of 63MD he said that he did not recall them from his time, but that at some stage after he stopped working there 63MD had been used for learning disabled patients and he understood they would have been encouraged to use the garden.

Defender's Evidence

Tracey-Ann Black

[67] The defender moved into 63MD towards the end of January/early February 2018. She confirmed that the property looked as depicted in the sales schedule when she moved in. She said it was apparent the garden had been maintained and she was left sheds, basketball hoops and washing lines from the previous owner.

[68] She had asked the selling agents whether she would be able use the door onto the Lane because her and her partner were keen gardeners and intended to use it to bring

compost and other gardening items into the garden. She said that the selling agent had told them that the NHS had received complaints about the Lane and that the Langskaills had said not to put the Lane in the particulars, but that this was not an issue as there was a servitude right in the deeds.

[69] The defender explained that she and her family started using the Lane as soon as they moved in. They would go in and out of the door to the Lane with bikes as this was easier than carrying them up the steps at the front of the house. The door's lock was in good condition and was easy to open. She had a master key which opened various locks at 63MD including the lock on the door into the Lane. She had investigated the position regarding the lock and because the key was registered, was able to locate the locksmith who had supplied the locks at 63MD. She said he confirmed that the locks were changed in around 2010 or 2011.

[70] She said that she used the Lane to bring some earth into the garden and that her partner, Ryan Carter, liked to salvage from skips and that some items were brought in through the door in the Lane. There were diseased trees in the garden and after obtaining appropriate consents to carry out work on the trees, a rotovator and stump grinder were brought into the garden through the door in the Lane.

[71] She explained that 63MD was very much like an institution and required extensive renovation. She wanted to extend at the back and to create off street parking.

[72] There had been complaints about the use of the Lane prior to the submission of her planning application. Ryan Carter had encountered Ruth Langskaill who told him that he could not use the Lane. Ruth Langskaill had subsequently come round to 63MD and told Ryan Carter that he had no right to use the Lane and that if he wanted to use it then he needed her permission and left him with a copy of the 2011 Disposition.

[73] The defender did not accept that her proposed work to 63MD would damage the Lane. She said the Lane is not wide and it would be impractical for heavy equipment to be brought up it. In any event she would not want to cause distress to the elderly pursuer – she and her partner have elderly parents themselves. She said that all access would be from the front of 63MD and that any opening up of the wall would be done from within their garden, with all waste removed to a skip on Morningside Road.

[74] She explained the impact that the interim interdict has had on her and her family. She said that it had been challenging. Her father died two years ago, and prior to that had been ill with cancer. For the last two years of his life he was unable to visit 63MD as he could not climb the flights of stairs at the front. He would have been able to take access through the Lane, but for the interim interdict. She said that at Christmas 2024 they had to carry an Aunt down the stairs at the front of the house, because they were not allowed to use the Lane.

Ryan Carter

[75] Ryan Carter said that he used the door into the Lane when they first moved into 63MD in late January/early February 2018. He described the door as being in a fair condition with a modern, functioning lock. He said the lock mechanism was smooth, but the door was a bit stiff. He said they used the door for pedestrian access – their son was 5 years old when they moved in and they had a dog.

[76] He said that they received complaints about using the door from the pursuer and Ruth Langskaill. He said the complaints began soon after they have moved in but not immediately after he first used the door into the Lane – he thought it had been used a handful of times before the complaints started.

[77] He said that Ruth Langskaill came out to him and said he should not be in the Lane at all and that residents were not allowed to use the Lane and that it was hers in its entirety.

[78] He said they arranged to meet to discuss the issue and that Ruth Langskaill had come round to 63MD. He recalled that she had said she would proffer information to show why he, the defender, his son and his dog should never be in the Lane for any reason. He was referred to the letter from Ruth Langskaill dated 21 March 2018 (6/11 of process) and said it was sent after their meeting. He said he could not recall Miss Langskaill referring to prescription at the meeting.

[79] He said that when they moved into 63MD, there was crazy paving that went up to the foot of the door in the Lane. However, this was removed sometime after they moved in. He strongly refuted the suggestion that he had removed the paving. He refused to speculate on who might have removed it.

[80] He was shown a photograph of the door (5/6 of process, page 3) with a bush growing immediately outside the door, approximately half the height of the door. He said he first saw this bush in the summer of 2018. He said it was a surprise to him, as it had just suddenly appeared. He said it was not in a pot, but in the soil immediately outside the door. He said he did not know who planted it, but he and the defender had written to the residents of 2SRT and asked if it could be removed. He had offered to put it in a pot to keep it viable. He did not say if he received a reply to his letter, but he said he did put it in a large pot which he left in the Lane. It is visible in the photograph of the garden equipment being manoeuvred through the door. He also pointed out that in the photograph one can see protective matting laid down in order to protect the Lane.

[81] He said the equipment was hired for one day around 17 July 2018 and that Ruth Langskaill had complained about it. He said that he had told her in advance as one of

her complaints was that she had not been told in advance about every proposed future use of the door into the Lane. He said that she had reported him to the police and that they had contacted him, but that no action was taken.

[82] Asked about the impact of the interim interdict, Mr Carter said it had stopped them enjoying the use of the door into the Lane. His son was young at the time, they had a dog and it had been pleasant to use the door to go about their business. The inability to use the Lane meant that everything had to go up the steps at the front door – goods as well as people. It meant that people did less with them because not everyone could access the house by climbing the steps at the front.

[83] Mr Carter denied that any work to 63MD would damage the Lane. He said that he knew the practical limits of what the Lane could be used for. The two machines they had used in 2018 were designed to go through doorways but nothing else would be taken through the Lane as it is too narrow. He did say that it would be convenient to be able to use the Lane, but for almost everything associated with planned future work it could not be used. Any works access would be taken from the front of 63MD and the Lane would not be blocked.

Eadie Hawkes

[84] Ms Hawkes is a retired mental health nurse. She said she worked at 63MD as a trainee nurse. She said her memory of the placement was clear, because she had fond memories of working there. She remembered taking a patient to the Edinburgh Festival so she was able to say that her 12 week period straddled the Edinburgh Festival. She was relatively confident that this was in 1993, because she qualified in November of that year.

[85] She did not remember Andrew Wills from her time there. She did not accept that patients were kept under "lock and key." She recognised 63MD and 65MD from photographs shown to her and described the path between the two properties and the door at the bottom of 63MD's garden.

[86] Her evidence was that the front of 65MD was too steep for all deliveries and that some things came and went via the Lane. She said that laundry came from the Royal Edinburgh Hospital in a van. She remembered that a trolley would be wheeled to and from the door at the bottom of 63MD's garden with laundry bags. The garden was not overgrown when she worked there.

[87] Mail would be delivered to the front of 65MD. She said medical waste would also go out through the door into the Lane. She said that they would receive a phone call to let them know about deliveries. She described the vans involved as being "little transit vans" with an NHS logo on them. She did not recall any objection to the Lane being used but did recall being aware that staff were told not to leave vehicles parked in the Lane.

[88] She was asked, in cross examination, about how it was she had come to be a witness in the case. She explained that a friend had purchased a headboard online and had asked her to collect it. The seller was Mr Carter and when she went to collect it she recognised 63MD as her former place of work. After she mentioned this, the defender gave her a tour of 63MD to show her the changes she had made. She was asked whether she had also visited 65MD and replied that she had not. She bristled at a suggestion that this discussion with the defender might have influenced her evidence and caused her to misremember what had happened during her time working at 63MD.

