OUTER HOUSE, COURT OF SESSION

[2020] CSOH 34

CA44/19

OPINION OF LADY WOLFFE

In the cause

LEAFREALM LAND LIMITED

Pursuer

against

THE CITY OF EDINBURGH COUNCIL

First Defender

and

THE RAEBURN PLACE FOUNDATION and RAEBURN PLACE DEVELOPMENT LIMITED

Second and Third Defenders

Pursuer: Lake QC, Anderson; Gilson Gray LLP
First Defenders: Barne QC; Morton Fraser LLP
Second and Third Defenders: Mure QC; CMS Cameron McKenna, Nabarro and Olswang

18 March 2020

Introduction

Contested ownership of a strip of land

[1] A large area of unbuilt, green space lies to the north of Comely Bank Road in Stockbridge in Edinburgh. This has long been used as playing fields for a number of clubs, including the Edinburgh Academical Club ("the EA Club"). In 1979 the EA Club acquired

ownership of land ("the EA Land") by disposition ("the 1979 Disposition") from the Grange Trustees. The southern-most part of the EA Land is now being developed to build a stand with seating for sports matches and to create a number of retail spaces ("the development").

[2] The central question in this commercial action is whether the development is being built on land owned or controlled by one or other of the defenders (the first defender *qua* owner and the other defenders by virtue of contractual rights of access), or in respect of which there is a public right of way - and in either of those circumstances the pursuer's action fails, or whether the development is taking place or impinging on a strip of land ("the Disputed Strip") - assuming it exists - running parallel to Comely Bank Road and owned by the pursuer. On the hypotheses that the pursuer establishes that the Disputed Strip exists, that the pursuer has acquired it and that no rights of way subsist in relation to it, there are subsidiary questions as to whether the disposition in its favour, which has not yet been recorded by the Keeper in the Land Register, is vitiated by a number of technical difficulties, the effect of which would be to disentitle the pursuer from the first declarator it seeks as owner of the Disputed Strip ("technical deficiency arguments"). The other conclusions were for declarator that no public right of passage subsisted in the *solum* of the 1912 Wall, that the *solum* of the 1912 Wall had not vested in the Council by virtue of listing Comely Bank Road as a road, and for interdict against the defenders impinging on the Disputed Strip.

The parties

[3] The first defender (hereinafter "the Council") is the roads authority. The second and third defenders are (to simplify) the developers of the development. The second defender is promoting the development to provide a sustainable income stream in order "to fund the on-going provision of sport, recreation and associated sports programmes at the site and to

maintain the new sporting facilities to be provided". The third defender is a wholly-owned subsidiary of the second defender, and was established to carry out the development. The second and third defenders instructed the same legal representation. (For ease of reference, I shall refer to them collectively as "the developers" and to the Council and developers collectively as "the defenders".) The developers were the principal contradictors in this action, in that they (unlike the Council) instructed their own expert, and they cross-examined the pursuer's witnesses and led their own proof before the Council did. On certain chapters, the Council had no position (eg on the question of jurisdiction, any title and interest of the developers to oppose the orders the pursuer seeks) or it otherwise adopted the position of the developers.

Comely Bank Road, the old estate wall and the 1912 Wall

[4] Before setting out the legal issues (of which there are many) and the evidence on the contested matters, it is helpful to describe the land to which the Disputed Strip relates.

[5] Comely Bank Road, a road in Stockbridge running on an east-west axis, lies immediately to the south of the EA Land. The 1895 Ordinance Survey ("OS") Plan for this part of Edinburgh ("the 1895 OS Plan") depicts a wall ("the old estate wall") dividing the playing fields to the north from Comely Bank Road to the south. The old estate wall runs in a reasonably straight line along the whole length of the EA Land, apart from two openings for gates. One of these was a larger opening at the west-most end and the other opening was close to the eastern end of the old estate wall (hereinafter "the old estate wall openings"). The approximate width of the old estate wall was 1 foot 8 inches. The approximate length of the old estate wall along the southern boundary of the playing fields was about 115 metres (*per* the GL Survey of 2000).

The parties' focus on a dealing in 1912

[6] The central question, as I have described it, arises from certain dealings with the EA Land in 1912. In summary, in pursuance of a road-widening scheme in 1911, the statutory predecessors of the Council (to whom I shall refer as "the Corporation") approached the then owners of the EA Land (being the trust which had acquired *inter alia* the EA Land in 1882, hereinafter "the Grange Trustees") to request the grant (to use a neutral word) to them of a 6-foot strip of land immediately to the north of the then-existing roadway. This would necessitate the removal of the old estate wall which divided the playing fields from the roadway. In exchange, the Corporation offered to build a new wall ("the 1912 Wall") to the north of the old estate wall and to maintain it in all time coming. In due course, this arrangement was recorded in a Minute of Agreement in 1912 ("the 1912 Minute of Agreement"). (The subjects of the 1912 Minute of Agreement are not the Disputed Strip; the pursuer's case necessarily assumes these are different.) I shall refer to the land which was the subject of the 1912 Minute of Agreement as "the 1912 Strip". Immediately to the east of the EA Land lies the Raeburn Hotel (formerly known as Somerset House). This is set back some distance from Comely Bank Road. In 1913, the Corporation entered into a similar arrangement with the owner of Somerset House (now known as the Raeburn Hotel) in the form of missives ("the 1913 Missives"). The new wall built in 1913, which divided the front garden ground of the Raeburn Hotel from the road, continued the line of the 1912 Wall. On photographic evidence, the south face of the 1912 Wall bounding the playing fields to the north was offset by no more than 1 or 2 inches to the north of the line of the south face of the new wall built in 1913 in front of the Raeburn Hotel pursuant to the 1913 Missives. (The wall in front of the Raeburn Hotel still stands.)

[7] The two most contentious issues at the proof were:

1) whether the 1912 Wall was built on the 1912 Strip (as the defenders contend) or to the north of the 1912 Strip (as the pursuer contends), and
2) whether the 1912 Minute of Agreement was habile to convey the 1912 Strip in favour of the Corporation.

The assumption underlying the first question appeared to be that if the 1912 Wall had been built to the north of the 1912 Strip, the ownership of the *solum* could not have passed to the Council or any of its statutory predecessors. (I consider further at paras [15] to [17] the centrality of this assumption to the pursuer's case.)

The 1895 OS Map and other maps and surveys referred to by the experts

[8] There was extensive reference to several plans in the evidence. It is therefore convenient here to summarise them (without prejudice to challenges to the accuracy or reliability of the same):

1) <u>The 1895 Ordinance Survey Map</u>: This was produced to a scale of 1:500, the most precise scale ever used for OS maps. This enabled features as small as 6 inches to be depicted. The line of the old estate wall is shown as a virtually straight line parallel to Comely Bank Road, subject to a slight deviation just to the west of the approximate mid-point of the wall. (This is just above the letter "R" in the word "Road" in the depiction of Comely Bank Road.) On Mr McCreadie's estimation, this is about 1 foot or so off the line of the old estate wall. (In his second supplementary report ("MR3") Mr McCreadie dealt further with the precise deviation of the old estate wall from a straight line.) The length of the old estate wall was more than 100 yards long.

2) The 1908 and 1914 Ordinance Survey Maps: These were produced to a scale of 1:2500. While the 1914 OS Map showed the 1912 Wall, in Mr McCreadie's view, a scale of 1:2500 was insufficiently precise for the finer measurements he required.

3) The Topographical Survey prepared by GL Survey in 2000 ("the GL Survey 2000"): This was the last survey of the actual line of the 1912 Wall mapped or plotted on the ground to a known scale, in contrast to the 2012 Condition Survey (which simply surveyed the physical condition and cross sections of the old estate wall). The data from the GL Survey 2000 was included in the overlay referred to by the developers' expert, Brian Laird (see paras [10] to [11] of Appendix A to this Opinion).

The pursuer's title

[9] In explaining the pursuer's title it is necessary to record the genesis of its granter's title and to note the title of the adjoining land by which it is said to be bound on the north.

The Grange Trustees and the EA Land

[10] The Grange Trustees were the granters of the 2018 Disposition in favour of the pursuer. In brief, in 1882 a number of sporting clubs having separate leases from the same landowner formed a trust (whose trustees I have referred to as "the Grange Trustees") with a view to the ultimate purchase of the land they used as playing fields once the associated borrowing was repaid. The Grange Trustees held the playing fields under a bare trust and were obliged to grant title to each club, once its respective borrowing had been repaid. The 1912 Minute of Agreement related to the south-most part of the EA Land.

The 1979 Disposition in favour of the EA Club

[11] In 1979, the EA Club called on the Grange Trustees to grant a disposition in their favour of the EA Land and which was to the north of the 1912 Wall ("the 1979 Disposition"). It suffices for present purposes to note that the 1979 Disposition defined the south border of the land conveyed as "on or towards the south by the north face of the boundary wall separating the subjects hereby disponed from Comely Bank Road, Edinburgh" (emphasis added). The effect of this description as a bounding description is to exclude the boundary wall (being the 1912 Wall) and its *solum* from the 1979 Disposition.

[12] This opens up the prospect that the *solum* of the 1912 Wall was retained in the ownership of the Grange Trustees if no other party (ie the Council) had acquired ownership of it (ie by virtue of a statutory listing) or permissibly exercised control over it (eg if dedicated to road purposes). The pursuer seeks to exploit this prospect. It is in that context that the two questions noted in para [7] arise. Even if question (2) is determined in favour of the Council, that was not fatal to the pursuer's case if it can show that the 1912 Wall was built outwith (ie to the north) of the 1912 Strip, subject, of course to (a) the parties' arguments about statutory vesting or listing subsequently constituting the Council as owning or controlling the 1912 Wall and its *solum*, (b) there being no public rights of way, and (c) the 2018 Disposition not being vitiated by the technical deficiency arguments.

The 2018 Disposition

[13] The Grange Trustees granted the 2018 Disposition in favour of the pursuer. The land conveyed was described as follows:

> "ALL and WHOLE that strip of ground… , shown delineated in red on the plan annexed and signed as relative hereto and situated generally along the north side of Raeburn Place/Comely Bank Road, Edinburgh, and bounded on the north by subjects disponed by Disposition (hereinafter called the '1979 Disposition') by [the Grange Trustees]…, along which boundary it extends on the line of the north face of a wall now or formerly situated on the subjects hereby disponed (being the wall situated on the subjects hereby disponed at the time of the granting of the 1979 Disposition); on the east partly by ground pertaining to the Raeburn Hotel, Raeburn Place/Comely Bank Road, and partly by ground within the pavement of Raeburn Place/Comely Bank Road, Edinburgh (including that part of the pavement which comprises ground formerly pertaining to the said Hotel); on the south by ground now situated within the pavement of Raeburn Place/Comely Bank Road, Edinburgh; and on the west by North Park Terrace, Edinburgh…." (Emphasis added.)

The effect of the first passage underlined is to seek to include the 1912 Wall (up to its north face) in the 2018 Disposition (on the hypotheses that the Disputed Strip exists and that the Council did not have rights of ownership or control in respect of it). It should be noted that there is an indeterminate southern boundary of the subjects of the 2018 Disposition.

[14] The qualified terms of the warrandice clause should be noted. In particular, the granters of the 2018 Disposition granted warrandice from their "own facts and deeds only" and bound the trust estate in absolute warrandice,

> "but always excepting therefrom the rights constituted in favour of third parties under (a) [the 1912 Minute of Agreement] and (b) public rights of passage or way constituted by whatever means and including by means of the Roads Scotland Act 1984".

The pursuer's contention that there is a strip of land capable of being conveyed to the pursuer

[15] The pursuer's case is premised on the overarching proposition that there existed a strip of land (ie the Disputed Strip) between the northern edge of the 1912 Strip and the north face of the 1912 Wall, not conveyed to or controlled by the Council or the Corporation, but retained in the ownership of the Grange Trustees and hence capable of being conveyed by them to it (ie the subjects of the 2018 Disposition). This prospect would potentially arise

if the 1912 Wall was actually built to the north of, and not within, the 1912 Strip, with the consequence that the *solum* of the 1912 Wall remained in the ownership of the Grange Trustees after 1912. On this hypothesis, the Grange Trustees had title to grant the 2018 Disposition conveying the extant Disputed Strip to the pursuer.

[16] This approach is best illustrated by the draft diagram produced by Mr Lowe (albeit emblazoned with the coat of arms of "A Company of Grange Members") and included as an appendix to the report of the pursuer's expert, Mr Carrie ("the Carrie Report"). This diagram showed the north side of Comely Bank Road as a straight line, the old estate wall as a bowed line (the centre point of which was closer to the road, or further south, than its ends) and the 1912 Wall built in a straight line parallel to the road. In Mr Lowe's notes to his diagram it is asserted that the 1912 Wall was built to the north of the 1912 Strip. As a result, there was a thin crescent-shaped white gap or strip (being the presumed Disputed Strip) between the yellow strip (representing the 1912 Wall) and the south face of the 1912 Wall. I should observe that this diagram has no foundation in fact. There is nothing to enable it to be related to any known physical point on the ground. It is not drawn to scale. The widest point of the presumed white strip is stated in the diagram as 2 feet, being a figure Mr Lowe supplied but for which he said he had assistance from Mr McCreadie. However, to the extent it was touched on in the evidence of Mr McCreadie, he did not support this figure. When asked, Mr McCreadie's evidence was that the maximum difference between the south face of the 1912 Wall and a distance 6 feet to the north of the south face of the old estate wall (ie the putative northern edge of the 1912 Strip if it were exactly parallel to the old estate wall) was about 1 foot but this was not along the whole length of the line. (This was not explored further with him in his evidence, but parenthetically I note that, if the measure is taken from the north face of the old estate wall, the gap will obviously be reduced.) The

absence of any scale measurement on the diagram is consistent with the pursuer's position that it sufficed to show that the 1912 Wall was built to the north of the 1912 Strip. This is the fundamental premise of the pursuer's case.

[17] Given the number and complexity of the legal and factual issues, it is helpful to identify some of the individual propositions relevant to this part of the pursuer's case. These include the following:

1) That the 1912 Wall was not built on the 1912 Strip; rather it was built on land to the north of that strip and which remained in the ownership of the then-owners (the Grange Trustees) of the EA Land;
2) That when the current owner of the EA Land acquired title in 1979, the 1912 Wall and the *solum* thereof were not included in the title in its favour (that is, the Disputed Strip);
3) That neither the Council nor its predecessors ever acquired a right of ownership in respect of the 1912 Strip under the 1912 Minute of Agreement (it being ineffective as a conveyance), nor did it acquire ownership or control of the wall or *solum* thereof by virtue of any subsequent statutory vesting or listing; and
4) That the 2018 Disposition in favour of the pursuer conveyed the Disputed Strip to it. (I record below the additional, technical challenges made to the 2018 Disposition.)

The reason why these questions arise and why evidence is necessary to determine them, is that the 1912 Wall collapsed in 2014 and was subsequently demolished. (As noted above, the wall in front of the adjacent property, the Raeburn Hotel, and which was built in line with the 1912 Wall a year later, still subsists.) The destruction of the 1912 Wall several years

before these proceedings were initiated gives rise to an evidential conundrum, referred to below (at paras [27] to [29]).

The defenders' position

[18] The defenders' overarching position was as follows:

1) That the 1912 Wall was actually built wholly within the Strip;
2) That title was acquired either
   (a) by the Corporation by virtue of the 1912 Minute of Agreement (because it was a competent conveyance of ownership, notwithstanding its tripartite character or the absence in it of any form of the word "dispone"), or
   (b) by the Council by virtue of the subsequent exercise of statutory power, being
      (i) vesting or
      (ii) listing;
3) Which failing, a public right of way subsists in respect of the *solum* of the 1912 Wall and that sufficed to enable the developers lawfully to proceed with the development and to frustrate the pursuer's action.

Accordingly, while proof that the *solum* of the 1912 Wall was situated within the 6-foot strip was not itself determinative of the merits, establishing that factor underpinned the defenders' arguments based on the 1912 Minute of Agreement (see 1 above).

[19] Even assuming the pursuer succeeded in proving that the likely location of the 1912 Wall was outwith the 1912 Strip, the pursuer also required to show that the 2018 Disposition in its favour was a valid conveyance, notwithstanding that the Keeper of the Land Register has not yet registered the pursuer's title in the Land Register.

Outline of factual and legal issues

[20] The central question, as I have described it, has given rise to a number of factual and legal issues, summarised in the paras [21] to [26].

Ownership and the proper construction of the 1912 Minute of Agreement

[21] The principal factual dispute is the physical location of the 1912 Wall and of its *solum* relative to the 6-foot strip referred to in the 1912 Minute of Agreement. The related questions are:

1. Whether or not the pursuer owns the 6-foot strip and, if separate, the *solum* of the 1912 Wall;
2. Whether, on a proper construction of the 1912 Minute of Agreement, it conveyed any heritable title to
   (a) The 6-foot strip, and/or
   (b) the *solum* of the 1912 Wall to be erected by the Corporation, or whether title thereto was retained by the Grange Trust or transferred to the Corporation.

   (While there was a separate question as to the capacity of the Grange Trust in 1912 to convey the 6-foot strip or the *solum* of the 1912 Wall, it is accepted that it is now too late to contest that matter.)
3. Whether or not, in terms of the 1912 Minute of Agreement, the Trustees of the Grange Trust ceded title to the 6-foot strip to the Corporation.
4. Whether, in any event, the ownership of the 6-foot strip vested in the Corporation in terms of section 191 of the Corporation Order Confirmation Act 1967 ("the 1967 Act").