Margaret Mesbah

[89] Margaret Mesbah moved into 4SRT with her husband and three children in 1998 and lived there until 2016. She was shown photographs of the back of 4SRT (5/16 of process, page 4) and pointed out her daughter's bedroom on the first floor on the left hand side (next to the Lane) and adjacent to that a bathroom window. At ground level, again on the left hand side as one looks at the back of 4SRT, was the sitting room window.

[90] Mrs Mesbah was shown the Google Maps images of the Lane from May 2011. She identified the door into the Lane from 63MD and said this is what the Lane looked like when she lived there. She said that it was always possible to see the door and that it was not obstructed by shrubs.

[91] She said that when she and her husband bought 4SRT they knew that there would be three users of the Lane – them, the Langskaills and the NHS. She said that vans used to come up the Lane and deliver items through the door into 63MD's garden. Some vans had NHS livery, others were plain white. Sometimes the door would be open and she would see staff having a cigarette in the garden. On one occasion she remembered a trampoline and goal post being brought into the garden via the Lane – although while the door was open during the delivery the items went over the wall due to their size.

[92] She was asked how often the NHS used the Lane and the door and said that sometimes twice a week, sometimes once a week but that she never paid particular attention to the Lane as it never bothered her. From her son's bedroom window she could see the garden of 63MD. It did not have a manicured lawn and was quite messy, but not overgrown.

[93] Mrs Mesbah said that she had asked her husband to take the photograph of the van in the Lane (6/3 of process). She was not asked specifically about the date of the photograph,

but said that it was a taken at a time when they were in in dispute with the Langskaills about access. She said they had been accused of breaking paving stones in the Lane and had wanted to demonstrate that they were not the only other party who used the Lane.

[94] She said the problems with the Langskaills started when she and her husband decided to build a new garage. She said the Langskaills had claimed to have bought the Lane in 1975 but it turned out they had not. The dispute was going to end up in court, but that the Langskaills had backed down.

[95] Mrs Mesbah said that her family were harassed by the Langskaills. She said that they had lifted up stones and planted shrubbery (I took this to refer to the Mesbahs' garage area), moved wheelie bins and made accusations to the police. She suggested some of the confrontations had been physical.

[96] She said that the subsequent purchasers of 4SRT had also had problems with the Langskaills.

[97] In cross examination, she was asked again about the photograph of the van in the Lane and it was suggested to her that it was stationary rather than moving. She responded by saying that she had seen it further up the Lane and that was why she had asked her husband to take a photograph of it.

[98] It was also put to her that given the position of her sitting room window relative to the Lane and the door, and with the presence of her own garden wall, she would not have been able to see the Lane door. She maintained that when standing she would have been able to see.

Mohammed Mesbah

[99] Mr Mesbah lived at 4SRT with his wife and three children, from 1998 to 2016. He identified the door into the Lane from the photographs spoken to by other witnesses. He said that he had seen cars, vans and lorries making deliveries to 63MD's door in the Lane. He confirmed that he had taken the photograph of the van in the Lane, possibly in around November 2011. It had been taken because the Langskaills had accused the Mesbahs of breaking slabs in the Lane by driving their car on it and he had wanted to demonstrate that other parties used the Lane. He accepted that deliveries could also have been made to 2SRT, especially after Mr Langskaill's stroke. He said that he had seen vehicles use the Lane before then, but that he had paid closer attention after 2010 when the Langskaills tried to block their access to the Lane altogether.

[100] The following witnesses gave evidence wholly by affidavit.

Zara Mesbah

[101] Zara Mesbah lived at 4SRT with her parents. Her bedroom window was at the back of 4SRT and overlooked the Lane. She remembered seeing vans drive up into the Lane, but could not recall how frequently or if they had NHS livery. She said she could also hear the sounds of vans beeping when they were reversing.

Adam McKeever

[102] Adam McKeever is a locksmith with a company who trade as Bell Donaldson Steele in Edinburgh. In April 2024 he was contacted by the defender in relation to keys for 63MD which had the number 4EA73-E etched onto them. He said that this was a "suite number" and that a search of his records brought up a list of locks changed. The list had basic

descriptions of the locations although none referred specifically to an outside gate. There were some entries which were illegible and could refer to the date. He could not say with certainty when the locks were changed, and thought the work would have been done by NHS joiners. However, he said that the locks were "charged out" to the client on 15 March 2010.

Alison Goodwin

[103] Miss Goodwin's affidavit was formally adopted as part of the defender's proof, but does not directly address any of the critical issues. Miss Goodwin is a retired social worker and is a board member of a charity which supports adults with learning disabilities. She recalled that 63MD was used by the NHS as a home for adult men with learning disabilities.

Laura Finnie

[104] Laura Finnie and her partner are the current owners of 4SRT. They moved into 4SRT in September 2016 and lived there for four years before letting the property. She explained that the Langskaills had complained about their use of the Lane from the moment they moved in and their removal van used the Lane. She said the Pursuer and Miss Langskaill would shout at any tradesmen they had employed who were in the Lane. The Langskaills had complained about steam from their boiler being emitted into the Lane. The Langskaills' demeanour had changed when they wanted Miss Finnie to object to the defender's planning application. She said that her tenant had told her that the pursuer had shouted at her for washing a car outside 4SRT's garage, telling them that they had no right to wash a car in the Lane.

Submissions

[105] After evidence concluded, both parties provided written submissions and there was a short hearing on submissions. What follows is a summary of the arguments presented by the pursuer and defender.

Pursuer

Whether the 2011 Disposition is habile to include the Lane

[106] The pursuer's position was that the question of whether the 2011 Disposition is habile to include the Lane has already been decided by SAC in its decision reported at 2023 S.L.T. (SAC) 51. Although SAC had allowed a proof before answer on all averments, the debate before Sheriff Mundy was solely on the defender's preliminary plea. Accordingly, while proof before answer had been allowed, it was clear that the question of whether 2011 Disposition was habile to include the Lane, had already been conclusively determined by SAC. As this decision was binding on me, counsel submitted that declarator as first craved ought to be granted.

Title to Sue

[107] SAC had declined to rule on Sheriff Mundy's decision that, as a matter of law, the pursuer could have title and interest to sue by demonstrating possession of the Lane alone. Accordingly, that decision was binding on me (2023 S.L.T. (Sh.Ct) 95). Counsel submitted that Sheriff Mundy's decision was in any event a correct statement of the law, following *Watson* v *Shields* 1996 S.C.L.R. 81 and *GCN (Scotland) Ltd v Gillespie* 2020 S.L.T.185.

[108] Even if it was necessary for possession to be founded upon a title habile to include the land possessed, the pursuer had such a title standing the SAC decision in relation to the 2011 Disposition.

[109] Counsel invited me to find that the pursuer and her predecessors in title had possessed the Lane since 1962 based on the relevant legal principles and the evidence in relation to possession.

[110] Counsel set out the following principles in relation to possession:

(i) Possession is "the having or holding a thing within the possessor's control. With the intention of holding it as his own property" (Rankine, J. (4th Ed): "The Law of Landownership in Scotland", p 3-4);

(ii) "In judging the sufficiency of possession, regard will be had to the nature of the subject and the uses to which it can be put" (Aitken's Trustees v The Caledonian Railway Company and the Lord Advocate (1904) 6 F 465, per Lord Moncrieff at p 470);

(iii) "All the various acts of possession and all the circumstances can be taken together to build up a case of possession" (Johnston, D. (2nd Ed): "Prescription and Limitation", paragraph 18.34, citing Hamilton v McIntosh Donald Ltd 1994 S.L.T. 793 at 800-801); and

(iv) "Possession being once begun, it is continued, not only by reiteration of possessory act, but even by the mind only, though there be no outward acts exerced, and the mind and affection to continue possession is always presumed unless the contrary appear; so that if the thing once possessed be void as to outward acts, yet it is held possessed by the mind; and any contrary act of others entering to that possession is unwarrantable and intrusion." (Stair, Institutions, II, 1, 19)

[111] It was submitted that acts relevant to possession would include using the Lane by travelling up and down it, constructing the surface of the Lane, maintaining its surface and borders, entering into agreements with other parties allowing them to use the Lane and seeking to defend possession of the Lane against other parties.

[112] I was invited to find that there was evidence to support possession of the Lane. Counsel drew my attention to various matters including:-

(i) How the late Mr Langskaill was amazed to discover he was not the owner of the Lane, and how he had sought to interdict the Mesbah family from driving into the grounds of 2SRT when parking their cars in their garage;

(ii) Other parties, such as Susan Johnston believing Mr Langskaill was the owner of the Lane;

(iii) Mr Langskaill's resurfacing of the Lane and laying a water pipe along the Lane in the 1970s;

(iv) The agreement between Mr Langskaill and BT regarding the installation of telecommunications apparatus in the Lane would have served no purpose if either party had not believed Mr Langskaill was the owner of the Lane;

(v) How walls, plants and shrubbery were maintained by Mr Langskaill and latterly by the pursuer and Ruth Langskaill;

(vi) The pursuer having the only key to the street light in the Lane;

(vii) The Lane being the only means of access to 2SRT;

(viii) The registration of the 2011 Disposition;

(ix) Consistent steps taken by the pursuer and Ruth Langskaill to assert ownership of the Lane.

[113] Taken together, it was submitted that all of this demonstrated a continuous period of possession of the Lane from 1962 to the present day.

[114] In relation to the first period, counsel submitted that acts of possession by individuals other than the pursuer may be significant where, by virtue of some relationship which that individual had with the pursuer, that individual's acts can be attributed to the pursuer herself. A husband's possession of lands by himself may be held to be the wife's possession (Stair, *Institutions,* II 1 16) and accordingly acts of the pursuer's family may be relevant to questions of possession by the pursuer.

[115] Further, acts prior to 2011 may still be relevant to possession after that date. Firstly, possession requires both *corpus* (the having or holding of a thing) and *animus* (the intention of holding for one's own property) (Rankine, J. (4th Ed.) *"The Law of Landownership in Scotland"* pages 3-4). *Animus* attributed to the pursuer in the period after 2011 may be inferred from acts of the pursuer – and her family – prior to that.

[116] Secondly, once established, possession may be continued by *animus* only (Stair, *Institutions,* II 1 19), so if possession was established prior to 2011 there was no need for the pursuer to establish *corpus* thereafter.

[117] Finally, even if it was necessary for the pursuer to establish *corpus* after 2011, the acts required to establish this would depend on the facts and circumstances of the case (*Hamilton* v *McIntosh Donald Ltd* 1994. S.L.T. 793). These facts and circumstances might include things which happened prior to 2011. For example, the fact that the Lane had already been resurfaced, would be relevant to what a party in the pursuer's position might need to do in order to demonstrate the *corpus* element of possession.

The servitude – prescription

[118] There were two questions relevant to crave 2 in the principal action and crave 2 of the counterclaim – (i) has the servitude created by the 1886 Feu Contract been extinguished by prescription; and (ii) if not, what is the true construction of the Servitude?

[119] I was referred to section 8(1) of the Prescription and Limitation (Scotland) Act 1973 which provides:

> "If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of twenty years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished."

[120] Counsel argued that the burden of proof lies on the defender to establish that she has the legal right claimed by her. In support of this proposition I was referred to Johnston, D. (2nd Ed): *"Prescription and Limitation"* para 22.13 and advised that the learned author's view will soon be put on a statutory footing when s13A of the 1973 Act is brought into force.

[121] I was invited to find that the evidence showed that during the period from 1962 to 1993 neither the Lane, nor the door leading from the Lane into the back garden of 63MD was used to take pedestrian or vehicular access to, or egress from, 63MD.

[122] The relevant witnesses for the period from 1993 to 2018 were those who gave oral evidence – the pursuer, Ruth Langskaill, Maggie Mesbah, Mohammed Mesbah, Andrew Wills and Eadie Hawkes. I was invited to attach no weight to the affidavit evidence of witnesses who were not cross examined.

The servitude - interpretation

[123] Counsel submitted that the following principles applied to the construction of servitudes:

(i) "The most important principle…is the presumption in favour of the freedom of the servient tenement from restrictions and, because a servitude is a limitation on freedom of ownership, it is strictly construed." (Cusine, D.J. and Paisley, R.M.M. (1998): *"Servitudes and Rights of Way"*, para 15.06)

(ii) Servitudes must be construed "in the context of the relevant deed, read as a whole, in the light of the surrounding circumstances" (Cusine and Paisley, *op. cit.* para 15.17)

(iii) Actings by the benefitted proprietor inconsistent with the continued existence of a servitude may result in it being abandoned – "If the proprietor of a dominant tenement erects a wall on his property which cuts off the access…the servitude would be discharged" (Cusine and Paisley, *op. cit.* paragraph 17.14); and

(iv) Where a servitude is for both pedestrian and vehicular access, use for only pedestrian access over a period of 20 years can lead to the extinction by prescription of the vehicular right of access (*Ferguson* v *Gregor & Others* [2023] SAC (Civ) 24).

[124] The Servitude in the 1886 Feu Contract provides "…and to allow the said Robert Foggo and James MacPherson and their successors proprietors…on the north, access by the said lane to the back entrances of their said feus…"

[125] This was clearly a reference to pedestrian access only. It was accepted that it was permissible to interpret the Servitude in context and that part of the context was the earlier 1880 Feu Contract which provided:

> "(Second) The second party and his [heirs and assignees] shall be **entitled at any time to erect on the back ground of the area or piece of ground before disponed a stable and coach house** for the use of the occupant of the dwelling house." (Emphasis added)
>
> […]

> (Fourth) The second party and his [heirs and assignees] shall be bound to enclose the said area or piece of ground hereby disponed as follows viz on the east, south and west sides thereof so far as not already done with a rubble stone wall…and on the north side with a dwarf stone wall…and having a proper iron entrance gate or gates in the said parapet wall…and having a proper iron entrance gate or gates in the said parapet wall and railing of a pattern to correspond with the said railing and also a close wooden doors or doors in the south boundary wall giving access from the back lane…"

[126] The defender's reliance on the highlighted section to infer a right of access in the 1886 Feu Contract by coach and horse as well as by foot is misconceived because it ignores another important part of the context i.e. that the wall on the southern boundary of the benefitted property *was* constructed pursuant to clause 4 of the 1880 Feu Contract. The door in the wall was, from the evidence, clearly too small to ride a coach and horses through. There were two possibilities – either the wall was built before the 1886 Feu Contract was granted, in which case it could not have been the intention of the servitude to grant access to 63MD by horse and coach, as such access would have been impossible; or that the wall was built after the granting of the 1886 Feu Contract, meaning that even if the defender's interpretation is correct, any right of access was abandoned when the wall was erected.