Rights of passage/listing

[22] At issue in this proof was also whether any public right of way subsisted in respect of the Disputed Strip (as the defenders contend). The relevance of this, as I understood it, was that even if the pursuer established that it owned the disputed strip, the development could proceed unimpeded if rights of way subsisted or if the Disputed Strip has been dedicated to road purposes. The relevant questions may be formulated thus:

5. Whether there is a public right of passage over (a) the 6-foot strip and (b) the *solum* of the 1912 Wall.
6. Whether or not the entirety of the 6-foot strip and the *solum* of the 1912 Wall forms part of Comely Bank Road and is vested in the Council as roads authority; or, if the *solum* of the former wall does not form part of the 6-foot strip, whether or not the *solum* of the former wall nonetheless forms part of Comely Bank Road and vests in the Council as roads authority.
7. This was broken down into more particular questions:
   (a) Whether or not the 1912 Wall formed part of the public road (as the defenders argue); or whether or not the presence of the 1912 Wall necessarily precluded a public right of passage existing along that section of the strip (as the pursuer argues);
   (b) Whether or not the Council was entitled to include the 1912 Wall within the relevant listing for Comely Bank Road in terms of section 1 of the Roads (Scotland) Act 1984 ("the 1984 Act");
   (c) Whether or not that listing extends to the *solum* of the 1912 Wall, now that that wall has been demolished; and

(d) Whether the effect of any statutory vesting was able to convey ownership to the Corporation.

Prescription

[23] Some of these issues in turn give rise to issues of prescription, namely:

8. Is the Council's title fortified by positive prescription and exempt from challenge?
9. Is the Council's asserted title fortified by positive prescription and exempt from challenge?

Jurisdiction

[24] On the pursuer's hypotheses (that it owns the Disputed Strip and there are no countervailing rights of way), the Disputed Strip has a very substantial value (£800,000 was mooted) as a ransom strip. This was well within the Court's privative jurisdiction. If the defenders' hypotheses are correct (that there is no Disputed Strip susceptible to be conveyed to the pursuer or, in any event, a public right of way subsists such as to enable the defenders to proceed with the development and thereafter for members of the public to access it), then the value of the Disputed Strip and the sum at issue in the pursuer's action is nil or of only nominal value. These competing contentions give rise to the following jurisdictional issue:

10. Whether or not the pursuer seeks orders the aggregate value of which exceeds £100,000 and whether the commercial court has, or should exercise, jurisdiction in accordance with sections 39 and 93 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act").

Title and interest of the pursuer

[25] The defenders take discrete technical points, in part arising from the fact that the 2018 Disposition has not yet been accepted for registration in the Land Register. The following questions arise:

11. Whether or not, in the absence of an extract of the title sheet for the *solum* of the 1912 Wall and, more generally, the 6-foot strip given up in terms of the 1912 Minute of Agreement, the pursuer is entitled to the orders sought.
12. *Whether or not the 2018 Disposition on which the pursuer relies for its title to sue and the plan appended to it is sufficient to give to the pursuer a personal title to pursue the action, irrespective of whether or not the 2018 Disposition and plan are, or come to be, registered in the Land Register.*[1]
13. Whether or not the plan appended to the 2018 Disposition, on which the pursuer relies for its title to sue, is sufficient for the Keeper to accept in terms of section 23(1)(b) & (c) of the Land Registration (Scotland) Act 2012 ("the 1912 Act").
14. Whether or not the 2018 Disposition includes the *solum* of the 1912 Wall.

Title and interest of the defenders and interdict

[26] Separately, the pursuer challenges the title and interest of the developers to resist the order it seeks:

15. The relevancy of the averments for the developers *and whether they have title separatim interest to defend the action.*

[1] The Council does not consider that this issue arises, since the orders sought relate to the real right of ownership and not to personal rights.

16. *Whether the developers, whose interest as tenants ends at the north face of the 1912 Wall have any interest to oppose to the orders sought by the Pursuer, or, as juristic and not individual persons, to seek to assert access rights exercisable by natural persons under the Land Reforms (Scotland) Act 2003* ("the 2003 Act").[2]

The evidential conundrum and the approaches of the pursuer's and the developers' respective experts

[27] The focus of the proof was on the evidential conundrum of how to prove the precise location of a no-longer-extant wall (ie the 1912 Wall). The pursuer's approach, which was map-based, started with the location of the earlier wall (ie the old estate wall) as depicted on the 1895 OS Map. The pursuer's expert, Mr McCreadie, applied a variety of techniques (creating a laser-generated topographical survey, re-scaling a digital version of the 1895 OS Map and, using computer aided design ("CAD") and geo-referencing, combining these data sets to form a topographical survey data set ("TSD")) in order to identify the precise location of the old estate wall. Two assumptions were then made: (i) that the northern line of the 1912 Strip exactly replicated the irregular contours of the old estate wall (which was not straight but bowed slightly to the south at its middle), the justification for which was that the width of the 1912 Strip was 6 feet; and (ii) that the 6-foot strip included the *solum* of the old estate wall, such that the southern boundary of the 6-foot strip was the south face of the old estate wall. On this approach, Mr McCreadie's conclusion (without his alignment adjustment, see para [2(4)] of Appendix A to this Opinion) was that the south face of the 1912 Wall was a distance of between 6 feet 6 inches and 8 inches from the south face of the

[2] The developers do not consider that, on the pleadings, the issues set out in questions 15 and 16 arise in this case.

old estate wall and, therefore, the 1912 Wall was built outwith the boundaries of (ie it was actually built to the north of) the 1912 Strip.

[28] By contrast, the developers' positon was to start with the figure of 49 feet as the width of Comely Bank Road before it was widened (that figure was taken from the contemporaneous documentation; see para [31(2)], below), and which figure was assumed to be the distance between the north face of the garden walls on the south side of Comely Bank Avenue ("the base point") and the inner aspect or southern face of the old estate wall. The developers' expert, Mr Brian Laird, undertook a desk-top topographical study, based on a number of earlier surveys (although the only one relevant to this proof was the GL Survey 2000). This enabled Mr Laird to depict the 1912 Wall on a modern plan ("the Overlay"). Next, he measured a distance of 6 feet to the south of each of the north and south faces of the 1912 Wall, and depicted these on the Overlay as dashed lines parallel to the 1912 Wall. Having done so, he sought to depict the notional line of the old estate wall (drawn a distance 49 feet to the north of the base point) to show that this fell within the dashed parallel lines. (It should be noted that Mr Laird assumed, incorrectly, that the widths of the old estate wall and the 1912 Wall were the same, though this does not affect the methodology just described.) The result was to demonstrate that the 49-foot line fell broadly (his word was "tolerances") within the dashed parallel lines. From this, it was inferred that the 1912 Wall was built on the 1912 Strip, that is, on a line 55 feet north of the base point (the figure of 55 is the sum of 49 feet and 6 feet). The critical assumptions to this approach were (i) that the old estate wall was exactly 49 feet to the north of the base point, and (ii) that both walls (the old estate wall and the 1912 Wall) fell within the 6-foot strip (ie the 6-foot strip commenced from the south face of the old estate wall). This last assumption operated at least in relation to the

east end of the old estate wall (see the plan appended to his witness statement; at the west end the 55-foot offset line coincides with the north face of the old estate wall).

Critical assumption underpinning the experts' approaches

[29] It should be observed that the assumption common to both experts was that the relevant starting point for their respective analyses was the south face of the old estate wall, and which (as just noted) they both assumed was included within the 6-foot Strip. However, as will be seen, I find that this assumption is fundamentally inconsistent with the 1912 Plan. As a consequence, the expert evidence in this case provided little assistance to the central factual issue that fell to be determined. Accordingly, I deal shortly with the expert evidence in the body of the Opinion, though out of deference to parties' efforts in eliciting this, I set this out in more detail in Appendix A to this Opinion.

[30] Other issues at proof in relation to the 1912 Minute of Agreement included

(i) whether the plan appended thereto was reliable (ie did its scale match the 6-foot figure marked thereon),

(ii) to which faces of the old estate wall and the proposed 1912 Wall did the arrows indicating the northern and southern edges of the 6-foot 1912 Strip relate, and

(iii) whether the 1912 Wall *as built* was in accordance with the 1912 Minute of Agreement.

It is appropriate to start with the 1912 Minute of Agreement (including its plan) and the contemporaneous documentation.

The 1912 Minute of Agreement and contemporaneous documentation

Entries from documentary materials preceding the 1912 Minute of Amendment

[31] Reference was made to certain documentary materials preceding the 1912 Minute of Agreement. Extracts from late 1911 and early 1912 were produced from the Minute books of the Corporation, from the EA Club's Minute Books and from the Minutes of the Grange Trustees. In substance these extracts recorded the following:

1) The Corporation's desire to widen by 6 feet the width of Comely Bank Road (see the burgh engineer's report of 18 October 1911 to the Corporation's Streets and Building Committee ([JB 110; pdf 797] and also recorded in the Minute of the Grange Trustees of 30 November 1911 [JB135, pdf870]) and which proposed that there be "a voluntary surrender" by the Grange Trustees (who were asked in the burgh engineer's letter "to surrender the strip required" [JB135; pdf870)) in exchange for the Council bearing the expense of the new wall;
2) The width of the road was recorded as being 49-feet (*per* burgh engineer's letter of 28 September 1911 ([JB110; pdf798]), a measurement relied on by the developers' expert;
3) The resolution of the EA Club "after full consideration" at its meeting on 23 November 1911 (recorded *in gremio* of the Grange Trustees' Minute of 30 November 1911) to recommend that it "give six feet off the South side of the field", provided that the Corporation erected a wall in accordance with its plan;
4) The EA Club's agreement to the proposed new wall, if the Grange Trustees resolved "to give off the required strip of ground", was intimated by the EA Club Committee to the Corporation (*per* letter to the Corporation dated 29 November

2011 [JB105; pdf787] and also recorded *in gremio* the Minute of the Grange Trustees of 30 November 1911 [JB135; pdf872]);

5) The consent by the Grange Trustees to "the proposed arrangement", after recording the burgh engineer's proposal "to give six feet off the south side of the field" (*per* Minute of 30 November 1911 [JB135]), in return for which the Corporation would erect a new wall (to be 6-feet high on the road side and 9-feet high on the playing field side) and subject to the proviso that the "site of the proposed new wall does not encroach beyond six feet into the Academy field" ("the granters' stipulation") (*per* Minute of the AGM of the Grange Trustees on 30 November 2011 [JB 135 pdf 875) (emphasis added)). The Grange Trustees' Minute of 30 November 1911 recorded a comment from the Chairman, under reference to the Grange Trustees' trust deed, that that deed did not contain an express power to sell. However, after quoting the Trustees full powers of management, he expressed the view that the trustees "were entitled to consent, or at all events would not incur any real responsibility in consenting". Another member was recorded as concurring in that view. A third member was recorded as noting that "by agreeing to the proposal the Trustees were selling or disponing of some part of the Trust property without being authorised to do so by the Trust Deed", but that in view of the others present being in favour of the proposal, he realised his view would not prevail. It was thereafter recorded as being agreed that the Grange Trustees would consent to the proposed arrangement but "on the footing that the [Corporation] accept the Trustees ['] letter and do not ask for a conveyance. The minute also recorded the grantees' stipulation;

6) At the meeting of the Corporation's Streets and Buildings Committee on 2 February 1912 it was noted the Grange Trustees "would agree to give up for the widening of the street a strip of ground six feet wide along the whole frontage viz 500 feet" on condition that the Corporation "erect a new wall along the new line of frontage to the clear height of six feet from the level of the pavement, with a pointed serrated surmount for prevention of climbing". This was said to be conditional on five further conditions. The last three are reflected in clauses Third to Fifth of the Minute of Agreement. The first additional condition was that the Corporation "do not ask for a conveyance, or, if a conveyance is required, that the [Corporation] accept the trustees' title to grant such". The second additional condition repeated the granters' stipulation (as I have defined it) in the following terms: that the site of the proposed 1912 Wall will "not encroach beyond six feet on the Academy field from the north side of the existing wall" (emphasis added) [JB 112 pdf 802].

7) The minutes of the EA Club of 5 December 1912 recorded that the 1912 Wall had been completed and "that the work had been substantially done and satisfactory in every way, and had been carried out by the end of September" [JB 123 at pdf 833]. It will be recalled that the discussions took place under reference to a plan for the proposed 1912 Wall, though that plan has not been produced (and cannot necessarily be assumed to be the same as the 1912 Plan).

[32] As the experts speculated about the source of the plan appended to the 1912 Minute of Agreement, the terms of the letter dated 21 November 1911 from the firm of Leadbetter, Fairley & Reid to the EA Club should be noted. It was clearly in response to an enquiry from the EA Club and it noted that the ground "which we understand is to be acquired by

the [Corporation], which is coloured red on the tracing herewith returned" amounted to .067 of an acre; that if sold at the rate of £1,000 per acre, it would yield a figure rounded up to £67. It was also noted that the south boundary had been scaled from "the original ordinance sheet from which the above plan was traced, which we understand to be sufficiently exact for the purpose" ([JB104; pdf785]. The letter concluded that if an actual survey were required, the firm would be happy to assist. There is nothing from the other minutes or other materials produced (many of which post-dated the 1912 Minute of Agreement) to indicate that this offer was taken up. It is not stated which OS Map was used, though the parties' experts were agreed that the plan appended to the 1912 Minute of Agreement was not traced from the 1895 OS Map. The reference to the "ordinance sheet" may be to the then most recent OS Map, that of 1908. For completeness, I should note that the Corporation's internal assessment of the cost of constructing the new wall was £500.

The 1912 Minute of Agreement

[33] The principal of the 1912 Minute of Agreement was produced. It was a tripartite deed among the Grange Trustees, the EA Club and the Corporation. The preamble narrated that the Grange Trustees and the EA Club were respectively the owners and tenants of the EA Land; that the Corporation had approached them with a view to their "giving up a portion" of the EA Land for the purposes of road widening and that they had agreed to do so. So far as material, it provided as follows:

1) Clause First: … that

> "[w]ithout any price being received by them [ie by the Corporation], the [Grange Trustees] and [the EA Club] for their respective rights and interests hereby give up for the purpose of widening the street of Comely Bank Road… a strip of ground six feet in width along the whole frontage of [the EA Land] to said road…". (Emphasis added.)

The strip given up (ie "the 1912 Strip") was described by reference to the 1912 Plan, as the area delineated and coloured pink "on the plan annexed and signed as relative hereto". No fuller verbal description of the 1912 Strip was provided. Consistent with a new break-away conveyance, a full conveyancing description of the land of which the 1912 Strip formed part ("All and Whole [the land conveyed to the Grange Trustees under the 1882 deed]") was provided.

2) Clause Second: … that the Corporation would remove the

> "existing boundary wall on the said strip of ground, and shall thereafter erect a new boundary wall along the frontage of the said [EA Land] to Comely Bank Road, as widened" (Emphasis added).

It was further stipulated that the wall would be 6 feet in height from the level of the pavement, with a pointed serrated surmount to prevent climbing. (The pursuer relies on this additional feature to argue that its principal purpose was not road widening.) The new wall

> "shall be built in a substantial manner and in accordance with the Plan submitted to and approved by [the Grange Trustees]. The work was to be carried out as most suitable for [the Grange Trustees] and the [EA Club]".

3) Clause Third: The 1912 Wall was to be maintained by the Corporation "at their own expense in all time coming".

4) Clause Fourth: This required the Corporation to erect a substantial steel screen "along the line three feet on the field side" to the satisfaction of the EA Club. It was further provided that the top was to be not less than 6 feet above the 1912 Wall (being to a height of 15 feet high from the ground on the playing field side) and the screen would be "maintained in all time coming" by the EA Club.

5) Clause Fifth: this certified that the transaction was not part of a larger transaction and parties consented to registration of the deed.

As is clear from its notations, the principal of the 1912 Minute of Agreement was presented for recording in the General Register of Sasines ("the GRS") for the County of Edinburgh on 2 August 1912 and it bore a 10-s stamp duty (parties disputed whether this was the rate applicable at that time to a conveyance of land (as the Council contended) or to "any other deed not described in the schedule", ie a deed other than a conveyance (as the pursuer contended).

The plan appended to the 1912 Minute of Agreement

[34] The 1912 Minute of Agreement had a plan appended to it. The principal of the 1912 Minute of Agreement (ie the handwritten version which was stamped and presented for recording in the General Register of Sasines for the County of Edinburgh) was produced, as well as a typed version of the same vintage. Both had the same plan appended to it. It suffices to note what was depicted on the plan appended to the principal of the 1912 Minute of Agreement ("the 1912 Plan"). (I will use the phrase "the 1912 Plans" when both are referred to.) This showed a pink area in the form of a long, thin rectangular strip on an east-west axis along the length, and immediately to the north, of the old estate wall.

Was the 1912 Wall included within the pink area comprising the 1912 Strip?

[35] I was invited to consider the 1912 Plans and to determine whether the proposed 1912 Wall was included within the pink strip. My clear view upon an examination of the 1912 Plans is that the area marked in pink included the proposed 1912 Wall. That the 1912 Wall was included within the 1912 Strip is shown most clearly at the gateway at the west-most end, where the pink line defining the northern boundary of the pink area was drawn linking both sides of the north face of the proposed 1912 Wall across the new

gateway opening. Further, it is evident upon examination that the pink area extended along the whole line representing the north face of the proposed 1912 Wall. I therefore do not accept the suggestion that the ink from the pink area has inadvertently bled into the area of the proposed 1912 Wall. The factor I find most compelling, and which puts this reading beyond doubt, is the position of the two arrow notations indicating the north and south points of the 6-foot comprising the 1912 Strip. The north-most of the two arrows points to the north face of the proposed 1912 Wall; in other words the north face of the 1912 Wall formed the north boundary of the 1912 Strip. Accordingly, the whole of the 1912 Wall was encompassed within the 1912 Strip. For completeness, I note that in the plan appended to the 1913 Missives (relating to the acquisition of a similar strip in the adjoining property to the east (ie along the frontage of what is now Raeburn House)), the proposed new wall in front of Raeburn House (which continued along the line of the adjacent 1912 Wall) was also included within the area of land to be given up and that the northern edges of both acquisitions align in a continuous straight line.