[127] Counsel for the pursuer submitted that there was no pleading to support any attempt by the defender to argue that the burden on 2SRT had increased due to 20 years of vehicular access or that a servitude had been created by positive prescription.

Interdict

[128] The defender submitted that the evidence of the defender and Mr Carter clearly demonstrated their intention to take vehicular access over the Lane to carry out the works for which it was agreed they have planning permission. There being no legal right to do so, this would be a clear interference with the pursuer's rightful possession of the Lane.

Defender

Title to sue

[129] Before Sheriff Mundy and SAC, the defender's argument in relation to title to sue was focused on whether the terms of the 2011 Disposition were habile to include the Lane. Standing the decision of SAC, the defender was not insisting on her first crave in the counterclaim for declarator that the description of the subjects conveyed by the 2011 Disposition was not habile to include the Lane.

[130] However, a further argument was developed in submissions following the conclusion of evidence – that the pursuer is seeking possessory judgments (interdicts) to vindicate her claim to possession of the Lane. Although she seeks certain declarators as a foundation for these possessory judgments, the pursuer does not claim or seek to have declared that she is the heritable proprietor of the Lane. The pursuer argued that two requirements must be satisfied where possessory judgment is sought:

(i) The land must have been possessed on a lawful, uninterrupted and good faith basis for at least seven years (Stair, *Institutions,* IV, 26.3; *Maxwell* v *Ferguson* (1673) Mor 10628; *Countess of Dunfermline* v *Lord Pitmedden* (1698) Mor 10630; *McKerron v Gordon* (1876) 3 R 429, 435 ("Possession"); and

(ii) The possession must be attributable to written title which is *ex facie* apt to confer a right of possession on the pursuer (*Carson, Warren and Co* v *Miller* 1863 1 M 604); acts of possession must be referable to the title and not to possession without title (*Ross* v *Meikle* (1869) 6 SLR 331; and the title must have been obtained in good faith and not fraudulently or improperly *(Ross v Fisher* 1833 11 S 476; *Brown's Trs* v *Fraser* 1870 8 M 820 ("Title").

[131] In relation to Title, the defender argued that although SAC had held that the 2011 Disposition was *susceptible* to an interpretation which included the Lane, the question of its *proper* construction was left until factual inquiry.

[132] The defender submitted that there were two significant aspects of the wording of the 2011 Disposition. First, Mr Langskaill described himself as "heritable proprietor of the subjects and others hereinafter disponed" while the evidence showed he knew that he was not the owner of the Lane. If, as suggested in evidence, Mr Langskaill was a religious man who would never tell a lie, this meant that there was no intention to dispone the Lane because he would not have lied and described himself as the heritable proprietor.

[133] Second, echoing the arguments before Sheriff Mundy and SAC, the plan on the 2011 Disposition was inconsistent with the verbal description and does not express accurately what was described. Indeed, the plan did not appear to have been professionally prepared as the red lines are roughly drawn. The verbal description should prevail (*Currie* v *Campbell's Trs* (1888) 16 R 237; JM Halliday, *Conveyancing Law and Practice in Scotland* (2nd Ed. 1997), para 33.13).

[134] *Esto* this was not the case, and the 2011 disposition is *prima facie* apt to include the Lane, counsel submitted that it was fraudulent or at least improper, meaning that title was not obtained in good faith and that the possession which followed was not the basis for a possessory judgment.

[135] There is no dispute that there was no written title or *ex facie* valid title apt to include the Lane prior to the 2011 Disposition being granted. Accordingly, any purported acts of possession prior to then could not follow from or be attributable to the 2011 Disposition and were therefore irrelevant to the pursuer's case. They might be attributable to the servitude

right of access and maintenance burden contained in the 1962 Disposition, but that was different.

[136] In any event, the defender took issue with the matters relied on by the pursuer and submitted that they were a series of one off or intermittent acts. In relation to the establishment of flower beds, trees and shrubs, the evidence was that most of these were in place when 2SRT was purchased in 1962. As for the redemption of the feu duty in 1975, whether or not Mr or Mrs Langskaill thought they owned the Lane after 1975 (which was Ruth Langskaill's evidence) or from 1962 (as the pursuer stated in her evidence) was irrelevant – redemption of feu duty is a paper exercise and not an act of possession. The boundary wall did not fall within the pursuer's title and was not part of the Lane itself, so any maintenance of the wall was irrelevant. However, in any event, intermittent or occasional acts of maintenance are not sufficient to amount to acts of possession. Mr Langskaill preparing a key for an electricity supply box was a one off act. The agreement with BT did not disclose the capacity in which Mr Langskaill entered into the agreement but in any event, this was also a single rather than a continuous act.

[137] The defender submitted that there was relatively little evidence of purported acts of possession which post-date November 2011. The installation of gates and CCTV supported the defender's position, not that of the pursuer. The gate was installed across the boundary of 2SRT. Had the pursuer wished to possess the Lane then the gate ought to have been installed at the *opposite* end. Any maintenance of flower beds was intermittent and occasional but in any event, were acts of maintenance attributable to the pursuer's obligation to maintain the Lane.

[138] Counsel submitted that the pursuer was seeking a possessory judgement, but as she had not demonstrated possession, did not have title and interest to sue for the interdicts

sought. Further, the defender had no title and interest to seek the declarator in her first crave because it would have no practical consequence, meaning it was incompetent (*Salt International Ltd* v *Scottish Ministers* 2016 S.L.T. 82, 50; D M Walker, *Civil Remedies* (1974), p 106).

[139] Finally, if the pursuer did have title and interest, the wording of the first crave was inaccurate because it is not the 2011 Disposition which is habile to include the Lane, but the description of the land contained within it.

The servitude - prescription

[140] The pursuer was offering to prove that for more than 60 years prior to the defender's purchase of 63MD, no access of any form was taken from 63MD into the Lane. Establishing anything less than this would mean that the action would fail as it was not open to the pursuer to establish a lesser proposition, such as 20 years of non-use (*Parkash* v *Royal Bank of Scotland plc* 2023 SCLR 449 at 28).

[141] Counsel disputed that the defender had the onus of proving that the servitude right had not prescribed. Section 13A of the 1973 Act is not yet in force and cannot be relied on by the pursuer. In any event, the section from Johnson's book cited by the pursuer represented the paradigm position where a party comes to court seeking to assert a right. Here, the defender is the party being sued and the counterclaim is essentially a response to the action raised against her.

[142] Counsel urged me to accept that there was clear evidence of use of the Lane from 1993 to the date of the interdict being granted. I was invited to deal with the period prior to 1993 by way of presumption that use continued all the way back to the granting of the right

(WG Dickson, *Evidence* (1887), para 114). At best for the pursuer, if I accepted the evidence led in her proof, all that could be said is that she was not aware of the Lane being used.

[143] In her second crave the defender seeks a declarator that as heritable proprietor of 63MD she has a pedestrian and vehicular servitude right of access over the Lane. This is more than a mirror image of the crave in the principal action because it requires the court to determine not only whether any servitude right continues to exist, but the nature of any such right.

The servitude - interpretation

[144] Counsel for the defender submitted that as the 1880 and 1886 Feu Contracts share the same grantor they should be read together. Neither the 1880 nor 1886 Feu Contract specified the mode of access, although it was submitted that the grantor's intention was to allow both vehicular and pedestrian traffic.

[145] The provision in the 1880 Feu Contract regarding the erection of a coach house would only make sense if there was a corresponding right to take vehicular access to 63MD along the Lane as there would be no other way to access any stable or coach house for the purpose suggested by their name. The right would plainly now comprehend vehicular access by car rather than horse and cart (*Crawford* v *Lumsden* 1951 S.L.T. (Notes) 52).

[146] Counsel submitted that nothing turned on the erection of the boundary wall. The wording of the 1880 Feu Contract ("…entitled to erect at any time…") means that it was plain that the erection of the coach house was not envisaged as being immediate or required within any particular period of time.

[147] Finally, the defender invited me to find that as the evidence showed vehicular access had been taken to 63MD for at least 20 years (1993 to 2016) continuously, peaceably and

without judicial interruption, the acceptable burden has increased to accommodate vehicles (Cusine and Paisley, *op.sit* para 12.84). During the course of submissions, counsel for the defender elaborated on this point and submitted that in the principal action it was possible for me to find that a right of vehicular access had been created by positive prescription.

Decision

The evidence

[148] The main witness for the pursuer was her daughter, Ruth Langskaill. It was clear that she was the main instigator of opposition to the defender's application for planning permission. She also appears to have been heavily involved in the dispute with the Mesbha family, which began at around the time she returned to live at 2SRT. There is no doubt that she has strong views about the Lane and what she perceives as her and her family's rights in relation thereto.

[149] At various points in her evidence (both in chief and in cross examination) she often gave long answers which set out what she wanted to say, rather than address the questions asked. At times she invited counsel to ask her different questions or to refer her to different documents.

[150] In relation to the use of 63MD's door into the Lane, she was unswerving in her position which was not just that she was unaware of the door having been used, but that it had *never* been used since 1962 and that it was always locked. This narrative fits with the pursuer's case, but it is clearly an overstatement. She was only two years old when she moved 2SRT and has spent significant periods of time living away from 2SRT. Even when living at 2SRT, there are inevitably times when she would not be at home.

[151] The suggestion that she would have been made aware of the door being used because other family members would have told her of the "precedent" does not withstand careful scrutiny. First, and most obviously, there is no evidence that other family members spent all of their time at 2SRT. Further, I felt that the suggestion that use of the door would have been a concern as it would have set precedent does not fit with her evidence as a whole, which is that there were no particular concerns about the use of the door until the defender moved in and started to make use it while planning to renovate 63MD from an NHS facility to a family home. For instance, when 2SRT's water supply was disrupted in around 2010, Miss Langskaill's evidence was that she visited 63MD in the hope that the then occupiers could run a hose pipe *through the door into the Lane*. This does not sit comfortably with other elements of her evidence which were to the effect that the door had never been unlocked or opened and that if it had been, this would have set a "precedent" that would have concerned the family.

[152] The significance of whether the door was used in the past is something that is now understood by Miss Langskaill, but it appeared to me that her evidence, either consciously or otherwise, was given through the prism of what she now understood to be an important part of the pursuer's case against the defender. It is of note that her letter to the defender dated 21 March 2018 makes no reference to prescription and I do not accept that prescription was mentioned at the March 2018 meeting with Mr Carter.

[153] Her position in relation to the Lane can also be tested by reference to the various photographs which were referred to in evidence. The earliest was taken in around 1965 and the others were taken more recently, from around 2010 onwards. Somewhat curiously, there were no photographs of the Lane between those dates. Contrary to the evidence of

Miss Langskaill, it appeared to me that in none of these photographs was the door overgrown with shrubs.

[154] There was one photograph of a prominent shrub in front of the door. Miss Langskaill said she took this photograph after the defender moved in and before these proceedings were raised. The shrub appears to be growing from soil on the Lane side of the door and reaches about half way up the door. It is of course consistent with the pursuer's case that the door was overgrown. However, the evidence of witnesses (including Miss Langskaill) was that paving had been laid right up to the edge of the door but had been removed at some point after the defender moved in. It is logical that this shrub appeared after the crazy paving had been removed. Mr Carter said that this shrub had suddenly appeared in the doorway and that he re-potted it (the pot being visible in the photograph of the machinery being moved through the door). I discuss Mr Carter's evidence below. I accept his evidence on this point. Miss Langskaill said that she was unaware who removed the plant and said without prompting that it was not her. Standing her earlier evidence that she and her family could see everything that happened in the Lane, and that since 2011 CCTV was in place allowing her to view recorded footage of Mr Carter entering the door at night (and presumably also capturing the removal of the paving next to the door) this raises questions, in my judgment, regarding the credibility and reliability of her evidence.

[155] It is not necessary for me to make a finding about who planted the shrub and why, but on the evidence I am satisfied that the shrub appeared after the defender moved into 63MD and that it was not planted by the defender or anyone acting on her behalf.

[156] Her propensity to offer answers to questions consistent with a particular desired outcome is also consistent with the terms of the letters which she issued to neighbours and the defender's architect in relation to the defender's planning application. Her letter to

residents regarding the legal interpretation of the title to 63MD and the alleged involvement of named councillors suggests, at best, a desire to present matters in a way most favourable to her preferred outcome rather than as accurate statements of fact. The same might be said of her insistence in cross examination that there was an error in the title documents for 4SRT.

[157] For all these reasons, and after careful consideration, I am unable to accept her evidence regarding the use of the Lane unless it is supported by an alternative source of evidence which I can accept.

[158] I accept Miss Langskaill's evidence regarding the work her father did in the Lane, his engagement with BT and other utilities and the use of the Lane generally. There was no evidence to challenge this.

[159] The **pursuer's** evidence was in relatively short compass. I accept her evidence regarding the Langskaills' use of the Lane. Her evidence in relation to the use of the door was more nuanced than her daughter and was to the effect that she had not seen the door being used and had not herself ever seen any NHS vans in the Lane. She had not seen the earlier use of the door by Mr Carter, which suggests that other uses of the door may not have been seen by her.

[160] Her statement that she believed that she had owned the Lane since 1962 was incongruous given the evidence as a whole and raises some questions regarding the reliability of parts of her evidence.

[161] **Patrick Maclean** was a straightforward witness and he readily accepted that he was friendly with the Langskaill family and had been recruited to help in their opposition to the defender's planning permission. I did not consider this impacted on his credibility and reliability.

[162] **Susan Johnston** was also a credible and reliable witness although she did not speak to ever having been in the Lane when she visited family at 4SRT. Her evidence was therefore of limited assistance in relation to the use of the door. She did confirm that she had assumed the Lane was owned by the owners of the cottage at 2SRT.

[163] **Andrew Wills** was a credible witness who did his best to assist the court. However, his answers were not always focused and were at times discursive and hard to follow. It appeared to me that at points he was thinking out loud and I have some concerns as to the reliability of elements of his evidence.

[164] **The defender's** and **Gavin Carter's** evidence was relatively limited given the subject matter of the dispute. They could only speak to matters from the purchase of 63MD onwards. However, they gave careful answers to the questions asked and did not stray beyond the bounds of these questions. They were both credible and reliable witnesses and I accept the entirety of their evidence

[165] **Eadie Hawkes** gave clear evidence. Although her evidence related only to a short time at 63MD, it was a memorable time for her because it was towards the end of her training. Her recollection was anchored in time by the Edinburgh Festival. I found her to be a credible and reliable witness.