[36] Accordingly, having regard to the 1912 Plans and the enlargement also produced, I find that the southern edge of the 1912 Strip was to start from the north face of the old estate wall (as indicated by the arrow on the 1912 Plan). If the 1912 Plan were followed, the proposed 1912 Wall would be built on the 6-foot strip to be given up. In short, the pink area shown on the 1912 Plan included the proposed 1912 Wall. As noted below, other consequences arising from possession of such a title might flow, if the grantees acquired and occupied the land up to its physical boundaries. (One possible effect might be to acquire title to a marginally greater area of land, eg the extent to which the straight 1912 Wall is marginally more than 6 feet to the north of the slightly curved old estate wall.)

[37] From this I infer that it was the common intention of the parties to the 1912 Minute of Agreement that the proposed 1912 Wall be built within the 6-foot strip. The pursuer argued that this was not conclusive of whether, in fact, the 1912 Wall was built within the 1912 Strip and they led expert evidence to try to establish that it was not.

Was the old estate wall included within the pink area comprising the 1912 Strip?

[38] Having regard to the common assumption of the pursuer and developers and their experts, that the old estate wall was also included within the 6-foot strip, it is necessary to test that assumption against the 1912 Plan and the 1912 Minute of Agreement. The words underlined in Clause Second (concerning removal of the existing boundary wall "on the said strip") would suggest that the 1912 Strip included the old estate wall. However, in submissions, Mr Barne QC, who appeared for the Council, acknowledged that there was a certain tension between those words and the 1912 Plan itself, which appeared to exclude the old estate wall from the pink area. (Neither the developers nor the pursuer addressed that tension in the evidence or in submissions.) It is therefore necessary to consider whether the pink area representing the 6-foot strip to be given up included or excluded the old estate wall. (If included, then the south face of the old estate wall was the south boundary of the 1912 Strip; if excluded, the north face of the old estate wall was the south boundary of the 1912 Strip.) In my view, the pink strip on the 1912 Plan did not include the old estate wall. This is clear upon examination of the principal of the 1912 Plan (and the enlargement). This is confirmed, in my view, by the treatment of the old estate wall openings providing access between the road and the EA Land. It is patent that the old estate wall openings are uncoloured up to the line representing a continuation of the northern face of the old estate wall. In other words, the old estate wall openings were excluded from the pink area. It is

highly improbable that the old estate wall would have been included in the pink area but the old estate wall openings excluded, as this would have resulted in a peculiar gap-tooth of different ownerships along the *solum* of the old estate wall and, once the 1912 Wall was built, would have left marooned two little rectangular islands (the former old estate wall openings) inexplicably retained in the ownership of the Grange Trustees. Furthermore, such a conclusion is patently inconsistent with the straight line of the southern boundary of the 1912 Strip shown in the 1912 Plan. The position of the south arrow on the 1912 Plan, pointing as it does to the north face of the old estate wall (as the start of the southern boundary of the 6-foot strip) further reinforces the conclusion that the old estate wall was excluded from the 1912 Strip.

[39] As noted above, the pursuer and the developers (and their experts) assumed that the 6-foot strip included the old estate wall and hence their key measurements were taken from its south face. However, that is not consistent with the 1912 Plan and my finding, based on it, that the south boundary of the 1912 Strip was the north face of the old estate wall. (I will address the consequences of that inconsistency in the next section of this Opinion.)

[40] The exclusion of the old estate wall from the 6-foot strip (as *per* the 1912 Plan) is entirely consistent with the Corporation's road-widening purposes. It may be the case that no party to the 1912 Minute of Agreement applied its mind to ownership of the *solum* of the old estate wall, but it is unlikely that the Corporation would have achieved its intended purpose of acquiring an additional 6 feet if less than 4 feet of that remained unbuilt on (ie if both the old estate wall (1 foot 8 inches wide) and the proposed 1912 Wall (1 foot 2 inches wide, together totalling 2 feet 10 inches) were located within the 6 feet of the 1912 Strip).

Further, it sufficed to comply with the granters' stipulation, if the 6-foot strip commenced from the north face of the old estate wall.

Consideration of extrinsic evidence

[41] In coming to the conclusions that the proposed 1912 Wall was included within the 1912 Strip, that the old estate wall was excluded from it and that the south boundary of the 1912 Strip was the north face of the old estate wall, I have only had regard to the 1912 Minute of Agreement and the 1912 Plans. I note that some evidence was led (without objection) of certain matters extrinsic to the 1912 Minute of Agreement which might inform this issue. Indeed, all parties referred to entries extrinsic to the 1912 Minute of Agreement when making submissions as to its meaning and effect. The extrinsic matters included the following:

1) The fact that at both ends of the old estate wall its north face is almost exactly 49 feet north of the base point (as demonstrated by figures 2 and 8 of Mr McCreadie's second supplementary report ("MR3")). This coincides with the only known measurement referred to at the material time by the burgh engineer in relation to the Corporation's road-widening purposes. In MR3 Mr McCreadie plotted the 49-foot line in relation to the old estate wall. (The pursuer's purpose in instructing MR3 appears to have been to undermine Mr Laird's reliance on the figure of 49 feet as the width of the road way (*if* this was measured from the inner aspects of physical boundaries of Comely Bank Road (ie to the south face of the old estate wall)). What is striking in my view is that at each end of the old estate wall the 49-foot line coincides exactly with the north face of the old estate wall and, at its east end, it also coincides with the north face of the wall in front of the

Raeburn Hotel (which was the subject of the 1913 Missives). Indeed, the 49-foot line would appear to correlate precisely with the north face of the old estate wall for a considerable distance from the east end (ie as shown in figures 6 to 8 of MR3). The 49-foot line also runs in line with the north face at the smaller of the old estate wall openings. In other words, at each of the most convenient points to take a measurement to its north face (at the east and west ends and at the opening towards the middle) the distance is 49 feet (measured from the base point to the north face of the old estate wall). To the extent that the 49-foot line and the north face of the old estate wall do not coincide, it is because the north face of the old estate wall dips slightly to the south at some points. As I understood Mr McCreadie's evidence, the maximum amount of that deviation was about 1 foot.

2) The second extrinsic factor is the evidence of satisfaction of the granters' stipulation that the strip to be given up did not impinge more than 6 feet into the playing fields (see para [31(7)], above).

3) The third factor extrinsic to the 1912 Minute of Agreement was the passage from the meeting on 30 November 1912 of the Grange Trustees stipulating that there be no conveyance.

[42] The defenders referred to the first two matters, while the purser referred to the third matter. For completeness, I should note the Corporation's recording of the agreement reached (set out at the end of para [31(6)] above), that the encroachment beyond 6 feet was reckoned from the north side of the old estate wall.

[43] In submissions the question of the admissibility of evidence extrinsic in construing the 1912 Minute of Agreement was touched upon. As noted above, I have come to the

findings I have made based on the 1912 Minute of Agreement and so need not consider these submissions in detail. I would have accepted the defenders' submission, under reference to the observations of Lord Walker in *Armbister* v *Lightbourne* [2012] UKPC 40, (2013) 1 P&CR 17 at paragraph 46 and Lord Kyllachy in *Hetherington* v *Galt* (1905) 7 F 706 at 713, that for the purposes of determining the boundaries arising from an ambiguous grant of land regard could be had to conduct post-dating the grant. (While reference was also made to deeds granted by the Grange Trustees years after 1912 in order to illustrate their understanding of the position, the scope of the relevant evidence is the conduct of the actual parties to the 1912 Minute of Agreement, as it is their conduct which is presumed to be in full knowledge of the objective facts reasonably available to the parties (including their understanding of their rights), and from which an inference may be drawn). This approach also accords with Lord Kinnear's observations in *Boyd* v *Hamilton* 1907 SC 912 at 923, confining the relevant evidence to "facts and circumstances at the time when the grant was made and to the conduct of the parties immediately following the grant" (emphasis added). As a consequence, I would have taken into account the matter (set out in paragraph [31(7)], above) of the EA Club's post-contract approval of the 1912 Wall as built. The EA Club's confirmation that all was in order is highly persuasive that the 1912 Wall was in fact built in accordance with terms of the 1912 Minute of Agreement. Given this evidence, it is not necessary to consider the Council's invocation of the brocard *omnia praesumuntur rite esse acta*. The critical features of the 1912 Minute of Agreement (including the 1912 Plan) are that the 1912 Wall was included within the 1912 Strip and that the south boundary of the 1912 Strip was the north face of the old estate wall. This is also consistent with the evidence I have noted in para [41(1)].

[44] However, I would have been disinclined to accept the pursuer's submission that it was legitimate to look at the discussion internal to the Grange Trustees, in particular the query about the *vires* and the stipulation that there be no conveyance (this is said to be justified for elucidating the purpose or objective of the parties to the transaction as referred to in *Chartbrook Ltd* v *Persimmon Homes Ltd*, [2009] 1 AC 1101). While the 1912 Minute of Agreement falls to be construed in the context of the facts and circumstances known or reasonably known to the parties, the discussion referred to among the trustees was superseded by the final decision of the meeting (the passage the pursuer highlighted being only part of the discussion) and which better reflects the conclusion of the collective mind of the Grange Trustees. Even then, that evidence would require to be balanced against the formal recording several months later of the final conditions in the Minutes of the Corporation's Streets and Roads Committee in February 1912 (which provided that, if there was a conveyance, the Grange Trustees' title was not challengeable (see the fourth condition, recorded para [31(6)]) and where (as noted below) features of the 1912 Minute of Agreement were only required if that deed were a conveyance.

[45] The evidence that the north face of the old estate wall (as envisaged by the 1912 Plan) reinforces, rather than undermines, Mr Laird's reliance on that figure.

Resolving the tension between the 1912 Plan and Clause Second of the 1912 Minute of Agreement

[46] I return to the tension, noted above, between the wording of Clause Second of the 1912 Minute of Agreement (which was suggestive that the 1912 Strip would include the old estate wall) and the 1912 Plan (which clearly excluded the old estate wall from the 1912 Strip). In my view, in resolving this ambiguity and determining the scope of the grant,

the 1912 Plan is to be preferred. Clause Second relates to a subsidiary obligation of the Corporation to remove the old estate wall, which is not dependant on the old estate wall being part of the 1912 Strip. However, the description in the operative clause (Clause First) of the land to be given up refers expressly to the 1912 Plan. This reinforces the primacy of the 1912 Plan in recording the extent of that grant to the Corporation. Two features of the 1912 Plan, the arrow notations and the colouring, both exclude the old estate wall from the 1912 Strip, but they include the proposed 1912 Wall within the 1912 Strip. Accordingly, to the extent that it is necessary to resolve the tension in the 1912 Minute of Agreement between Clause Second and the 1912 Plan, I do so by preferring the 1912 Plan on the basis of the factors just noted.

[47] While Mr McCreadie stated that the 1912 Plan was "indicative", he simply meant that it was not drawn to scale (because the measured distance between the arrows did not correspond to the figure of "6'"). He of course did not use the term "indicative" as understood in conveyancing practice (and which in that context is contrasted with "taxative"). Indeed, Mr McCreadie and Mr Laird agreed that the 1912 Plan was not based on the 1895 OS Map and that the old estate wall was drawn straighter on the 1912 Plan than it in fact was. It must be observed that the quality of being "straight" is relative. The overall length of the old estate wall exceeded 110 metres and the extent of deviation from the straight line drawn between its two ends was no more than about 1 to 2 feet. For most purposes, this is a straight line. It is notable, too, that the 1912 Plan was not drawn to scale (as found in MR2) and that it was not based on the more precise 1895 OS Map. This deviation from a straight line is barely perceptible to the naked eye when examining of the 1895 OS Map - the most precise scale ever used. On my examination of that Map, if there were a deviation, this appeared to be the old estate wall impinging slightly to the north into

the field, and not bowing south as the experts found (see para [8(1)], above). It should be noted that that form of deviation to the south required to be marked on the principal of the 1895 Map in the course of the evidence by one of the experts, with the aid of the computer software used to examine it. In light of this, there is some force in the defenders' submission that this may be no more than an aberration created in the production of the 1895 OS Map or in the process of digitising it. In any event, the ability to identify and quantify the deviation from straight was made possible by use of CAD software (both experts note that what they endeavoured to illustrate on the hard copy paper maps lodged was more apparent if viewed via the software (a suggestion not pursued at the proof)) as applied to digital version of the 1895 OS Map. These observations call into question the overly exact exercise Mr McCreadie undertook in compiling the TSD. (A point the Council made in submissions.) It is clear from its terms that the purpose of the 1912 Plan was not to achieve exactitude in expressing the relationship of the proposed 1912 Wall to the old estate wall, but to reflect the granters' stipulation that they lost no more than 6 feet of the playing field as bounded by the 1912 Wall. In the words of the surveyor instructed by the EA Club, a plan "sufficiently exact for the purpose" (see para [32], above).

[48] The 1912 Plan is cogent evidence that, in order to achieve the granters' stipulation, the proposed 1912 Wall was to be built within the 6-foot strip (ie the 1912 Strip) and also that parties were unconcerned as to the ownership of the *solum* of the old estate wall (perhaps on the assumption that the Corporation already owned it). For the foregoing reasons, I find that the 1912 Plan is the clearest indication of the parties' intentions that the location of the south boundary of the 1912 Strip was the north face of the old estate wall and that the 1912 Wall formed its northern edge.

The 1912 Wall as a boundary wall

[49] The notations in the 1912 Plan, to the effect that the 1912 Wall was to function as the new boundary wall, are also consistent with the 1912 Minute of Agreement, namely, the references therein to "boundary" walls. The old estate wall is described as "the existing boundary wall" at the beginning of Clause Second, and which is to be replaced by the erection of "a new boundary wall" - ie the 1912 Wall - "along the frontage of the …Field…. , as widened". The reference in each case to the 1912 Wall and to the old estate wall as a "boundary" wall is, in my view, highly significant. This demonstrates that the parties' common intention was that the old estate wall had marked, and the 1912 Wall would mark, the dividing line of their respective lands. It was enough for these purposes to depict the old estate wall and the 1912 Wall as straight lines. There was no need for the 1912 Plan to be drawn to scale. It should be noted, too, that by the time the 1912 Minute of Agreement was executed, the parties had already agreed the location of the 1912 Wall, which was to be built "…in accordance with the Plan already submitted to and approved by [the Grange Trustees]": see Clause Second. In these circumstances none of the parties was concerned that the construction of the 1912 Wall as a straight line between its two ends might result in the Corporation obtaining marginally more than 6 feet (at those points where the old estate wall bowed slightly to the south, if the parties had even noted this), than if the irregular (ie the minor deviation from straight) contours of the old estate wall were precisely replicated (ie to ensure that the 1912 Wall was exactly 6 feet to the north of the old estate wall at all points). The figure of 6 feet was indicative of the proportions of the 1912 Strip from north to south; that figure was not prescriptive of the line of the northern boundary of the 1912 Strip. The proper measure of the extent of the grant on its northern boundary was the 1912 Wall itself *qua* boundary wall.

Conclusion that the Pursuer's Disputed Strip does not exist

[50] The characterisation in the 1912 Minute of Agreement of the 1912 Wall as a boundary wall is fatal to the pursuer's case. If, as I have determined, the 1912 Wall was included within the 1912 Strip, then the land granted to the Corporation in 1912 included up to the north face of the 1912 Wall (regardless of precisely where it was built) and the southern boundary of the granters' land was to the north face of the 1912 Wall which the Corporation had acquired. There was therefore no scope for a putative gap or strip of land to exist (ie outwith the grant of the 1912 Minute of Agreement) between the south face of the 1912 Wall and the northern edge of the 1912 Strip - the existence of which was the fundamental premise of the pursuer's case. On that analysis, no gap or Disputed Strip is capable of coming into existence immediately to the south of the 1912 Wall.

[51] That finding is sufficient to dispose of the action in favour of the defenders, as the pursuer's case is essentially predicated on establishing the existence of the Disputed Strip as a gap between the northern line of the 1912 Strip and the 1912 Wall. However, even if the Disputed Strip potentially existed, there is a further difficulty for the pursuer's case. This concerns the location of the putative gap and arises from the extrinsic evidence noted at para [41(1)] above. The thrust of the pursuer's expert evidence was to demonstrate that the distance between the south faces of the old estate and 1912 Walls was more than 6 feet and that this resulted in a gap between the <u>northern</u> boundary of the 1912 Strip and the south face of the 1912 Wall. However, if it is correct that the eastern and western ends of the south face of the 1912 Wall were 6 feet to the north of the north face of the old estate wall, and if the 1912 Wall was built on the straight line between those two end points as indicated on the 1912 Plan (suppositions borne out by the GL Survey 2000 and confirmed by Mr Laird's

Report and the Overlay), then any "gap" between the 1912 Strip (*if* assumed to be exactly 6 feet in width along its whole length) would appear immediately to the north of the north face of the old estate wall (ie in its modest concave curve). This follows because the northern part of the 1912 Strip comprised the 1912 Wall, and the Corporation (and thereafter the Council) occupied or had control of the 1912 Strip up to the north face of the 1912 Wall.