[166] I was invited by counsel for the pursuer to find that **Margaret Mesbah** had a fraught relationship with the Langskaills and that her evidence should therefore be treated with caution. It was certainly clear that she had issues with the members of the Langskaill family although my impression of the evidence was that this related to the pursuer and Ruth Langskaill. Although it was clear that there was no love lost between Mrs Mesbah and the pursuer, I found Mrs Mesbah to be credible and reliable witness. Her evidence of how the pursuer and Miss Langskaill conducted themselves in relation to the Lane is consistent

with that of the defender, Mr Carter, the affidavit evidence of Laura Finnie and the evidence of Ruth Langskaill. The fact that she said that she had not paid particular attention to the door in the Lane added to, rather than undermined, her credibility.

[167] **Mr Mesbah** was also involved in dispute with the Langskaill family, but appeared less hostile towards them than his wife. His evidence was measured and although I was invited by counsel for the pursuer to find his evidence as suffering from vagueness, I found him to be both a credible and reliable witness who answered questions carefully and was not prepared to speculate.

Affidavits

[168] The witnesses who gave affidavit evidence only could not be tested in cross examination. Accordingly, I attach little weight to their evidence unless it is consistent with another source of evidence that I am able to accept.

The 2011 Disposition

[169] Counsel for the pursuer submitted that SAC has already decided that the 2011 Disposition is habile to include the Lane and that its decision is binding on me. There was some discussion during submissions regarding what this decision meant and whether proof before answer had been allowed on all matters. The defender is not insisting on her first crave in the counterclaim and I take that to mean that she also proceeds on the basis that this issue has been decided.

[170] However, as set out above, at times the counsel for the defender also argued that the only point which had been decided by SAC was whether the 2011 Disposition is *susceptible of*

a construction which includes the Lane and that its true construction remains to be resolved after inquiry.

[171] It appears to me that the decision of SAC on this point is clear. Had SAC decided that the question of whether the 2011 Disposition was habile to include the Lane was contingent upon evidence, the decision not to consider the second ground of appeal (in relation to whether possession alone is enough to confer title and interest) would not make sense. If there was any scenario in which, after evidence, a Sheriff might conclude that the title was *not* habile to include the Lane, the question of whether or not possession alone is enough to establish title and interest would be very much alive. The reason SAC declined to rule on the second ground of appeal, in my respectful opinion, is that standing its decision on the first ground of appeal, there was no scenario in which the pursuer would require to rely on possession alone.

[172] If my understanding of the SAC decision is wrong, then for the reasons identified by Sheriff Mundy and elaborated on by SAC, I would have found the 2011 Disposition to be habile to include the Lane. In addition, based on the evidence now available, the background to the framing and execution of the disposition was a clear desire on the part of the late Mr Langskaill to convey the Lane and it requires to be read and interpreted against that background. For completeness, I would add that defender's criticism of the wording of crave 1 is ill founded. Although it is of course the description contained within the 2011 Disposition that is relevant, that description forms part of the disposition referred to in crave 1, and the meaning of the crave is tolerably clear.

[173] Finally, the pursuer is not seeking a declarator in relation to ownership of the Lane. All that she seeks in crave 1 is a declarator that the 2011 Disposition is *habile* to include the Lane for the purpose of prescriptive possession.

Title and interest

[174] The defender's submission regarding to the alleged irregularities and potentially fraudulent nature of the 2011 Disposition was made in relation to whether possession of the Lane by the pursuer was attributable to a title obtained in good faith. Mr Langskaill's misapprehension regarding the nature of his title prior to the 2011 Disposition is a matter of averment by both the pursuer and the defender. There are no averments in either the defences or the counterclaim to lay a foundation for allegations of fraud and no questions were asked of witnesses (in particular the pursuer) in relation to whether or not the 2011 Disposition was fraudulent. Had there been, I have no doubt that they would have been the subject of objection standing the absence of any supporting averments.

[175] Accordingly, there is no pleaded basis for the defender to argue that the 2011 Disposition is invalid due to fraud on the part of the late Mr Langskaill. In any event, as submitted by counsel for the defender, the wording of an *a non domino* disposition, to be effective, cannot disclose that it was granted by a non-owner (GL Gretton and KGC Reid, *Conveyancing* (5th Ed.), para 13-14).

[176] Regarding possession of the Lane, although there is some force in the defender's argument that many of the acts relied on by the pursuer were one off events, I agree with counsel for the pursuer that it is appropriate to look at all the circumstances and the totality of the matters said to give rise to possession. I respectfully adopt the reasoning of Lord Justice Clerk (Ross) that "…each of the circumstances in itself may prove very little…the question must be when all the circumstances are taken together, is it reasonable to infer that the [pursuer was] asserting a right of ownership". *(Hamilton* v *McIntosh Donald Ltd* 1994 S.L.T. 739 at 800-801). Although that case was concerned with a declarator of ownership, I

consider the reasoning of the Inner House applies equally to an assessment of possession over a period of time in the context of this case.

[177] In this case, the full circumstances include matters spoken to in evidence such as the improvement of the Lane over a number of years by the laying of paving (rather than simply leaving it as a dirt track); not just tending to existing plants and shrubbery but establishing more; liaising with BT and other statutory undertakers in relation to access to the Lane for works; and taking steps to defend perceived ownership rights of the Lane. Further, there is no suggestion that until the dispute with the Mesbah family, anybody thought that the Lane was owned by anyone other than Mr Langskaill.

[178] For the reasons submitted by the defender, I do not accept that the installation of the gate across the top of the Lane or the maintenance of the Lane side of the boundary wall are acts of possession. However, the other matters relied on by the pursuer demonstrate both control of the Lane with the intention to hold it as the pursuer's (and her predecessor's) property and a continuing state of mind on the part of the possessor. An important component of the analysis of the claimed possession is the use to which the Lane is put – it is (and always has been) the only means of access to 2SRT and is used as such by the residents of 2SRT every time they leave and return home. All of these acts, and the circumstances in which they took place, build up the pursuer's case for possession.

[179] Taking all of them into account and looking at the overall circumstances, I am persuaded that the pursuer has demonstrated that she and her husband possessed the Lane from 1962 to the raising of this action. In relation to whether the actions of Mr Langskaill in respect of the Lane can be attributed to the pursuer, I consider that it would be false to draw a strict line between his actions and those of the pursuer. It is clear to me that their actions in relation to the Lane were part of a common purpose. They lived in 2SRT as a family and

each used the Lane as the sole means of access to and egress from their home. Sheriff Mundy's decision that possession alone can constitute sufficient title and interest is binding on me and in all the circumstances of this case, I consider that the pursuer has demonstrated possession.

[180] Further, and in any event, since the 2011 Disposition, the pursuer has had a title which is habile to include the Lane as well as possession of it. Inevitably, the *overt* acts of possession of the Lane may have diminished over time, there being no need to lay pipes or slabs etc., that having been done some time ago, but the actions of the pursuer and those acting on her behalf (such as Ruth Langskaill) since the 2011 Disposition are consistent with possession.