[52] Accordingly, even if the 1912 Minute of Agreement (including the 1912 Plan) had admitted of the possibility of any "gap", this was of no avail to the pursuer, for the simple reason that because the north face of the 1912 Wall was the north boundary, any gap would be to the south of the 1912 Strip (ie in the slight concave curve where the old estate wall bowed south), and not to the north of it (as the pursuer presumed). In other words, even if the Disputed Strip existed, it was not where the pursuer contemplated. Any gap constituting the Disputed Strip was, for the pursuer's purposes, in the wrong place. It was not encompassed within the 2018 Disposition. This conclusion suffices to determine that the pursuer's action fails. However, in deference to the evidence led at proof and the detailed submissions advanced, I consider these in Appendix C to this Opinion.

Disposal

[53] The pursuer's action fails. As is apparent from my determination of the other issues, the defenders have succeeded on most of their lines of defence. I reserve meantime all question of expenses.

APPENDIX A to OPINION

The pursuer's expert witnesses

Mr McCreadie's evidence

[1] The pursuer led the evidence of Mr David McCreadie, of 3D Measuring and Modelling, a geospatial engineer with expertise in many areas of geomatics including mapping, 3D city and infrastructure modelling, survey of heritage sites and historical digital reconstruction. He spoke to his principal report ("MR1") and his two supplementary reports (both dated 26 August 2019); his first supplementary report ("MR2") concluded that the plan appended to the 1912 Minute of Agreement was indicative only, and his second supplementary report ("MR3") sought to determine the degree of deviation in the line of the wall.

Mr McCreadie's principal report ("MR1")

[2] In brief, the steps he employed in MR1 were as follows:

1) Historic mapping and other data: Mr McCreadie researched the historical records and identified (i) the 1895 OS Map, which was produced to scale of 1:500 (which was unique, as subsequent OS maps were produced to lower scales) and which depicted the old estate wall, and (ii) the 1914 OS Map, produced to a scale of 1:2500, which depicted the 1912 Wall. The scale of the 1895 OS Map permitted any feature of 6 inches or greater to be depicted. By contrast, the scale of the 1914 OS Map was accurate only to +/- 19.7 inches, which was regarded as too imprecise for the desiderated accuracy. Reference was also made to a "Structural Condition Report" associated with a planning application ("the 2012 Condition Report"), the photographs of which depicted a degree of undulating bowing or

historic movement of the 1912 Wall as the trees to the south matured. This was said to be a further reason why the 1912 OS Map was inadequate.

2) Topographic Survey: Mr McCreadie undertook a topographic survey (to a scale of 1:50) of the physical features of the ground and structures on either side of Comely Bank Road using laser scanning instruments, the data from which generated 3-dimensional "point cloud" of all physical features. The images thus generated are photograph-like in their depiction of physical features, but enable a greater degree of accuracy than measures estimated from photographs. From this data a vector map (generated with computer-aided design ("CAD") software) was made, depicting the physical features in two-dimensions.

3) Adding the old estate wall to the Topographical Survey Data ("TSD"): In order to relate the TSD to the 1895 OS Map, a digital version of the latter was purchased. The digital 1895 OS Map was rescaled in order to have it agree with the scale of the TSD, in effect, enabling the features on the 1895 OS Map (now scaled to 1:50) to be plotted onto the digital TSD. This exercise in geo-referencing did not involve distortion of the 1895 OS Map. (In parole evidence, he explained that he used six reference points, as this was said to improve the accuracy. As noted below, Mr Laird was criticised for using only two reference points.) The digital 1895 OS Map was overlaid with the TSD. There was a very close agreement of the two data sets (ie a very close alignment of features shown on both) to conclude that they were accurate to +/- 3.9 inches. The next step was to incorporate the old estate wall into the TSD (again, using proprietary CAD software).

4) Adjusting for distortions in the 1895 OS Map: On the basis that the digital version of the 1895 OS Map acquired from the National Library of Scotland would have been scanned from an older paper map, it was anticipated that there would be some distortions. The minor dis-alignment of the south and west walls of what is known as the Raeburn Hotel illustrated this. As a cross-check, a measure from the southwest corner of the Raeburn Hotel to the south face of the old estate wall based on the 1895 OS Map produced a distance of 14.136 metres, whereas the same physical features were measured at a slighter shorter distance of 14.012 metres (ie a difference of .124 metres (or 4.9 inches)). This difference was used to make an adjustment to other measurements. In particular, this justified moving the traced position of the old estate wall south by this distance ("the alignment adjustment").

5) Adding the 1912 Wall to the 1:50 scale TSD: Having rejected the 1914 OS Map as insufficiently accurate, Mr McCreadie sought a means to add the 1912 Wall to the combined data sets of the digitised 1895 OS Map as overlaid on the 2-dimensional vector plan of the TSD. To that end, he sought evidence on the ground for the positions of the 1912 Wall at its east and west ends. He reviewed photographic evidence (taken while the 1912 Wall was still standing) as well as other material (including a plan) from a 2012 Condition Survey produced in 2012. Mr McCreadie was satisfied that the accuracy of the east and west points were +/- .4 inches. These were plotted onto the combined data set and a straight line then drawn between them to represent the 2012 Wall. As a crosscheck, the location of the 1912 Wall as depicted in the 2012 Condition Report (once rescaled) was also overlaid on the combined data set. This was said to demonstrate the

close alignment between that survey and Mr McCreadie's exercise, albeit Mr McCreadie explained that the 2012 Condition Survey reflected the then state of the wall (including the distortion caused by the trees). The south face of the 1912 Wall ascertained by the TSD was similar to or a little south of that shown in the 2012 Condition Report. The discrepancy was explained by the fact that the 2012 Condition Report showed the 1912 Wall, as distorted by the growth of substantial trees immediately to the south, and which had the effect of tilting parts of the 1912 Wall to the north in an undulating pattern.

6) Measurements from the TSD: The steps described in the preceding sub-paragraphs created a single data set containing the locations of the north and south faces of the old estate wall and the south face of the 1912 Wall, and from which measurements could be taken using the software at 10 metre intervals along the walls from east to west. Each measure was from the south face of the 1912 Wall and the south face of the old estate wall. In each case, the distance between these two south faces was at least 6 feet 6 inches and toward the middle was as wide as 7 feet 9 inches. If these measurements were adjusted to reflect the alignment adjustment (see sub-paragraph (4), above), then the distances increased, viz the minimum distance was 6 feet 6 inches and the maximum distance was 8 feet.

7) Conclusions: Mr McCreadie concluded that the 1895 OS Map met the RICS criteria for accuracy for a 1:500 scale map (this was demonstrated by its alignment with the TSD), although there were small distortions caused by digitising the 1895 OS Map, and the location of the old estate wall could therefore be plotted with a high degree of certainty onto a vector plan generated by the

TSD such that its position could be established to +/- 3.9 inches). A combination of field and photographic observations enabled the 1912 Wall (or, more accurately, its south face) to be established to +/- .4 inches. This enabled the distances between the respective south faces of the old estate wall and the 1912 Wall to be determined, and once the alignment adjustment was made this varied from between 6 feet 6 inches to 8 feet.

[3] The conclusion Mr McCreadie reached in MR1 was that the distance between the south face of the old estate wall and the south face of the 1912 Wall was never less than at least 6 feet 6 inches along its entire length (being 6 feet 7 inches at its east end, 6 feet 6 inches at its west end, and at most some 7 feet 9 inches at the approximate mid-point, where the wall bowed to the south). After allowing for an adjustment (which was said to better align the digitised version of OS 1895 with his own TSD), the distance was never less than at least 6 feet 6 inches along its entire length (being 6 feet 11 inches at its east end, 6 feet 6 inches at its west end, and some 8 feet at the approximate mid-point, where the wall bowed to the south).

Supplementary reports of Mr McCreadie

[4] As noted above, Mr McCreadie prepared two supplementary reports:

1) MR2: In this report Mr McCreadie considered the accuracy of the 1912 Plan. Mr McCreadie concluded that this was probably traced from the 1895 OS Map (as augmented by additional notations of structures post-dating the 1895 OS Map but which are not here relevant). However, Mr McCreadie concluded that the old estate wall was simplified as depicted on the 1912 Plan, essentially because the thickness of the old estate wall was inaccurate (the old estate wall was 1 foot

8 inches on the 1895 OS Map but appeared to be only 1 foot on the 1912 Plan) and because the south face of the old estate wall was drawn in a straighter line than on the 1895 OS Map. He also noted that the arrows indicating a 6-foot width were positioned at the north face of the old estate wall and "perhaps" to the north face of the proposed 1912 Wall. While the notation was that the distance between the arrows was 6 feet, the scaled measure was closer to 4 feet 11.3 inches.

2) MR3: The purpose of this report was to consider the reliance by Mr Laird (the Developers' expert) on the 49 foot measurement (including a 7 foot wide pavement to the north of Comely Bank Road), which figures were derived from the burgh engineer's report in 1911. Mr McCreadie concluded that these figures were not accurate. The 1895 OS Map depicted a pavement width of between 5 feet and 6 feet 6 inches. In relation to the measurement of 49 feet as the width of Comely Bank Road between the base point and the south face of the old estate wall, Mr McCreadie checked this on the 1908 OS Map. While this did confirm the figure of 49 feet, the standard deviation was +/- 1 foot 8 inches. Essentially, in MR3 Mr McCreadie plotted a line 49 feet from the north face of the garden walls of the properties on the south side of Comely Bank Road ("the base point") onto the TSD to show that (at certain points) the notional line of 49 feet drifted a little to the north of the old estate wall (as depicted on the 1895 OS Map). Mr McCreadie concluded that the north face of the garden walls on the south side of Comely Bank Road (ie the base point) were not in a straight line. Accordingly, he used a degree of judgment as to where to draw the notional 49' line to the north of this admittedly varying base point. An examination of the depiction of the yellow line (in the seven separate segments showing the whole length of the old estate wall in

close up) shows that the yellow line (being a notional 49 feet north of the base point) coincided pretty precisely with the north face of the old estate wall - especially at its east and west ends (ie on figures 2, 7 and 8). At other points the yellow line was a little to the north of the north face of the old estate wall. While the degree of drift varied, Mr McCreadie confirmed in his parole evidence that the maximum difference was 1 foot 8 inches. This was said to reinforce the conclusion that the 1912 Wall was built to the north of the 1912 Strip. Mr McCreadie surmised that in 1911 no one checked the actual position on the ground. He also surmised that because on his TSD the south face of the 1912 Wall was built within a few inches of a line 13 feet from the north road kerb of Comely Bank Road, the instruction at the time was to build 13 feet from it (ie allowing a 7 foot kerb). From this he concluded that the 1912 Wall was further than 6 feet from the south face of the old estate wall.

Cross-examination of Mr McCreadie

[5] Mr McCreadie was cross-examined in relation to the following:

1) He accepted that he had not seen the instructions to the surveyors for compilation of the 1985 OS Map, but he believed he understood fieldwork instructions for the production of maps to various scales.
2) He believed, in common with Mr Laird, that the Corporation would have continued to update their own reference OS maps themselves, though he accepted that none had been produced. He believed that the 1912 Minute of Agreement Plan was derived from such an updated map internal to the Corporation and not from the 1895 OS Map.

3) He accepted that a figure of 49 feet did not feature on any of the contemporaneous maps produced, though he tried to suggest that this figure might indicate considerable rounding up as no inches were stated. He acknowledged that the burgh engineer might have made a measure on the ground, but he thought it more probable that this figure was produced from drawings already held because he could find no width of 49 feet (ie from the inner aspects of the physical features bounding the road) on the basis of any OS map. He was doubtful that the burgh engineer undertook a measurement, as he maintained that he has no idea how the figure of 49 feet was derived. He did accept that the 1908 OS Map had the same figure.

4) He also accepted that it was not specifically stated that that figure of 49 feet was necessarily the distance between the inner faces of the physical features bounding the road (ie the south face of the old estate wall and the base point).

5) Under references to the arrows on the 1912 Plan, he accepted that they pointed to the north faces of the old estate wall and the proposed 1912 Wall, and that this evinced an intention to define the parameters of the 6-foot strip.

6) He accepted that on the 1912 Plan both the proposed 1912 Wall and the old estate wall was shown as straight.

7) He clarified that the alignment adjustment he proposed was simply to achieve a better alignment in that area (ie in the vicinity of the Raeburn Hotel) but not that the 1895 OS Map was inaccurate.

8) He and Mr Laird agreed that the location of the north face of the old estate wall was as plotted by Mr McCreadie and that they were also agreed as to the position of the north face of the old estate wall at its east and west ends. He was critical of

Mr Laird for not appreciating that the old estate wall was not straight and for not noting that the old estate wall was bowed to the south. He was also critical of Mr Laird for assuming that both walls had the same width: they did not, as the 1912 Wall was, at 1 foot 2 inches, ie about 6 inches thinner than the thickness of the old estate wall.

9) He accepted that his report was critically dependent on the 1895 OS Map. He rejected the proposition that this might be inaccurate due to reproduction via zincography.

10) He resisted the proposition that some features on the 1895 OS Map would simply be symbolically represented (as opposed to actually representing a feature). While he acknowledged that that may be the case for vegetation, he was positive that man-made structures (such as garden walls) would be measured. That was what he was instructed to do when he undertook this type of survey work earlier in his career.

11) He accepted that the maximum bowing of the old estate wall to the south was no more than 1 foot 6 inches, that the width of the old estate wall was 1 foot 8 inches and further, that the extent of the bowing to the south was never more than the width of the old estate wall.

12) The plan appended to the 1913 Missives relating to what is now Raeburn Hotel was put to him, as showing the best relationship between the 1912 Wall to the south of the EA Land (as depicted on that plan) and the then-extant line of the old estate wall in front of the Raeburn Hotel. Mr McCreadie repeatedly declined to express a view on the distance between the two plans, in the absence of scanning this to a CAD system.

[6] While other topics were explored (eg techniques of zincography, how the NLS digitised maps, the meaning of certain notations or abbreviations (not related to the features under consideration), the standards of the RICS guidance and the function of redundancies in mapping techniques), they did not generally assist in clarifying the relevant issues.

No challenges to Mr McCreadie's methodology and evidence

[7] While there were challenges to features of Mr McCreadie's evidence, there was no fundamental challenge to his methodology.

Comment on MR3

[8] On examination, the 49 foot line Mr McCreadie plotted onto his TSD coincided almost precisely with the east and west ends of the old estate wall. The north face of the old estate wall and the notional 49 foot line matched almost exactly, when shown overlaid in figures 8 and 9 and the east-most half of figure 6 - a distance of c 40 metres (assuming figures 2 to 8 cover the whole 117 metres) in MR3.

The developers' expert evidence: Mr Laird

[9] The developers led Bryan Laird, a civil engineer, who is employed by Harley Haddow (Edinburgh) Limited ("HH") as a principal engineer. He had worked in that capacity since 2016 and as an engineer for 22 years. He spoke to Harley Haddow's role in the development. They prepared the applications under section 56 of the Roads (Scotland) Act 1984 for works to be carried out on the public roads, including along the frontage of Comely Bank Road.

[10] Mr Laird spoke to the topographical survey Overlay assessment diary prepared by Harvey Haddow in May 2019 ("the Overlay"). The Overlay was essentially a desk-top study of a number of earlier topographical surveys (including the 2000 GL Survey) to determine the location of the 1912 Wall. It is not necessary to detail the other surveys, as the relative notations on the Overlay did not provide more information than that contained in the 2000 GL Survey. (The Overlay did not consider the 1895 OS Map; it was based on topographical surveys.) The following were depicted on the Overlay:

1) The line of the 1912 Wall as disclosed in the 2000 GL survey was depicted on the HH Overlay (as an unbroken green line). Two reference points relating to identifiable physical structures were used to correlate the 2000 GL and another survey. (Mr McCreadie undertook the same geo-referencing exercise, but used 6 points, not just 2, a point of criticism made of the 2019 HH Report);
2) As Mr Laid had been advised that the old estate wall was 49 feet from the base point, this was marked on the plan (as a dashed green line); and
3) Further, on the basis that the Corporation had acquired a 6-foot strip in 1912, this was represented by two parallel dashed brown lines, from the north and south faces of the 1912 Wall (as derived from the 2000 GL Survey).

[11] On analysis, the dashed green line representing the 1912 Wall (presumed to be 49 feet north of the base point) fell within the parallel lines representing the 6-foot strip (ie the 1912 Strip). The foregoing steps demonstrated that it was reasonable to conclude that the 1912 Wall was constructed "in line with historic minutes with tolerance". He explained "tolerance" as constructed in accordance with the dimensions of the thickness of the wall.

[12] Mr Laird also spoke to the 2012 Condition report, which Harley Haddow had prepared.

Examination in chief of Mr Laird

[13] In his parole evidence, Mr Laird confirmed that he did not challenge Mr McCreadie's laser scanning. He agreed with Mr McCreadie that the burgh engineer in 1911 probably used a locally updated town plan. He agreed with the surmise (in Mr McCreadie's report) that the burgh engineer probably used a more accurate locally updated plan than a larger scale (ie less accurate) plan such as the 1908 OS Map.

[14] He was asked questions eliciting evidence on photozincography as a means of producing the 1895 OS Map, notations on the 1895 Map (which were unrelated to the location of the old estate wall) and (under objection) what were said to be a number of distortions on the 1895 OS Map, only one of which related to the old estate wall. He agreed that if one scaled off the 1912 Minute of Agreement Plan, the strip was not 6 feet.