[181] Counsel for the defender also submitted that the pursuer would not be benefitted or prejudiced if declarator was pronounced in the terms sought, as it would have no practical consequence. The same point was made in a slightly different way before Sheriff Mundy, where the defender argued that the pursuer had no patrimonial interest in the Lane and therefore does not have title and interest. In making this argument counsel relied on the opinion of the court, delivered by Lord Justice Clerk Carloway (as he was) in *Salt International Ltd v Scottish Ministers* (*op.sit* at paragraph 50.) In that case, the Inner House upheld the decision of the Lord Ordinary who had found that in the context of a public procurement dispute, the pursuer had no right to obtain a bare declarator that the defender had breached public procurement regulations.

[182] This element of the *Salt International Ltd* decision has to be looked at in context. I understand it to have been reached on the basis that the pursuer had an effective remedy provided by the regulations in question - which was why the declarator was unnecessary.

[183] In essence, the defender appears to be arguing that in order for the pursuer to have a basis for seeking the orders she needs to demonstrate a patrimonial interest. Presumably, on the defender's analysis, this would entail her including a crave for declarator of ownership following a period of possession based on a valid disposition, the terms of which are habile to include the Lane. However, while crave 1 falls short of seeking a declarator of ownership, it is framed under reference to (i) a title habile to include the Lane; and (ii) prescriptive possession. Counsel for the defender categorises the pursuer's action as possessory in all but name, allowing him to criticise the remedies sought. However, this approach is somewhat circular. I consider the defender's analysis is over technical and that the declarators sought are not without meaning and effect.

[184] For all these reasons, I reject the defender's submission that the pursuer does not have title and interest.

The servitude – prescription

There are two issues to be determined in relation to 63MD's servitude in relation to the Lane – (i) has it been extinguished by prescription; and (ii) does the construction allow both vehicular and pedestrian access, or just pedestrian access? The second question only arises if the first question is answered in the negative.

[185] Before addressing these questions it is necessary to address the question of burden proof, which was raised by the pursuer. Section 13A of the Prescription and Limitation Scotland Act 1973 provides:-

> "**13A Burden of proof**
> (1) This section applies in relation to—
> (a) an obligation to which a prescriptive period under section 6, 7 or 8A applies, and
> (b) a right to which the prescriptive period under section 8 applies.

> (2) If a question arises as to whether the obligation or right has been extinguished by the expiry of the applicable prescriptive period, it is to be presumed that the obligation or right has been so extinguished unless the contrary is proved by the creditor."

[186] The pursuer urged to me accept that this provision, which does not come into effect until 28 February 2025, is a statement of the current law as reflected in the passage from Johnston D (2nd Ed) "*Prescription and Limitation"* cited above. The passage relied on by the pursuer states "On balance, the better view therefore appears to be that ordinarily the pursuer will be bear the burden of satisfying the court of the existence of the right of action". However, the section goes on to read "This, however, is not a universal rule: the position may be different if it is unfair in the particular circumstances for the pursuer to bear the burden".

[187] Section 13A is not yet in force and has no bearing on this case. I was given no information to confirm that the intention of the Scottish Parliament in enacting s13A was to place the current legal position on a statutory footing - although I pause to note that if this was the case then it begs the question why the new section is necessary. However, the passage cited from Johnson's book follows a discussion regarding whether it was unfair to expect a pursuer to prove that she has a right of action, rather than requiring a defender to prove that she does not.

[188] The pursuer has raised proceedings against the defender and has sought and obtained interdict *ad interim* against the defender based on the case she offers to prove. The defender purchased 63MD (with a working door into the Lane) in 2018 with a *prima facie* right of servitude over the Lane. I consider that it would be unfair in the particular circumstances of this case for the defender to bear the burden of proof. The defender is defending the action raised against her. Although there is a counterclaim, that is a necessary

corollary of the defence to the principal action. Further, this issue was only raised in the context of submissions. There was no discussion of onus prior to evidence commencing and no suggestion that the defender ought to have been ordained to lead at proof.

[189] However, once evidence has been heard, the burden of proof is rarely determinative. My decision in this case does not turn on the burden of proof but on my overall assessment of the evidence.

[190] The defender's primary position is that the pursuer must establish what she has offered to prove otherwise her case will fail. Here, that means proving that "For more than 60 years prior to the defender's purchase of 63MD, no access of any form was taken to the Lane".. If she proves a lesser period, even if it is over 20 years, her case would fail. I disagree with this submission and consider that the offer to prove 60 years non-use does not prevent the court making a finding of an alternative period of time. The authority relied on by the defender (*Parkash* v *Royal Bank of Scotland)* relates to a quite different point. In that case, Lord Sandison held that where an action had been raised on the basis of essential error induced by misrepresentation, it was not open to the pursuer at the conclusion of proof to advance an additional argument based on uninduced unilateral error. Here, the pursuer offers to prove a 60 year period, but the duration established after proof is a matter of fact for me to determine.

[191] The evidence in this case covers the period from 1962 to 2020. I asked counsel how the court ought to address a notional period prior to 1962, for example 1900 to 1920. How could it be known that the servitude had not been extinguished by non-use prior to 1962 and on the pursuer's analysis, how could the defender ever prove that? Counsel for the pursuer's response to this question was to say that the issue did not arise because there was evidence of non-use from at least 1962 to 1993, which somewhat avoided the question. Counsel for

the defender's response was that the law would deal with this issue by way of presumption. I was referred to WG Dickson, *Evidence* (1887) (paragraph 114(3)) as authority for an evidential presumption that once established, later acts can be attributed to a chain of acts leading back (in this case) to the original servitude.

[192] Counsel for the pursuer referred me to *Ferguson* v *Gregors* [2023] SAC (Civ) 24 as authority for the proposition that there may be circumstances where a right to vehicular access can be divided or isolated from pedestrian access in the context of section 8 of the 1973 Act. The circumstances of that case are different as the servitude right at issue was created by way of positive prescription, but the general proposition seems to me to be equally relevant to a servitude founded on a written title.

[193] I have already discussed the witness evidence and I am satisfied that the Lane and the door into to the Lane from 63MD were used in the manner spoken to by Mr and Mrs Mesbah when they lived at of 4SRT. The evidence in relation to the changing of locks at 63MD in 2010 is also consistent with the door into the Lane being used – if it was not then there would be no obvious need for the NHS to change the lock on the door.

[194] I also find that the door and the Lane were being used in the late summer/early autumn of 1993, as explained by Eadie Hawkes. That leaves the period from 1962 to 1993. In view of my concerns regarding the evidence of Ruth Langskaill and the limited nature of the pursuer's evidence, there is very little direct evidence of what use was or was not taken by 63MD of the door into the Lane. At best for the pursuer, the evidence from her proof is that none of the witnesses were aware of the door and the Lane being used. For obvious reasons, it is difficult for the defender to lead positive evidence of her own in relation to events beginning in 1962, ten years before she was born and forty eight years before she

purchased 63MD. The situation is therefore similar to the hypothetical scenario I put to counsel.

[195] I am entitled to draw an inference from the facts which I have found to be established in addition to considering any evidence available in respect of that period. Where there are conflicting inferences, the one which is most probable will prevail. The two scenarios here are (i) that the servitude right of access into the Lane was used; or (ii) that it was not.