[15] Mr Laird was asked to consider the 1913 Missives Plan and, using a scale ruler, he estimated that the width of the strip to be given up was 6 feet from north face to north face or from south face to south face. This was not the most accurate way to do this but it was a reasonable method. On the questioning of discrepancies in scaling from old maps (under reference to Mr McCreadie's alignment adjustment), Mr Laird explained that these would always arise when comparing an old map and a new survey, and when one tried to fit one image to another. One needed reference points to match orientation and scale to achieve a "best fit". This will not always be 100% accurate. One can do this using two points, as using more can cause distortion at some point on the map.

Cross-examination

[16] The following points were elicited in cross-examination:

1) He did not accept that the measure he took off the scale of the 1913 Missives Plan might be inaccurate to +/- a 1 foot; at most the degree of inaccuracy was only to 2 or 3 inches.
2) It was not difficult to determine the position of the 1912 Wall, as this was depicted as it existed in 2000 (from the GL Survey 2000).
3) Apart from using the figure of 49 from the burgh minutes of 1911, he did not undertake any other measurements on the ground. He used nothing else to determine the position prior to the 1912 Wall.
4) He was challenged as just assuming that the old estate wall was 49 feet from the base point; that he had wrongly assumed that the old estate wall was exactly parallel and was a straight wall. Mr Laird accepted that if the old estate wall was not straight the width of the road might vary, with the result that it might only be 49 feet wide at some points. He did not assume that the old estate wall was straight, but he did use the same offset from the base point. He assumed the burgh engineer would have measured from the base point to the south face of the old estate wall.
5) He had assumed that the thickness of the 1912 Wall was the same as the old estate wall, when undertaking his assessment.
6) He spoke in detail to the Overlay and he accepted that on it parts of the 1912 Wall were to the north of the notional line of the old estate wall (if drawn as exactly 49 feet to the north of the base point). He accepted that if the old estate wall bowed to the south, this would not be reflected in the notional line drawn at a distance of 49 feet from the base point. On that hypothesis, the gap between the south faces of the old estate wall and of the 1912 Wall would exceed 6 feet. He

also accepted the further propositions that if the 1895 OS Map was correct (ie the old estate wall was not an entirely straight wall along its whole length), then the notional 49 foot line will not coincide at all points with the old estate wall, and, further, that if the 1912 Wall were built in line with the old estate wall, this, too would vary. He also accepted that the orange line drawn at 49 feet did not represent an actual wall; it was a 49 foot offset or line parallel to the base point.

7) He accepted that there was no physical way to verify that the old estate wall and the 1912 Wall were exactly 6 feet apart. He had assumed that the dimensions minuted were correct.

Comment on expert evidence

[17] An usual feature of the expert evidence in this case is that the court is not adjudicating between two experts using the same methodology, but coming to different conclusions. Rather, the experts here adopted very different methodologies - Mr McCreadie's map-based TSD and Mr Laird's mathematical exercise of applying the figure of 49 feet to a desktop survey of older topographical surveys - and it is therefore not surprising that their conclusions do not coincide.

[18] I have already explained in the body of the Opinion why the assumptions that the relevant starting point was the south face of the old estate wall or that it was included in the 1912 Strip are, in my view, incorrect. This affected Mr McCreadie's evidence to a greater extent than Mr Laird's evidence. That matter aside, I would not have been prepared to accept Mr McCreadie's conclusions. This is for several reasons.

[19] First, if the point of the exercise is to identify the 1912 Wall, the better starting point is to begin with the known data (ie the GL Survey 2000), rather than the position of the old

estate wall as shown on the 1895 OS Map. On his approach Mr McCreadie was always compelled to make assumptions about the relationship between the two walls, viz as evidenced by assumptions that the 6-foot strip comprising the 1912 Strip was measured precisely from the varying contours of the old estate wall.

[20] Furthermore, Mr McCreadie's adherence to the assumption that the figure of 49' necessarily related to the inner aspect (or south face) of the old estate wall precluded him from recognising the several points when the figure of 49 feet coincided exactly with known points, the most important of which are the east and west ends of the old estate wall (see para [41[1)] of the Opinion).

[21] Moreover, his whole approach (of starting with the old estate wall) is inconsistent with the parties' intentions that no more than 6-feet was lost to the playing fields. Taken literally, this stipulation would dictate the precise replication of the uneven contours of the old estate wall. All of the evidence suggests that this was not done: the 1912 Plan did not disclose an uneven boundary on the 1912 Wall and, as built, the 1912 Wall was straight.

[22] Given that the old estate wall was generally straight and that any deviation was at most 1 foot 8 inches or so, it mattered not to the parties to the 1912 Minute of Agreement that, in providing for (and approving the construction of) a straight wall, marginally more than 6-feet was taken at several points toward the middle of the 1912 Strip.

[23] Accordingly, I would have placed little weight on the evidence of Mr McCreadie. I stress that this is no criticism of his skill, credibility or reliability. He was simply instructed to proceed on the basis of a wrong assumption and to employ a methodological exactitude that was not commensurate with what may be inferred of the intentions of the parties to the 1912 Minute of Agreement. The pursuer has therefore failed to prove the existence of the Disputed Strip, which was the essential premise of its action.

APPENDIX B to OPINION

The Witnesses to fact and expert witnesses (other than Messrs McCreadie and Laird)

The pursuer's witnesses to fact

[1] The pursuer led the following witnesses to fact.

Ian Douglas Lowe

[2] Mr Lowe narrated his background, career, appointments, wider business interests, involvement in the Grange Trust, and personal views as to the location of the 1912 Wall (which have varied considerably) but this is not relevant to the issues at proof. (Nor, it might be said, is the evidence elicited in cross-examination about those changes of belief.) He is the principal behind the pursuer, having purchased that company in the late 1970s. In the belief that the 1912 Wall was not constructed on the 1912 Strip, but built to the north of it, he sought to acquire the *solum* thereof via the 2018 Disposition and he arranged for contractors to paint a red line along what he believed to be the centre line of the *solum*. He confirmed in his parole evidence that he had no input from surveyors as to the location of the red line, but he believed it represented the approximate centre point of the 1912 Wall. He also confirmed the photographs he had taken in February 2015 of the pavement area. Mr Lowe was referred to a valuation report from DM Hall dated 6 July 2019 of the development. This narrated that there was no alternative usable access to the frontages of the retail units other than via the pavement adjoining Comely Bank Road but that the five entrance points along that road had been completed. Mr Lowe confirmed that he had provided the assumed rentals recorded in the table at page 9.

[3] Mr Lowe was cross-examined extensively by the developers on a number of topics of no obvious relevance to the issues (eg his views of some of the materials pre-dating the

1912 Minute of Agreement, his interpretation of the 1912 Plan, his views on the 1882 trust deed creating the Grange Trustees, his attendance in 2017/2018 at meetings of the Grange Trustees, his change of views of the location of the *solum* of the 1912 Wall relative to the 1912 Strip), but he did confirm that he had advised Andrew Carrie, the author of a report addressing *inter alia* the function of the 2012 Wall, to proceed on the basis that the 1912 Wall had been built to the north of the 1912 Strip. (See paragraph 3.3 of the Carrie Report and that he (Mr Lowe) was the author of a draft diagram appended to that report which purported to show this.) The Council also pressed Mr Lowe on his change of position as to his understanding of the location of the 1912 Wall relative to the 1912 Strip. Nothing of significance was elicited in re-examination, as this rehearsed some of the 1912 documentary materials, Mr Lowe's change of position and the terms of the 2018 Disposition.

Michael Baynham

[4] Mr Baynham, a qualified solicitor, is the pursuer's company secretary. He has worked closely with Mr Lowe for 30 years. He instructed solicitors in relation to the 2018 Disposition and liaised with David Jennings about the plan appended to it. He repeated the belief that the 1912 Wall was built to the north of the 1912 Strip.

[5] He was cross-examined under reference to the Keeper's Guidance on "undefined boundaries", which provided that if there were no physical boundaries then metric measurements were required. Mr Baynham acknowledged that there were no metric measurements in the 2018 Disposition and he agreed that the plan appended to the 2018 Disposition did not comply with the Keeper's Guidance. It was put to him that in the case of an undefined boundary without measurements, the Keeper will find it difficult to delineate boundaries. Mr Baynham accepted that proposition but he did not have practical

experience. He had not been aware of the Keeper's Guidance until the week before giving his evidence. His position was that it was only guidance. To be registrable the property had to be recordable on a cadastral map. There had been no response by the Keeper to the 2018 Disposition and no entry on the title sheet of the Land Register in respect of the 2018 Disposition.

[6] In cross on behalf of the Council, the "one-shot" rule of the Keeper was put to him, which was to the effect that if there was a critical defect the Keeper would reject the application. Mr Baynham demurred, having attended a recent conference at which the Keeper had indicated that if no fatal flaw had been identified within 35 days an application for registration would not be rejected.

[7] In re-examination, Mr Baynham confirmed his understanding of clause 5.6.2 of the missives preceding the 2018 Disposition that if the Keeper rejected the plan, the seller was obliged to correct the plan to enable the Disposition to be registered.

Alan Robert Motion

[8] Mr Motion, who was a Chartered Forester, a Consultant Arboriculturist and director of his consulting business, was instructed in 2012 by architects to carry out a survey of the trees around the playing fields, including those to the north of Comely Bank Road. He was instructed in 2016 to update his report and in 2017 he produced an Arboricultural Method Statement for the developers, to address the question of impact on these trees. (A large part of his statements was taken up with a discussion of the tree roots which is not here relevant and he was not taken to any of his own reports in his parole evidence.)

[9] Some of the trees surveyed were situated between Comely Bank Avenue and the 1912 Wall. He estimated that these trees were about 80 to 85 years old. In his

supplementary witness statement, Mr Motion referred to his further instructions in connection with the trees north of Comely Bank Avenue and his subsequent report in 2017. In relation to the function of the 1912 Wall, in his view it was "clear" that the 1912 Wall had a retaining purpose, given the difference between the ground levels on either side of the wall. He estimated that the pavement side was about 1 metre higher than the ground on the playing field side, and that the wall functioned to support the higher ground.

[10] The structural condition report prepared in October 2012 by Michael Laird Architects ("the 2012 Condition Report") showed the trunks of many of these trees, of a mature age, hard up against the 1912 Wall and it showed that the upper parts of the 1912 Wall had been moved off the vertical. The 2012 Condition Report contained cross-sections of the 1912 Wall and notations of the "retention" or height differential of the ground on either side of the wall as varying between 510 and 740cm. The wall was stated to be 2.5 metres high from the playing field side and 1.5 metres high on the road side. Under reference to one of the cross-sectional drawings, Mr Motion confirmed that the displacement of the top of the wall was up to 100 mm and coincided with the location of trees. The displacement was not uniform along the whole length of the 1912 Wall. It undulated.

[11] In cross-examination, he confirmed that the base of the wall would not generally have moved to the same degree as the top, although in re-examination he accepted under reference to one photograph that the displacement at the top and bottom of the wall was similar.

David Jennings

[12] Mr Jennings, a solicitor in private practice for 39 years, was the solicitor instructed on behalf of the pursuer as the disponee of the 2018 Disposition. He explained that as the title

to the property had not previously been registered, it was necessary to instruct a plan for the disposition that complied with the requirements of the 2012 Act. He instructed Millar & Bryce for this purpose. He also submitted the usual application for registration to the Keeper of the Land Register in about September 2018. To the best of his knowledge, the Keeper has not rejected that application.

[13] He was cross-examined about aspects of the description and plan, confirming that the south boundary of the strip of the subjects of the 2018 Disposition now lay under the pavement and that there was no physical feature on the ground reflecting this. It was put to him that the 2018 Disposition did not conform to the Keeper's Guidance. Mr Jennings resisted this; only the southern boundary was without a physical boundary. He had spoken to an individual within the Keeper's plan section the week before giving evidence, who confirmed that a disposition would not be rejected for want of a measurement so long as the land could be identified by other features or if sufficient surrounding detail could be combined with sufficient scaling. While the application in respect of the 2018 Disposition had been with the Keeper for a long time, he understood it still to be pending.

Hannah Ross, Ruth MacDonald and Dame Sue Bruce

[14] The pursuer's list of witnesses contained three individuals who were senior officials or staff within the Council, namely Hannah Ross, Ruth MacDonald and Dame Sue Bruce, but their written statements were agreed to be their evidence in chief, and they were not called. It would appear that one or more of these individuals expressed their views on the question whether the Council or the Grange Trust owned the 1912 Strip or the 1912 Wall, or whether the 1912 Minute of Agreement was an effectual conveyance. (Mr Lowe points to these communings as the basis for the view he formerly held, from which he has since

departed, that the Council owned these.) As these matters are legal questions, or mixed questions of fact and law, this evidence is of no relevance. Indeed, no reference was made to the evidence of any of these witnesses in closing submissions.

The pursuer's expert witnesses

Michael Court and the DM Hall Report

[15] Michael M Court, a MRICS and a partner of DM Hall, spoke to the valuation report dated 7 July 2019 ("the DM Hall Report") of the development. He valued the development at £9.6 million and the value of the *solum* of the 1912 Wall at £4.8 million. The latter valuation was predicated, essentially, on the Disputed Strip as a ransom strip (ie outwith the ownership or control of the defenders (and to which he says he applied the principles in *Stokes* v *Cambridge* (1961) to the effect that the ransom strip owner gets 50% of the development value) and the absence of any other means to access to the retail units on the development site. He confirmed he was asked to assume that the pursuer owned the Disputed Strip.

[16] It was put to him in cross-examination that in 2015 he had valued the *solum* of the 1912 Wall for the Grange Trustees at £1000. He explained that this was a different calculation, a "surrender value calculation", so a nominal value. He had assumed that the 1912 Wall had been punctured at five places; at least there were five places where the foundations had been removed. He confirmed that Mr Lowe gave him the information about rental rates, but said he had also satisfied himself as to tenancy yields. He accepted the difference in value would depend critically on whether or not there was a ransom strip.

Andrew Carrie and the Carrie Report

[17] Andrew Carrie, a Civil Engineer who had been employed in the highways department of the former Lothian Regional Council ("LRC") from 1978 to 1989, was led to speak to his report ("the Carrie Report"). He spoke to his investigations and his response to three questions. At the outset of his evidence, objection was taken to Mr Carrie's responses to questions 2 and 3 of the Carrie Report as well as to his conclusion (at paragraph 1.10) ("the Carrie objection"). In particular, Mr Carrie expressed his opinion on whether any retaining function was "the main or primary function" of the 1912 Wall ("question 2"), and on whether "the presence of some element of retaining function of a wall bounding a public road or footway cause a Roads Authority to include such a wall on their Register of Public Streets" ("question 3")). These questions proceeded on the hypothesis that the 1912 Wall had a retaining function. His conclusion (at paragraph 1.10) was that the 1912 Wall "was never intended to be part of the public road and ought not to be considered as such". No objection was taken to his answer to the question of whether the 1912 Wall had any retaining function ("question 4"). On that matter he concluded that the 1912 Wall did perform some retaining function, namely of retaining the road, given the differences in level.

[18] Mr Carrie was asked about the entries on the front and reverse of a card from LRC's Register of Streets (said to be "copied Feb 1976"). The front described the road (but did not mention either its width or the 1912 Wall). Under the heading "notes" on the reverse of the card, the following entry appeared: "Wall at Edinburgh Academy playing field maintained by Corporation (see Minute of Agreement 1912)". It was his recollection that the card was from a card index system and that entries on the front of the card were for public knowledge and the reverse were notes for the LRC's internal use. It was his understanding that if a wall

were adopted this was shown on the front of the card but if shown on the reverse this was not necessarily the case.

[19] In cross-examination, he confirmed that the draft diagram (described in the Opinion, at para [16]) appended to his report was produced by Mr Lowe, as was some information he recorded about the footway prior to construction of the 1912 Wall and about the location of the 1912 Wall being to the north of the strip referred to in the 1912 Minute of Agreement. In cross-examination he accepted, after some sparring, that if there were a difference in levels near a road a roads authority would use a retaining structure. He was initially unwilling to accept the proposition that such a retaining wall might be part of the road, as "no one has a public right of passage over a wall, so it wasn't a road". It was twice put to him that if a roads authority took a strip of land and erected a wall which had a retaining function, it would be consistent with the roads authority protecting the public. However, Mr Carrie refused to consider or respond to the proposition. The first time the question was put, he countered by asking what was meant by "took a piece of land" and the second time he simply stated that he would expect the road would be adopted. In response to other questions in cross examination, he ultimately conceded that a roads authority could erect a wall as part of a road. He also accepted that a retaining wall could be integral to a road, for example, to prevent the road from collapse.

The developers' witnesses to fact

[20] In addition to their expert, Bryan Laird, whose evidence I consider in Appendix A to this Opinion, the developers led James Young and Gavin Melville. The witness statements of two other witnesses, David Newland and Gillian Smith were agreed as their evidence and chief and they were not called.

1) James Young: Mr Young, a retired civil and structural engineer, undertook site and ground investigations and produced several reports, including the 2012 Condition Report and a structural condition report in 2014 ("the 2014 Structural Report"). In relation to the function of the wall, in his view the 1912 Wall formed a retaining function. This was because the ground level on the playing side was about 3 feet lower (ie the wall on that side was 9 feet tall) than the pavement side (where the wall was about 6 feet high). He also referred to the diagrams in the 2012 Condition Report showing the difference in ground levels on either side the 2012 Wall.
2) Gavin Melville: Mr Melville, a Senior Quantity Surveyor or with a construction company, and who has been involved in the development since late 2016, spoke to the value of the pile of stones which had formerly comprised the 1912 Wall. He estimated that the value of the reusable stone was between £3,000 and £4,000. The cost of removing them from site would be about £2,000.
3) David Newlands: Mr Newlands, a retired chartered accountant, is the chairman of the trustees of the second defenders (a charitable organisation). His statement covered the objectives of the development.
4) Gillian Smith: Ms Smith, a project manager for the company that manages the development on behalf of the developers, spoke to her involvement in the development from 2010 onwards, and to the 2012 Condition Report, the partial collapse of the 2012 Wall in late 2014 and the photos she took at that time.