[196] It is not disputed that 63MD was occupied during the period in question. Miss Langskaill spoke of hearing and seeing residents play in the garden. That is potentially inconsistent with her suggestion that the garden of 63MD was too overgrown to allow access to the door. The photograph of the Langskaill family in the Lane in 1965 shows clearly the door into 63MD's back garden. It is not overgrown, as was suggested by Miss Langskaill. The pursuer did not produce any other photographs of the Lane covering the period from 1965 to 2011. It is improbable that the residents of 63MD suddenly started using the door in 1993 after a 31 year period of having not done so. The use of the Lane continued during the period spoken to by Mr and Mrs Mesbah. Miss Langskaill thought the door into the Lane could be opened to run a hose to 2SRT in around 2010, a proposal which, it appears to me would have been highly unlikely if, as she explained elsewhere in her evidence, the door had never been opened and was always locked.

[197] The inference I draw from these facts is that that defender's predecessors in title did exercise their servitude right in respect of the Lane, from time to time, between 1962 and 1993 and that there is no basis for me to make separate findings in relation to pedestrian and vehicular use.

[198] Further, and in any event, I accept counsel for the defender's submission in relation to the existence of a presumption in relation to previous use.

The servitude – interpretation

[199] In different ways, both parties accepted that the 1880 Feu Contract was relevant to the dispute. Counsel for the pursuer's position, as I understood it, was that any servitude right which the pursuer might have is referable solely to the 1886 Feu Contract. However, he accepted that the 1880 Feu Contract was relevant as part of the overall circumstances when interpreting the 1886 Feu Contract. Counsel for the defender placed greater reliance on the 1880 Feu Contract, essentially submitting that both feu contracts ought to be read together. The declarator sought by the defender in the counterclaim is in relation to the 1886 Feu Contract.

[200] There is no material difference between these positions and I did not understand counsel for the defender to disagree with the pursuer's summary of the principles to be used in the interpretation of servitudes.

[201] Where parties differ, is the significance of surrounding circumstances, relevant to the interpretation of the 1886 Feu Contract. Counsel for the pursuer relied heavily on the construction on the boundary wall. Although there is no way of knowing when it was built, he submitted that the building of the wall was either confirmation that only a pedestrian right of servitude had existed or that any right for access by coach and horse had been abandoned.

[202] Although the two strands of this argument were conflated, in my opinion they are conceptually quite separate. I have already quoted the passage from Cuisine and Paisley that the defender relies upon in relation to the erection of the wall being an act of

abandonment. However, it is necessary to read on through the text in order to place that quote in context. The learned authors go on to conclude that there is a distinction between extinction by non-use (constituting abandonment) and extinction by non-exercise (negative prescription). They observe that absent such a distinction, there could be a *de facto* reduction in the period for negative prescription. Accordingly, they conclude (and I agree) that there must be something more than non-use to constitute abandonment. Their view is that in order to demonstrate abandonment it is necessary for there to be (i) a cessation of use by the dominant proprietor; *and* (ii) an intention on the part of the dominant proprietor to relinquish the servitude (Cusine and Paisley, *op. cit.* paragraph 17.15).

[203] It is not necessary for me to address whether these tests are met. The pursuer's second crave is for declarator that any servitude right of access over the Lane in favour of 63MD has negatively prescribed. There is no crave seeking a declarator that any such servitude right (or part of any such right) has been abandoned. Accordingly, there is no pleaded basis for the pursuer to make out a case based on abandonment of a servitude right.

[204] In any event, standing the proximity in time of the two feu contracts, and that the 1880 right was to erect a coach house "at any time" it is not clear to me that the erection of the boundary wall would, inevitably, be seen as an abandonment of that right. I would also observe that the construction of the boundary wall was an obligation, also contained in the 1880 Feu Contract (clause 4). It is difficult to see how complying with this obligation can be seen as the abandonment of a right and had it been necessary for me to determine the point, I would not have been persuaded that the pursuer had proved abandonment.

[205] That leaves the question of the true construction of the 1886 Feu Contract. There is no evidence to confirm whether the boundary wall was built before the 1886 Feu Contract, but if it was, the pursuer's argument is that it cannot have been the intention of the 1886

Servitude to provide access to 63MD by coach and horse as this would have been impossible given the presence of the wall . The defender's response to this is, in essence, that just as walls can be built they can be knocked down (at least in part). My own observations regarding the obligation to construct the wall are also relevant in relation to this point.

[206] I agree with principles of interpretation of servitudes suggested by the counsel for pursuer. His second principle is that, in essence, a purposive approach to interpretation is appropriate (Cusine and Paisley, *op.cit.* para 15.17.) Adopting a purposive approach to interpreting the 1886 Feu Contract, in the light of the surrounding circumstances (which include the earlier feu of only six years prior) I consider that properly construed, its wording provides for access by both pedestrians and vehicles. The right to erect a coach house, albeit in the earlier disposition, is one said to exist "at any time" meaning it was not necessarily in immediate contemplation and the granting of the second feu is only six years after the 1880 Feu Contract. Irrespective of when the wall was erected, I can readily see how an opening could be made in it to allow access, short of full scale demolition. Further, the wording deployed is wide in that it refers to "access" rather than "pedestrian access" (or similar) and one must presume the wording was chosen by the drafter for a reason.

[207] A purposive interpretation of the servitude also obliges me to consider the intention behind the granting of the servitude (Cusine and Paisley, *op. cit.* paragraph 15.17). This is relevant given the pursuer's submission regarding the possible severability of pedestrian and vehicular servitude rights in relation to prescription. Standing the terms of the 1880 Feu Contract, I have considered whether the purpose of any vehicular access encompassed by the servitude is only to access any coach house. If the servitude right was limited in this way, given that there is no coach house, it could be argued that this right was never exercised and had prescribed. However, the terms of the 1886 Feu Contract are drafted in

wider terms. As noted above, it refers to "access" generally but in terms of what access is given to, it is "...to the back entrances of … said feus." In my view, this wording is wide enough to encompass access *into* ground where a coach house may have been built, but also access *to* any back entrance. The wording is wide enough to encompass both pedestrian and vehicular access.

[208] Accordingly, I prefer the position of the defender in relation to the interpretation of the defender's servitude right. I agree with counsel for the defender that following *Crawford* v *Lumsden* this right would encompass access by car.

[209] In view of my decision on the interpretation of the servitude, it is not necessary for me to decide whether the defender has established a right of vehicular access by way of positive prescription or that the . Had it been necessary for me to do so, I would have agreed with counsel for the pursuer that there was no pleading to support such a claim.

Interdict

[210] Standing my decision on the interpretation of the defender's servitude right and the issue of prescription, the defender is not entitled to interdict as third craved.

[211] In relation to her fourth crave, the pursuer led no evidence to show that the defender, her agents, contractors or employees will remove any shrub, or other flora from the Lane or that she had a reasonable apprehension they would do so. Accordingly, the pursuer is not entitled to interdict as fourth craved.

Summary

[212] The 2011 Disposition is habile to include the Lane for the purposes of prescriptive possession. The pursuer has possessed the Lane since the granting of the 2011 Disposition

and, prior to that, from 1962. The defender's servitude right of access has not been extinguished by negative prescription and properly construed is wide enough to encompass both vehicular and pedestrian access.

[213] Accordingly, I will grant the pursuer' first crave, refuse her remaining craves and recall the interim interdict pronounced on 4 March 2020. In terms of the counterclaim, I will refuse the defender's first crave and grant her second crave.

[214] In relation to expenses, the sheriff clerk will arrange a hearing on date to be afterwards fixed.