The Council's witnesses to fact

[21] The Council led no witnesses at proof. The statement of Neil Macfarlane was agreed as his evidence in chief. Mr Macfarlane, a consulting roads and transport engineer, was formerly employed by the Council as a roads manager. In that capacity, he was aware by April 2014 that the 1912 Wall was coming to the end of its useful life, but that a significant sum would be required to rebuild it.

Discussion

Credibility and reliability

[22] No real issue of credibility or reliability was raised in respect of these witnesses to fact, perhaps because so little of their evidence was relevant to the factual and legal issues. Where I have not accepted a witness' evidence on a substantive matter, I have explained this in the Opinion.

APPENDIX C to OPINION

Evidence led at the proof

[1] Parties produced full witness statements and (in the case of experts) reports and which, in accordance with practice in the commercial court, were adopted as the evidence in chief of the witness. (All witnesses adopted their witness statements or reports, without qualification.) The evidence at the proof was focused overwhelmingly on the issue of determining the location of the now-demolished 1912 Wall, as this formed one of the central issues on the question of ownership. This was addressed in detail in the form of the expert evidence of the pursuer's and developers' respective expert witnesses and their several reports. To a lesser extent, there was some evidence about the function of the 1912 Wall as a retaining wall (which was relevant to the roads adoption issue) and about the use of the road and pavement (which was potentially relevant to the public rights of way issues). I have had regard to the witness statements and reports, as well as my notes of the examination and re-examination of the witnesses. In light of my conclusions above, I need not consider this in the body of this Opinion. Out of deference to parties' efforts at the proof led, I note the expert evidence about the location of the 1912 Wall in Appendix A of this Opinion. The evidence of the other witnesses (12 witnesses to fact and two other experts) is summarised in Appendix B to this Opinion. To the extent that it is necessary to refer to matters recorded in the Appendices, the Appendix and paragraph number is given (eg A[1]).

Discussion of McCreadie's evidence in light of the 1912 Minute of Agreement

[2] Even if the 1912 Wall did not function as a boundary, the finding that the 1912 Wall was included within the 1912 Strip undermines a critical assumption of the pursuer's expert.

While each expert could apply modern technology to achieve a degree of precision for part of his calculation, Mr McCreadie's geo-referenced transfer of the 1895 Wall onto his TSD and Mr Laird's mapping of the 1912 Wall onto the Overlay, each expert nonetheless had to make a number of assumptions. Mr McCreadie proceeded on the basis that the calculations he undertook were from the south faces of each of the old estate wall and the 1912 Wall, ie because it was assumed that the 1912 Strip included the old estate wall. However, for the reason set out above this assumption is incorrect. Accordingly, this calls into question the figures recorded in the tables at paragraphs 6.2 and 6.3 of MR1, not least because the widths of the walls differ. If one excluded the old estate wall (ie by starting from the north face), but now included the 1912 Wall, then an adjustment is required, and it would be likely to be a deduction of c 6 inches from each measurement (being the difference between the width of the old estate wall (of 1 foot 8 inches, which is deducted) and the width of the old estate wall (of 1 foot 2 inches, which is added back)). The effect is that a number of the figures are reduced to circa 6 feet, especially at the either end of the 1912 Wall (and for 20 or so metres from the ends).

[3] The second assumption underpinning Mr McCreadie's methodology concerns the assumption that the precise contours of the irregular old estate wall were relevant at all. (For the reasons provided above, the finding that the 1912 Wall functioned as boundary supersedes any reliance on precise measurements to try to prove that some part of the 1912 Wall may have been erected more than 6 feet to the north of the old estate wall.) In my view, it is improbable that the burgh engineer would have felt it necessary to take a measure of 49 feet from the base point at multiple intervals over the whole length of the old estate wall (as Mr McCreadie has done with the aid of laser and computer technology). Rather, the correct premise is that in 1912 the EA Club and Grange Trustees were not

concerned with the precise amount of the total land given up, ie on the hypothesis that the old estate wall was part of the trust's land, but that their principal concern (as expressed in the missives and contemporaneous documentation) was that not more than 6 feet of playing grounds were to be lost. On this, pragmatic, approach, the Grange Trustees and EA Club were not concerned about the old estate wall, but that the effect of the move of a boundary wall to the north did not impinge more than 6 feet. On that understanding, the natural starting point would be the north face of the old estate wall. If one used Mr McCreadie's measurements (without his alignment adjustment), the total ground lost to the granters (ie the width of the narrower 1912 Wall together with the unbuilt-on part of the 1912 Strip to be used for road widening) would have been between 6 feet and 7 feet 3 inches. More to the point, at either end, where there would be obvious physical structures to cross-check the width of the land taken, the distance was exactly 6 feet. Indeed, for the next several 10 metre intervals, that distance of 6 feet is maintained (subject to a minor deviation of 2 inches at 20 yards). In other words, it sufficed for the purposes of the 1912 Minute of Agreement that the measure of 49 feet was taken at each end of the old estate wall. I have already commented on the other points where the known points of the 1912 Wall (when extant) matched this figure of 49 feet. Given the straight line of the proposed 1912 Wall depicted in the 1912 Minute of Agreement Plan, it is likely that if the burgh engineer measured 6 feet north of each of those end points, and then proceeded to draw a straight line between those two points. The function of the 1912 Wall as a boundary wall did not require any greater degree of exactitude. For completeness, I note that the depiction of the 1912 Wall on 1914 OS Map appears to support this.

Was the 1912 Minute of Agreement a conveyance?

Preliminary observations on statutory powers available to the Corporation

[4] As part of the context in which the 1912 Minute of Agreement falls to be construed, it is helpful to understand the suite of statutory powers and duties applicable to the Corporation as the body responsible for the roads ("the roads authority"). I did not understand it to be disputed that, if the Corporation had wished to acquire ownership of the 1912 Strip for road purposes, it had powers to do so. In terms of the Land Clauses Consolidation Act 1845 ("the 1845 Act"), and any "special Act" (as defined in the 1845 Act), public bodies could use compulsory powers to acquire land for specified public purposes. That form of acquisition contemplated acquisition of ownership of the land coupled with compensation for the owner whose land had been compulsorily acquired. The 1845 Act also provided for acquisition by agreement which, again, took the form of permanent transfer of rights of ownership of the land so acquired. In addition, the Corporation had the powers conferred by section 136 of the Edinburgh Municipal and Police Act 1879 ("the 1879 Act"), which provided: "The Magistrates and Council may acquire by agreement lands and heritages for the purpose of widening, enlarging, or otherwise improving any of the streets…". In relation to walls or fences adjacent to roads, section 94 of the Turnpike Roads (Scotland) Act 1831 imposed a duty on roads trustees to erect sufficient walls or other means to secure dangerous parts of the road (the trustees' powers and responsibilities were transferred to the Corporation by section 94 of the Roads and Bridges (Scotland) Act 1878) and further, section 32 of the Edinburgh Municipal & Police (Amendment) Act 1891 vested in the Corporation pavements which it maintained. While the 1912 Minute of Agreement did not specifically refer to the statutory power the Corporation exercised in undertaking the road-widening scheme, this was patently within the scope of section 136 of the 1879 Act.

That acquisition of ownership remained the norm into the 1970s is at least implicit in section 16 of the Roads (Scotland) Act 1970, which provided for the vesting of the *solum* of stopped up roads in the adjoining proprietors (ie *divesting* the roads authorities of ownership). The 1967 Act used "vesting" in this sense, ie of the transfer of ownership; hence the necessity of introducing a different statutory meaning for that word in the Roads (Scotland) Act 1984 (ie roads entered into the public lists of roads "vested" in the roads authorities but "such vesting shall not confer on the authority any heritable right in relation to the road": section 1(9)). Accordingly, in 1912 the Corporation had available a number of statutory powers to achieve road-widening purposes and, where additional land was required, typically this involved acquisition of the ownership of the *solum* of that land.

The Council's position: the 1912 Minute of Agreement was effective as a disposition

[5] The Council contended that the 1912 Minute of Agreement was a valid conveyance of the 1912 Strip in favour of the Corporation, as it intended to create permanent rights that existed "in all time coming". On this hypothesis, the developers contend that the Grange Trustees did not have title to convey the 1912 Wall (it having been carried with the 1912 Minute of Agreement), and which was consistent with the fact that the 1979 Disposition in favour of the EA Club also did not include the 1912 Wall.

[6] The Council relied on the following features of the 1912 Minute of Agreement in support of its submission that it was intended to convey, and did convey, ownership of the 1912 Strip:

1) The 1912 Minute of Agreement contained a full conveyancing description of the subjects to be conveyed. This would not have been required, if, as the pursuer contended, the 1912 Minute of Agreement simply created personal rights.

2) A deed conveying heritable property did not require using the word "dispone": section 27 of Conveyancing (Scotland) Act 1874 ("the 1874 Act") and paragraph 11-12 of Gretton and Reid, *Conveyancing* (5th edition) ("Gretton and Reid"). In that text, it was observed that

> "the common-law rule requiring the use of the word 'dispone' has long since been abrogated, and all that is now needed is some term that makes the intention plain. But in practice the word 'dispone' continues to be used.";

3) Other clauses contained in a disposition in conventional form, such as the date of entry and warrandice, would have been implied into the 1912 Minute of Agreement: See section 28 of the 1874 Act and Gretton and Reid, at paragraph 20-09;

4) It was significant that the 1912 Minute of Agreement was recorded in the GRS, as this demonstrated that the 1912 Minute of Agreement was understood to have an effect on real rights. Although repealed in November 2004, section 15 of the Titles to Land Consolidation (Scotland) Act 1868 (which was in force in 1912), made it sufficient for the grantee to record the conveyance itself in the appropriate Register of Sasines instead of expeding and recording an instrument of sasine;

5) The 1912 Minute of Agreement was stamped in accordance with the stamp duty certificate included in the last Clause of the 1912 Minute of Agreement, which was in terms appropriate at the time for "Conveyance or Transfer of any kind not herein-before described "and for which the rate was, 10s".

6) Furthermore, the 1912 Minute of Agreement contained the certification in Clause Fifth (quoted above). Such a certificate was required in terms of

section 73 of the Finance Act 1910 and applied only in relation to conveyances and transfers. For this reason, the pursuer was incorrect to rely on the 10s duty applicable to "Deed of any kind whatsoever, not described in the schedule".

[7] The Council also relied on the following matters extrinsic to the 1912 Minute of Agreement:

1) The 1979 Disposition granted by the Grange Trustees to the EA Club did not include the *solum* of the Wall. This reflected the fact that the Grange Trustees did not have title to the 1912 Wall. Further, in terms of clause ninth of the Grange Trustees' Deed of Constitution, if the debt on the EA Land was paid off, the Grange Trustees had the power to dispone the EA Land to the EA Club or retain it. Properly construed, the Grange Trustees did not have the power to retain some of the EA Club's ground (on this hypothesis, the 1912 Wall), and dispone the rest of it.
2) The capacity of the Grange Trustees to dispose of land was, at this remove, irrelevant. None of the parties involved in or affected by the transaction took any steps to set it aside. Any such right would now be lost through acquiescence. In any event, the relevant beneficiary of the Grange Trust, being the EA Club, signed the 1912 Minute of Agreement. That was effective consent in terms of section 3 of the Trusts (Scotland) Act 1867 ("the 1867 Act"). The EA Club's consent to the 1912 Minute of Agreement would have barred it from seeking to set aside the transaction.
3) The language used in the 1912 Minute of Agreement should be read in light of the discussion that took place between the Grange Trustees at the time, as

recorded in the minute of the meeting that took place on 30 November 1911 (see para [31(5)].

4) To the extent that the pursuer relied on the Bond and Disposition in Security granted by the Grange Trustees in favour of the Edinburgh Life Assurance Company in 1911 ("the 1911 BDS"), it should be noted that such a security did not divest the proprietor of ownership, notwithstanding the use of dispositive language: *Campbell* v *Bertram* (1865) 4 M 23 at pp27-28. A proprietor could still dispone or grant real rights notwithstanding the existence of such a security (albeit such dispositions might be voidable at the instance of the creditor): see *Edinburgh Entertainments* v *Stevenson* (1926) SC 363 at p375; *Craigie's Conveyancing, Heritable Rights* (1899), p947. The absence of any "recognition" of the 1911 Security in the 1912 Minute of Agreement was therefore irrelevant.

[8] In submissions, senior counsel for the Council, Mr Barne QC, submitted that any issue as to the *vires* of the Grange Trustees to dispose of land was, at a remove of more than a century, irrelevant. (The other parties acquiesced in that submission.) In any event, the relevant beneficiary of the trust, being the EA Club, signed the 1912 Minute of Agreement, which constituted effective consent in terms of section 3 of the 1867 Act. While the question of the *vires* of the Grange Trustees in entering the 1912 Minute of Agreement was not contested at the proof, in the sense of comprising one of the issues the Court required to resolve, it was referred to as a factor relevant to the question of whether the 1912 Minute of Agreement was a conveyance.

The pursuer's position: The 1912 Minute of Agreement was not a conveyance

[9] The pursuer's position was that the 1912 Minute of Agreement was not a conveyance of the 1912 Strip in favour of the Corporation and, accordingly, could not be a foundation writ for prescriptive possession. The pursuer relied on the following factors:

1) The 1912 Minute of Agreement did not contain a dispositive clause. While it was not necessary to use the word "dispone", a valid conveyance still required "other word or words importing conveyance or transference, or present intention to convey or transfer" (section 27 of the 1874 Act). Some form of words was needed denoting that something was passed from a person or place to another. For there to be a "transfer" there must be an indication that ownership of the property passed from one party to another. Neither in the Recitals nor in any of the Clauses to the 1912 Minute of Agreement was there any intention that the Council should become owners of the 1912 Strip. There was no reference to sale or purchase; instead there was only reference to an "arrangement". Instead of words such as "convey", "transfer" or "dispone" or the many synonyms that are available, all that is said was that the Trustees will "give up" the ground in question. At best, this was an undertaking to surrender use of the property rather than to effect a transfer of ownership.
2) While the 1874 Act had changed the requirements for what was a conveyance generally, there were additional requirements for conveyances for land acquired by the Corporation. The 1845 Act was incorporated into the various Local Acts regulating the Council's predecessors, namely in the Edinburgh Municipal Police Act 1879 (section 3) and in the Edinburgh Corporation Act 1906 (section 6). The significance of this was that this provided power for the 'undertaking'.

Section 80 of the 1845 Act specified that conveyances of land purchased under the Act were to be as near as possible in the form of the conveyance set out in Schedule A. The 1912 Minute of Agreement was not in the form of Schedule A. This was another factor indicating that the parties did not intend that it be a conveyance.

[10] The pursuer argued that other factors, extrinsic to the terms of the Minute, were relevant:

1) The Grange Trustees granted the 1911 BDS. In terms of Clause Ninth of the 1882 Trust Deed, the Grange Trustees had power to dispone or make over the grounds to the clubs only if the whole debts on the ground had been paid off. However, given that the discharges were not until 1925, the debts were still outstanding in 1912.

2) Even if the 1882 Deed had not contained that provision, the Grange Trustees would have had no power to dispone the property. Section 3 of the 1867 Act, authorised sale of the trust estate or part of it when the Court has, on an application to it by petition, granted authority or when all the beneficiaries consent. There was nothing to indicate that there was any such petition or any such consent. Without either, a disposition would be *ultra vires* the Trustees.

3) That there was, in the circumstances, no power to dispone and that there could be no conveyance was indicated by the Minutes of 30 November 1911 of the Grange Trustees (see para [31(5)], above) and the Minutes of the Streets and Buildings Committee of the City Councillors of 2 February 1912 (see para [31(6)] where the proposal in relation to the ground proceeded on the basis that the City Councillors, "accept the Trustees' title and do not ask for a conveyance". These

provided clear evidence of the purpose or objective of the parties to the transaction as referred to in *Chartbrook*. This is quite different from looking at evidence of negotiations.

4) The 1912 Minute of Agreement was not bipartite but tripartite. The tenants of the land in question were included as parties to the 1912 Minute of Agreement. Had the 1912 Minute of Agreement truly been a disposition, it would have been bipartite with any obligations to be imposed on the tenants, to be done by the disponees as owners.

[11] The pursuer submitted that each of the foregoing factors supported the view, apparent from the terms of the 1912 Minute of Agreement, that it was not intended to be a conveyance. This was not changed by the fact that it was recorded in the Register of Sasines. Although at the time a disposition had to be so recorded to take effect, it did not follow that everything that was recorded was a conveyance. Registration in the GRS was not limited in practice to dispositions. Deeds of Conditions were the paradigm example of documents recorded in the GRS which did not have dispositive effect. And Deeds of Conditions often contain provisions that, as a matter of law, can have no effect as real rights. Accordingly, on no view can the fact that the Minute of Agreement was recorded supply the want of a term that meets the requirements of the 1874 Act and the Land Clauses Acts referred to above. As such it should not be used to determine what the parties meant by the language they used at the time the deed of contract was signed (*Chartbrook* and *James Miller & Partners Ltd* v *Whitworth Street Estates (Manchester) Ltd* [1970] AC 583). If matters after the grant were to be considered, it was necessary to note that in the conveyance of Grange Trust lands completed and recorded in 1912 after the Minute, there is no exception in relation to the 6-foot strip. Had there been a view that the 1912 Strip had been conveyed from the

Grange Trustees to the Corporation, it would have been necessary to except this to avoid the conclusion that the granters were seeking to dispone property that they no longer owned. Indeed, because the 6-foot strip was not carved-out, the 1912 Minute of Agreement was a foundation writ for the purposes of positive prescription at the instance of the Pursuer's predecessors in title.

[12] The absence of a dispositive clause was also fatal to the argument that the Minute can be the founding writ for the purposes of prescription. Even apart from the fact that, as the pursuer argued, the land to which it related did not include the 1912 Wall, while there may have been possession of the land to the south of the wall on which a pavement came to be constructed, there has been no possession of the wall consistent with a right of ownership. Such possession as the Council sought to found upon was not exclusively referable to ownership since it is principally referable to the express obligation in the Minute of Agreement.

Discussion of whether the 1912 Minute of Agreement was a conveyance

[13] In considering these submissions, I begin with the terms of the 1912 Minute of Agreement. The most compelling factor, in my view, is the language used in the operative clause (Clause First): this provided that the 1912 Strip was "given up in all time coming". I note that there is no reservation of any interest in favour of the granters (such as ownership of the *solum* of the 1912 Strip). Nor was there any provision for reversion of the use of the land (if that were the limited nature of the interest conferred) in the event the Corporation no longer required it. Given that the 1912 Strip was required to widen a principal thoroughfare through Stockbridge, the prospect that the Corporation would cease to need the 1912 Strip was improbable. In that circumstance, there would be little purpose in

providing for reversion of use; that same circumstance would also suggest that the granters had little to gain in reserving ownership of the *solum*. The statutory context, noted above, is also relevant. The form of dealing contemplated was acquisition of ownership, not some lesser form of grant (ie of use akin to a servitude). The pursuer argues that there are no words of transfer to a transferee, but it is clear that the 1912 Strip was being given up to, that is being ceded to, the Corporation and that the Corporation would thereafter take over the 1912 Strip for its road-widening purposes. Furthermore, the 1912 Strip was being given up "in all time coming". That language is inimical to the granters retaining any interest, much less of any intention to retain the ownership of the *solum* of the 1912 Strip. At the very least, that indicates an abandonment by the granters of any interest in future in the 1912 Strip. The combination of this language, being effectively the abandonment of any interest, and the ceding of the 1912 Strip to a known grantee, is sufficient of dispositive intent, notwithstanding the word "dispone" was not used.

[14] Accordingly, I find that the language used - "given up in all time coming" - constituted an unqualified ceding of the granters' rights to the 1912 Strip. The granters thereby avoided the risk that maintenance of the 1912 Wall might fall to them (*qua* owners of its *solum*), but that matter was put beyond doubt by obliging the Corporation to assume responsibility for its maintenance in all time coming. This also ensured that the granters would avoid any liability that might befall frontagers of roads, eg in respect of fences, as then recently provided for in section 68 of the Edinburgh Corporation Act 1906. (That that was not a merely theoretical risk is demonstrated by the Minute of a sub-committee of the Corporation's Streets and Buildings Committee on 10 March 1911, recommending a resolution be passed under section 68 of the 1906 Act requiring that no building be erected within 30 feet from the centre line of Comely Bank Road, including that part immediately to

the south of the EA Land.) The *quid pro quo* was the Corporation's undertaking to construct a substantial wall along the whole length of the 1912 Strip at its own expense and to maintain it in all time coming, together with the erection of a taller steel screen set back 3 feet from the new 1912 Wall. The onerous character of those undertakings supports the interpretation that the Corporation were obtaining something equally substantial in the form of ownership (and not simply use) of the 1912 Strip.

[15] In relation to the pursuer's observation that there were three parties to the 1912 Minute of Agreement, in my view this does not favour the pursuer. While as a generality dispositions are bipartite, the fact that the 1912 Minute of Agreement was a tripartite deed did not render it invalid (I did not understand the pursuer's argument to go that far). It is instructive to consider the purposes of the EA Club and the Grange Trustees both being parties to it. While the EA Club occupied the land at that time (it is said in the pleadings to have been under a lease), they were also beneficiaries of the trust of which the Grange Trustees were the trustees. Further, that was a bare trust pending repayment of the outstanding lending, upon which event, the Grange Trustees would be obliged to convey the EA Land to the EA Club if asked to do so. That may explain the otherwise curious feature that the Corporation's approach was to the EA Club (and not to the owners), and, further, the Grange Trustees also treated its views as subordinate to those of the EA Club notwithstanding that, in law, the Grange Trustees held the title. If the 1912 Minute of Agreement were solely concerned with the loss of rights of occupation over the 1912 Strip, in these particular circumstances, this was a matter which concerned the EA Club as beneficiaries under the trust and in which the Grange Trustees, as the trustees under a bare trust, had no practical interest. Absent the failure of the trust purposes, the Grange Trustees could not deal with that land as an outright owner could (ie if not impressed with trust

purposes) and they had no expectation to be in a position to do so. In these circumstances, they would not have required to be a party to a deed if it only resulted in a loss of rights of occupation; that was the sole concern of the occupiers, the EA Club. If, however, the Minute of Agreement was a permanent divestment of the ownership of the 1912 Strip, then the granters necessarily required to be the Grange Trustees (*qua* owners, albeit held in trust). Given the doubt expressed by one member of the Grange Trustee's power to sell, it would have been prudent for the Grange Trustees to secure the agreement of the EA Club to that dealing, as it was the one party who would have had a locus to challenge that dealing for any want of power or other potential breach of trust. It was expedient to do so in the same deed, as was done here. It follows that I reject the pursuer's submission that there was no consent by the beneficiaries (ie the EA Club) to the Grange Trustees' dealing affecting the trust property (ie the EA Land) in the form of the 1912 Minute of Agreement, as required by section 3 of the 1867 Act.

[16] Other features of the 1912 Minute of Agreement reinforce its character as a conveyance: the inclusion of a full description (by reference to the 1912 Plan); the use of a parts and portions clause; the certification in Clause Fifth, and its recording in the GRS. The stamp duty of 10s was equally consistent with this falling into the 'any other deed' category as into the category of a conveyance. However, in light of the certification, on balance this support's the Council's position, though I regard this particular factor as carrying little weight. While the pursuer argued that the 1912 Minute of Agreement did not conform with the prescribed form under the 1845 Act, this is of no moment because the 1912 Minute of Agreement did not bear to be entered into by the Corporation pursuant to that Act. It did not need to, given the availability of specific power under the 1867 Act to acquire land by agreement for road purposes. The absence of an express date of entry was also of little

consequence, as there is nothing to suggest that the timing of the works affected the granters; it was a very modest strip compared to the total area of the EA Land and the 1912 Wall was to be built to a plan already agreed and at a time convenient to the granters. For these reasons, I find that the 1912 Minute of Agreement was a valid disposition of the 1912 Strip to the Corporation.

The vesting and listing issues

Precis of parties' positions

The defenders' position

[17] As I understand the defenders' fall-back position (if the 1912 Minute of Agreement was not a conveyance), it is to argue that the 1912 Wall was sufficiently functionally related to the road that it fell within the powers and obligations of the roads authority; that ownership of the 1912 Strip was vested in the Council by virtue of section 191 of the 1967 Act; and in any event the listing of Comely Bank Road and the 1912 Wall covered its dealings with the 1912 Wall and its *solum*, and that (if this were needed) the grant of the section 56 orders in 2017 effected a re-dedication of the land to which those orders applied to relevant road purposes such as to defeat the pursuer's claim. This last proposition was relevant to the public rights of way issues.

The pursuer's response to the defenders' vesting and listing arguments

[18] The pursuer invited the court to reject these arguments. The 1912 Wall was not part of the road. The defenders' case based on the 1967 Act was misconceived as that provision did not confer ownership (at most it vested a right of use of the road surface) and, separately, that provision had no application to already-vested roads (which would have

been the position as at 1967). The defenders' case based on vesting in the 1984 Act is also ill-founded as that expressly provides that its provisions shall not vest any heritable right. Furthermore, the inclusion of the 1912 Wall in the list of public roads was for the restricted purpose of the maintenance obligation.

Was the 1912 Wall part of the road?

[19] Before turning to the road listing and vesting issues, it is helpful to consider as a preliminary matter the function of the 1912 Wall, insofar as that might inform consideration of its status as part of a "road" for the purposes of the 1984 Act. I approach this question, was the 1912 Wall part of the road?, as a mixed question of fact (did the 1912 Wall serve a retaining or other protective function related to the adjacent foot way and road?) and law (did that functional relationship bring the 1912 Wall within the definition of a "road" and susceptible to the exercise of statutory powers by the Corporation and its successors?). That part of Mr Carrie's Report to which objection was taken ("the Carrie objection" (see Appendix B[17] and para [88], below)) only arises after this preliminary question has been determined.

As a matter of fact what function did the 1912 Wall serve?

[20] I begin with the factual aspect of this question. There is no doubt that from its construction the 1912 Wall performed a retaining function for Comely Bank Road. Every witness who was asked accepted that it did so. (This even included the pursuer's expert, Mr Carrie (see B[17]) and the developers' James Young (B[20(1)].) A retaining wall was necessary, given the 3-foot differential between the ground levels of the roadway/pavement to the south and the playing fields to the north of the 1912 Wall. This differential existed

from the outset, as is clear from the entries in the contemporaneous documentation (referring to the need for a wall that was 6 feet from the roadside but 9 feet from the playing field side); and this differential still existed 100 years later, as disclosed in the cross-sectional drawings included in the 2012 Condition Report. In practical terms, in addition to protecting against subsidence of the road and pavement down into the EA Land, the 1912 Wall also protected road users and pedestrians against that vertical drop.

[21] The pursuer argued that the 1912 Wall itself was essentially to protect road users from the activities of the playing field, and not *vice versa*. I find this argument an artificial one, as it ignores the obvious purpose of the taller steel fence the Grange Trustees obliged the Corporation to construct three feet north of 1912 Wall. This submission also fails to accommodate the evidence of the substantial differential in the ground level between the pavement side and the playing field side of the 1912 Wall, and it fails to recognise that the same wall might simultaneously fulfil several functions. The fact that the stone wall was (for a time) surmounted by a metal fence or that the stone wall was 6 feet in height (from the road side), did not detract from its essential function as a retaining wall. In any event, this submission did not address the fact that even the lower part (ie the stone part) of the 1912 Wall retained the pavement and adjacent roadway in place. In submissions, the Council noted the comments in a report of Gordon Dow, chartered engineer, stating that due to the differences in level

> "a level footpath to allow safe passage of pedestrians could not have been extended….without the wall first being built below to provide a retaining function to and to maintain the integrity of the footpath".

This indicates that the 1912 Wall extended underneath the pavement to support it. I therefore accept the Council's submission that without the 1912 Wall, the pavement could not have been extended in the way that it was.

Did that functional relationship bring the 1912 Wall within the definition of a "road" and susceptible to the exercise of statutory powers by the Corporation and its successors?

[22] It is also relevant in my view to note the genesis of the 1912 Wall, which followed an approach expressly for road-widening purposes by the Corporation (which then was, as the Council is now, the roads authority). The 1912 Wall was built at the same time as Comely Bank Road was widened and the adjacent pavement was constructed at that time up to the south face of the 1912 Wall. Reference was made to The Roads and Bridges (Scotland) Act 1878, which imposed a duty on relevant roads authorities, who "…shall erect sufficient parapet walls,…or other adequate means of security along the sides of all… embankments, or other dangerous parts of the said roads" (emphasis added). (This provision, derived from section 94 of the Turnpike Roads (Scotland) Act 1831, was subsequently incorporated into the 1984 Act.) There was no suggestion that the Corporation did not have these powers available to it in 1912 or that it was acting *ultra vires* these powers. Accordingly, it was within the powers of the Corporation as the roads authority to construct a wall for the purpose of protecting road users and users of the adjacent footway, from the risks that that drop posed. The availability of these powers was not challenged.

[23] The Council referred to *Johnstone* v *The Magistrates of Glasgow (*1885) 12 R 596 ("*Johnstone*") for the proposition that a wall can form part of the road (*per* Lord Shand at 602) and to the possibility, acknowledged by Lord Boyd in earlier litigation concerning the 1912 Wall, that if the 1912 Wall did have retaining and public safety functions, then it could be considered part of the "road" within the meaning of the 1984 Act. While Lord Boyd could not determine that matter in the absence of evidence, I was invited to do so on the evidence that I have heard. While the pursuer argued that *Johnstone* could be distinguished

as that concerned embankments, not a wall, the correct analysis is whether the contested structure (embankment, wall or parapet) was necessary in the sense of functionally integral to the integrity of the road (which includes an associated footway or pavement). On the evidence, I am persuaded that the 1912 Wall had these functions.

[24] The Council argued that the contention that the 1912 Wall was part of the road is consistent with the obligation the Corporation assumed in Clause Third to maintain the 1912 Wall "in all time coming", as it was otherwise unclear on what basis or in the exercise of what power the roads authority could have undertaken an obligation to expend public funds maintaining a private wall that did not form part of the road. I would not have regarded this factor on its own to be determinative, but I accept it has a persuasive force that supports the conclusion that I have come to on the other evidence. It follows that I do not accept the submission that because this obligation was founded on an agreement, this displaced this being the exercise of a public function. The maintenance by the Council (and its statutory predecessors) of the 1912 Wall was consistent with their statutory functions as the roads authority.

[25] I therefore find that the Corporation built the 1912 Wall as part of the road-widening scheme undertaken in the exercise of its powers as the authority responsible for the roads; that having regard to its retaining function, the 1912 Wall was integral to those works; and that the 1912 Wall may therefore be considered part of the "road" for the purposes of the 1984 Act.

Vesting under the 1967 Act

[26] Notwithstanding the ownership arguments based on the 1912 Minute of Agreement, separately the defenders argued that ownership of the 1912 Wall (as part of the road) vested

in the Council in terms of the 1967 Act. While all 10 pages of the definitions in section 3 thereof were highlighted for the Court, I was not asked to note any particular definition. Similarly, other provisions were highlighted, including sections 201 and 202 (anent the prevention of dangers to street users), section 211 (construction of footways of public streets) and sections 506 and 507 (definitions for that part of the 1967 Act dealing with acquisitions and disposal and the acquisition of land by agreement). However, the only provisions referred to in submissions were sections 190 to 192 falling with section A ("Vesting, etc for Part XVIII") in Part XVIII. Sections 190 and 191 provide as follows:

> "190 Subject to the provisions of this Part of the Order, all streets, carriageways or footways, or parts thereof, which were vested in the Corporation at the commencement of this Order shall continue to be vested in them for the purposes of this Part of the Order.
>
> 191 Subject to the provisions of this Order, all land acquired by or ceded to the Corporation for the purposes of constructing, widening or improving public streets shall vest in them without the necessity of any disposition or other conveyance of such land in their favour."

I need not quote section 192, which simply concerns the maintenance of a list of public streets.

[27] The defenders' argument was that on a literal reading of section 191, Comely Bank Road and the 1912 Wall which was integral to it vested in it "without the necessity of any disposition or conveyance" and, in this context, vesting meant transfer of ownership to the roads authority and, that in this context "vesting" had a different meaning than that deployed in the 1984 Act.

[28] It is in my view correct that the 1967 Act used "vesting" in the sense of transferring ownership of the *solum* to the grantee roads authority. This much is implicit from the dispensation from having to use the usual kind of deed to achieve that effect. (And it is recognised in a conveyancing context that such a deed granted under such a provision can

act as a mid-couple, ie an unrecorded deed of conveyance.) Thus far, I accept the Council's argument. However, I do not accept that section 191 has any effect in respect of a subsisting road at the date of entry into force of the 1984 Act.

[29] While other sections were highlighted as noted, I have not had the benefit of submissions on these. With that caveat, it respectfully seems to me that while section 507(1)(a) of the 1967 Act enables the Corporation to acquire land *inter alia* by agreement for the purposes of any of their functions under the 1967 Act, that relates to the exercise of the powers under or for the purposes of the 1967 Act; it is not directed to land already within the ownership or control of the Corporation. (Subsection 507(1)(b) has no application in this case because, read short, it provides for compulsory acquisition and it is those parts of the Land Clauses Acts relating to compulsory acquisition which are incorporated by reference into the 1967 Act by subsection 507(2), and those provisions in the Land Clauses Acts concerning acquisition by agreement are excluded: subsection 507(2)(a).)

[30] To the extent that the Council relies on section 191 of the 1967 Act as vesting ownership in land previously held (but not owned) by the Council as roads authority, I find this argument unsound in law. The apparent width of the final part of section 191

> "…all land acquired by or ceded to the Corporation for the purposes of constructing, widening or improving public streets shall vest in them without the necessity of any disposition or other conveyance of such land in their favour"

is qualified by the opening phrase "Subject to the provisions of this Order". The words the Council relies on do not effect a wholesale vesting of all land held (but on the defenders' premise not owned) immediately prior to the 1967 Act. That would be a remarkable outcome and for which, on the canons of statutory interpretation, clear words would be required. However, the defenders' reading disregards the place of section 191 in the context of the other provisions of this part of the Order.

[31] Part XVIII of the 1967 Order, which is headed "Streets", is concerned with both existing and new streets. Part XVIII B, for example, governs the construction and naming of new streets. The opening provisions, in Part XVIII A, concern "vesting, etc", and it understandably must distinguish between existing and new streets. It is in that context that section 191 falls to be construed. Section 190 is the provision which deals with streets that "were vested in the Corporation at the commencement of the Order". This provision does no more than preserve the *status quo* in respect of already-vested streets, and which would include Comely Bank Road and the 1912 Wall. By contrast, section 191 relates to land acquired by the Corporation for the purposes of the 1967 Act; that is, for new streets. Accordingly, in respect of land that is acquired under the 1967 Act *inter alia* to form a new street, this is vested without the necessity of any disposition or conveyance. In terms, section 191 does not extend to existing streets (or, more strictly, the land on which existing streets are located) already vested in the Corporation. I therefore hold that the Council did not acquire any right of ownership to the *solum* of the 1912 Wall by virtue of section 191 of the 1967 Act.

The listing issue/ the 1984 Act

The defenders' position

[32] The defenders also advanced a discrete argument under reference to the 1984 Act. I did not understand the defenders to argue that any right of ownership in the *solum* of the 1912 Wall was acquired by virtue of the 1984 Act. In any event, section 1(9) precludes this, as it expressly provides that

> "…every road which is entered in the list of public roads kept by a local roads authority shall vest in the local authority for the purpose of their functions as roads

> authority: but such vesting shall not confer on an authority any heritable right in relation to a road".

Rather, the submissions under the listing issue are to support the submission about public rights of way on the basis that the 1912 Wall enjoyed the status of a "road" under the 1984 Act. My determination above, that the 1912 Wall was functionally integral to the road-widening works in 1912, largely supersedes this issue.

The pursuer's position

[33] The pursuer's position is that the definition of "road" in the 1984 Act makes no reference to walls at the sides of road. Nor was this surprising, as the essence of a road was that there was a public right of passage over it - which was nonsensical in respect of walls. While a verge was expressly included in the definition of a road, a wall was not a verge. As a road involves a right of passage, then a road will necessarily exclude a wall. That was the import of *Hamilton* v *Nairn* at paragraphs 22, 24, 25 and 28. While obstructions were permissible on a verge (*per David Runciman & Sons* v *Scottish Borders Council*) that did not encompass a wall which rendered passage impossible on its *solum*. The case of *Johnston* v *Magistrates of Glasgow* (1885) 12 R 596 was distinguishable, as the wall in that case was structurally part of the road, in contrast to "a fence properly so called". Having regard to the 1912 Minute of Agreement, the 1912 Wall functioned as a "fence" in this sense. Reference was also made to the requirement in the 1912 Minute of Agreement for the wall to be surmounted by a higher metal fence. That structure protected against stray balls, whereas the stone wall provided privacy. As for the listing of the 1912 Wall, properly construed, the last two sentences addressed obligations of maintenance.

Discussion

[34] The 1984 Act provided for the listing of public roads. The consequence of listing is to impose on the roads authority an obligation to manage and maintain the roads, and wide powers are conferred on it for this purpose: see end of section 1(1). Subsection 1(2) makes provision for the inclusion in that list of all public roads which had previously been listed. Accordingly, in my view, section 1 is neutral on the question of the ownership of the *solum*. It neither confers ownership on the roads authority in respect of new roads, nor divests roads authorities of ownership of those roads that were owned by the Council prior to the 1984 Act.

[35] I would not have regarded the fact that the 1912 Wall is included in the listing of this part of Comely Bank Road as determinative of whether it was a "road". However, the plain fact is that, on the available evidence, the 1912 Wall has been included for decades in the list of roads kept by the roads authorities in exercise of their powers. Those entries have not been challenged, reduced or corrected. There is no evidence to suggest that in the exercise of its statutory powers or in the expenditure of public funds the Council or the Corporation acted *ultra vires*. Other relevant factors are that the 1912 Wall was part of the overall acquisition of the 1912 Strip; that this was sought by the body then responsible for roads (ie the Corporation) specifically for road-widening purposes and that the 1912 Wall has been included historically in the roads lists of the old Lothian Regional Council and pre-dating the 1984 Act. In addition, consistent with its responsibilities as the roads authority, the Corporation accepted the maintenance obligation in Clause Third of the 1912 Minute of Agreement. (The fact that that obligation is founded on that agreement does not displace the statutory duty on the roads authority for its maintenance, if it formed part of the road.) The pursuer sought to construe the listing *quoad* the 1912 Wall as confined solely to Comely

Bank Road and not the wall (because of the reference to maintenance). I am not persuaded that applying the finer tools of textual analysis to entries in lists of roads is a fruitful exercise, compiled as they are by non-legal staff in local authorities and not in the expectation the punctuation used will be closely scrutinised. In light of these factors just noted, and in light of my earlier findings of fact that the 1912 Wall was functionally integral to the road, the 1912 Wall was properly included as part of the road in the listing of this stretch of Comely Bank Road. The 1912 Wall was dedicated to road purposes, consistent with that listing. It follows that I do not accept the pursuer's submission to the contrary.

The Carrie objection

[36] In light of the foregoing, I can deal briefly with the objection to parts of Mr Carrie's evidence (see B[17] to [19]). (In any event, the pursuer did not refer to or appear to found on Mr Carrie's evidence in submissions.) The basis of the objection was a *Kennedy* v *Cordia* objection, to the effect that there was no relevant expertise anent road listings. I accept that submission as well-founded and exclude this evidence. Even absent that objection, I would not have accepted the evidence of Mr Carrie for three reasons: first, in evidence he did not present the requisite independence of approach which is the hallmark of an expert. When asked to comment on a hypothesis contrary to his opinion, as experts are often asked in evidence to do, he repeatedly cavilled (see B[19]). He included in his Report, seemingly unquestioningly, the draft diagram of Mr Lowe without establishing whether it had any foundation in fact. More fundamentally, his assertion that the 1912 Wall should never have been listed was made without regard to some evidence available in the documentation inconsistent with this (which may not have been drawn to his attention). His opinion did not have a well-reasoned or cogent evidential basis. In any event, I would have preferred

the unchallenged evidence that the 1912 Wall served a retaining function, to Mr Carrie's unsupported assertion that it was inappropriately included as part of the listing for Comely Bank Road.

Rights of passage/access rights

[37] Given that I have determined that there was no Disputed Strip and that the 1912 Minute of Agreement was a conveyance of the 1912 Strip, the issues under this heading do not arise.

[38] On the hypotheses (1) that the Disputed Strip existed; (2) that it was situated in the location the pursuer contended for; (3) that the Council did not acquire ownership of the 1912 Strip or, at least, not ownership of the *solum* of the 1912 Wall, nonetheless, given the findings I have made as to the functions of the 1912 Wall and its status as a "road" for the purposes of the 1984 Act, I would have found in that by reason of that dedication to road purposes the public had rights of passage over the road - including the pavement and *solum* of the 1912 Wall. Even if I was wrong in that conclusion, I would have held that the grant of the section 56 orders (which were granted after the 1912 Wall had been taken down) effected a re-dedication of that area of the pavement and the now-exposed *solum* of the 1912 Wall such as to bring into existence anew rights of passage along it as part of the pavement. Had I found against the defenders on that point, I would not have held that, independently, any relevant right was capable of arising from the 2003 Act as, on this hypothesis, that right was sufficiently satisfied by other parts of the extant pavement.

The pursuer's title

[39] The defenders challenged the pursuer's title, essentially on the basis that an unregistered disposition did not transfer ownership (section 50 of the Land Registration etc (Scotland) Act 2012 (asp 5) (the "2012 Act") and, further, that such evidence as was led did not demonstrate that the 2018 Disposition (including the 2018 Plan) was in a form that was registrable in the Land Register.

[40] Reference was made to the Keeper's guidance on "Deed plan criteria" (which may be found on the Registers of Scotland website) ("the Keeper's Guidance"). (The objection taken to production of the Keeper's Guidance was, in my view rightly, dropped in submissions.) In the absence of expert evidence or submissions on behalf of the Keeper, which at the least might have assisted in the application of the Keeper's Guidance, I express only a provisional view on this issue. For a disposition to be registrable in the GRS it required a full conveyancing description. The equivalent to satisfy the need for identifiability in Land Registration (assuming the deed is otherwise valid) is that the deed "so describes the plot as to enable the Keeper to delineate its boundaries on the cadastral map": section 25(1)(b) the 2012 Act. The Keeper's Guidance notes that if the scale of the plan submitted is insufficient to show the detail, a larger scale may be required to show the requisite detail. The Keeper's Guidance also notes that in respect of a boundary where no physical boundary exists (an "undefined boundary"), such a boundary must be accurately fixed to existing detail by metric measurements shown on the plan. The southern boundary of the Disputed Strip falls into the category of an "undefined boundary".

[41] To be registrable in the Land Register the land must be shown on a scale plan with suitable markings that meets the Keeper's technical specifications. The purpose is to enable the land to be identified and plotted with sufficient precision on a cadastral map.

Measurements may not be necessary in instances where the boundaries are otherwise shown by reference to known physical features or is otherwise identifiable, eg by reference to adjacent titles, and which might be capable of articulation with the requisite precision, particularly if the overall area is given (and from which liner measures might be extrapolated). However, that is not the case here. The 2018 Disposition plan contains no figures of linear or area measurements; the critical southern boundary is not defined by reference to any physical boundary. It is an "undefined boundary" for the purposes of the Keeper's Guidance. Furthermore, the very modest dimension of the subjects of the 2018 Disposition, on a north to south axis, creates additional uncertainty, given the margin of error permitted for any scaled map. In my view, the dimensions and therefore location of the subjects of the 2018 Disposition are not susceptible to being fully and accurately plotted on a cadastral map. It respectfully seems to me, on present information and in the absence of fuller submissions, that the subjects of the 2018 Disposition do not satisfy the technical requirements for the cadastral map and are therefore unascertainable for the purposes of registration in the Land Register. It is insufficient to enable the Keeper to plot the Disputed Strip with the requisite precision on a cadastral map.

[42] As against this is the evidence elicited from some of the pursuer's witnesses, eg about the 30-day rule, or the practice of the Keeper to accept all deeds for registration if not returned or rejected in a specified number of days, or about the time-lag between presentation and registration. I did not find this evidence to be persuasive. The evidence was elicited in cursory fashion. In relation to the 2018 Plan, all that could be said was that it had been prepared with the assistance of a surveyor. More fundamentally, none of the witnesses with whom this issue was canvassed was tendered as an expert. At most, what was elicited was the view of an individual solicitor with a long association with the pursuer.

In any event, any view that was given was simply expressed as a generality and without reference to, or being tested against, the features of the subjects of the 2018 Disposition just discussed.

[43] Accordingly, even if I had found in favour of the pursuer on the other issues, the pursuer's case would nonetheless have failed at this hurdle. In other words, I accept the defenders' submissions that even if the pursuer succeeded on other issues, it would not be entitled to the first declarator sought (of ownership of the Disputed Strip). In that circumstance, however, I would have put the matter out by order for consideration of whether the technical deficiencies were capable of being remedied.

Jurisdiction

[44] The pursuer has no pecuniary conclusions. It concludes for declarator of ownership of the *solum* of the 1912 Wall (ie Disputed Strip) (in the first conclusion), for declarator that there are no rights of passage over it (in the second conclusion), for declarator that the 1912 Strip did not vest in the Council by virtue of listing under the 1984 Act, (the third conclusion) and finally it concluded for permanent interdict (fourth conclusion). In relation to meeting the privative jurisdiction, there is a bare averment (in Article 1 of Condescendence) that the pursuer believes the subjects of the 2018 Disposition are worth more than £100,000. Otherwise, the question of whether the pursuer's case met the privative jurisdiction of the court (of £100,000) was left to be resolved at the end of the proof.

[45] In submissions, I was referred to sections 39 and 93 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") and the relative Statutory Instrument (SI 1994/1443). The latter provided little assistance, as the provisions referred to (rules 14B.1 to 14B.6) are directed to a determination *ab ante* and not as part of the final disposal after proof (otherwise the

references to a matter being put out by order, eg in rule 14B.6(3) would be otiose). An order "determining rights in relation to property" - which would encompass the first and (probably) the second declarators - falls to be valued in terms of section 39 of the 2014 Act for the purposes of determining the value of an action. Section 93 provides for remit from the Court of Session to the sheriff court if the Court considers "at any stage" that it is unlikely that the value of the action meets the prescribed threshold (at present, of £100,000). Section 93(2) provides that the court "must remit" the proceedings to an appropriate sheriff court "unless the Court considers, on cause shown, that the proceedings should remain in the Court of Session".

[46] The question of the value of the pursuer' s action was unascertainable without proof, as any ransom value was dependent on the pursuer being the owner of, or at least having a title preferable to that of the Council to, the Disputed Strip. On one view, upon that determination, the obligation to remit comes into play. However, having heard this proof, and given how patently undesirable it would be for the matter to be disposed of by dismissal (upon upholding of the plea of no jurisdiction) with the prospect of the matter being re-litigated in a sheriff court, I have no hesitation in finding that this enables me to exercise the discretion in terms of section 93(2) for the action to remain in this court for the purposes of determining the substantive issues after proof.

Title and interest

[47] I would have rejected each parties' plea challenging the title and interest of another party. In my view, the pursuer had sufficient title and interest to raise these proceedings based on the 2018 Disposition and notwithstanding that that deed has not yet been recorded in the GRS. The argument to the contrary, conflates two meanings of "title". In this case, the

pursuer was the holder of a delivered but unregistered disposition; he has a personal right capable of being made real. That suffices to give him "title" and interest in the litigation sense, even if he does not have "title" (meaning a real right of ownership) in a property law sense.

[48] In relation to the developers' interests, a like reasoning applies. They are not the owners of the 1912 Strip. Nonetheless, they are exercising rights of access and occupation adjacent to or over the Disputed Strip. The pursuer's claim might, if well-founded, have had a material adverse impact on the exercise of those contractual rights. Those circumstances suffice to confer the requisite title and interest.

Prescription

[49] Determination of this issue is not determinative of the case. If, as I have found, the pursuer's case fails, the issue of prescription does not arise. The pursuer's title is unrecorded and, even if it were, the recording of the 2018 Disposition in the Land Register no longer has the "Midas" touch. Implicit in the pursuer's case is its reliance on its predecessor in title, the Grange Trustees. Even if they had retained title to the Disputed Strip (on the hypothesis it existed), the Corporation's adverse occupation on an ambiguous title and its possession thereof (including the 1912 Wall) was sufficient to perfect its title, even if the 1912 Wall had been built outwith the 1912 Strip (though I have found that that has not been established).

[50] If the Council succeeded on the basis that the 1912 Minute of Agreement was a conveyance of the 1912 Strip in their favour, in my view, its title would undoubtedly have been fortified by prescription. I would not have accepted the pursuer's argument that the acts related to maintenance of the 1912 Wall necessarily had to be excluded because the

source of that obligation was contractual (and therefore were not counted as acts of adverse possession), at least in circumstances where, as I have found, the Corporation became the owner of the land by virtue of the 1912 Minute of Agreement and that Agreement was also the source of the contractual obligation of maintenance.

[51] The heritable rights and the maintenance obligations were both derived from the same source: the 1912 Minute of Agreement. The terms of the 1912 Plan, and in particular the clear notations indicating that the 1912 Strip comprised the whole of the 1912 Wall (up to its north face), defined the scope of the intended grant. Consideration of the contractual rights of maintenance of the 1912 Wall imposed in the 1912 Minute of Agreement are subordinate to the question of whether the 1912 Minute of Agreement was a conveyance. If it was a conveyance constituting the Corporation as the owner, then this determined the matter. If the Corporation required to rely on acts of possession in order to perfect the title in respect of an ambiguous boundary in the title, I would not have accepted the argument that acts of possession derived from a contractual right had to be excluded because, in this case, the grant clearly included the area subject to the maintenance obligation (here, the 1912 Wall).

Public rights of passage

[52] In light of my findings that the 1912 Wall was part of the road for the purpose of the 1984 Act, it follows that from 1912 the subjects comprising the 1912 Strip (including the 1912 Wall) were dedicated to road purposes and along which there has been a public right of passage: see *Galbraith* v *Armour* (145) Bell's App 374 at 387 to 390 *per* Lord Brougham; *Magistrates of Edinburgh* v *North British Railway* (1904) 6 Of 620 at 639 *per* Lord Kinnear; *Steel* v *Scottish Ministers* 2015 SLT (Lands Tr) 81 at paragraphs 85 to 86; *Hamilton* v *Dumfries*

and Galloway Council (no 2) 2009 SC 277 at paragraphs 37 to 39 *per* Lord Reed. While I have rejected the Council's argument that the *solum* of the 1912 Strip vested in it under the 1984 Act, the public have used Comely Bank Road (including its pavement and to which the 1912 Wall was functionally integral), as part of public road since 1912. In those circumstances a public right of passage subsisted. On the particular facts, I would have been inclined to find that a right of passage subsisted in relation to the whole of the *solum* of the 1912 Wall (notwithstanding a degree of obstruction of parts of it), on the basis of Lord Drummond Young's observation that a "right of passage is… related to the existence of the way, rather than the area of the road itself" (*David Runciman and Sons* v *Scottish Borders Council* 2003 SLT 1405 at paragraph 6). Further, I accept the Council's submission that in any event a right of passage existed in relation to the *solum* of the 1912 Wall consequent upon the demolition of the 1912 Wall in late 2014 and in 2015 and by virtue of the re-dedication by the Council in the form of its grant of consents under section 56 of the Town and Country Planning (Scotland) Act 1997 in 2017. However, absent a right of public passage subsisting or arising in these terms, I would have rejected the defenders' argument that access rights on and across the *solum* of the 1912 Wall subsisted under Part 1 of the Land Reform (Scotland) Act 2003.