Rafique and another (Pursuers and Respondents)
v
Amin and others (Defenders and Appellants)

House of Lords
13 June 1997

JUDGMENT

Lady McCarthy (delivering the opinion of the Court)
My Lords and Ladies,

At issue in this case is the law of common ownership in Scotland as it relates to alteration of commonly owned subjects. The case concerns heritable property at 19/21 Rose Street, Aberdeen. The property is composed of a single building over three floors, which had been owned as a single unit until the point of transfer to the parties to this case. In 1990, the then owner separated the property into two distinct subjects, disponing one to the appellants and the other to the respondents. Although the two "new" properties were distinct, they were not independent of one another. Rather, the disposition specified that certain elements of the building were to be held in common ownership of the two parties. These elements included the solum, the foundations, outside walls, gable roof and chimneyheads, along with various sets of pipes and gutters, and some garden ground to the side and rear of the building. The effect of this stipulation in the disposition was that even though, for example, the interior of the shop/restaurant premises at 19 Rose Street was in the sole ownership of the respondents, the exterior walls of the premises were in common ownership of both parties.

The dispute before us arose from a programme of renovations planned by the appellants to their property. The planned work went far beyond routine repair and maintenance of the kind required to keep a property in habitable condition, involving substantial alteration to the structural fabric of the building. Briefly put, the appellants sought to create a new entrance and staircase leading directly from the street at 21 Rose Street to the first floor of the building. The bulk of the planned work, which was to be carried out within the curtilage of 21 Rose Street, concerned the appellants' solely owned property. However, construction of the staircase required steel columns to be seated on the solum of the building and steel beams to be inserted into the exterior walls. In addition, it was proposed that a granite column on the exterior of 21 Rose Street should be removed. The appellants sought the permission of the respondents to carry out these alterations to the commonly owned property. The respondents refused. That disagreement gave rise to the present action.

Legal Issue
The legal issue to be determined concerns management of commonly owned property. The respondents assert that no alterations, beyond regular repairs and maintenance, to commonly owned property may be carried out without unanimous consent of every common owner. In other words, a common owner has an absolute veto in respect of alterations. The appellants argue that the absolute veto exists only in situations where common owners may respond to deadlock by exercising the remedy of division and sale. In situations where the remedy is unavailable because,

from a practical perspective, division or sale of the common property is not possible, the veto is not absolute. Instead, the availability of the veto is governed by equitable considerations.

The respondents' position was preferred at first instance in Aberdeen Sheriff Court and that decision was upheld in the Inner House of the Court of Session. The point is now before us.

Decision

It may be useful to clarify at this early point in the judgment that we have decided to refuse the appeal. We have felt obliged to do so by the clear line of authority presented to us in respect of the matter at issue. However, we have taken the opportunity to express our concerns about the fitness of the rule for purpose, and would enjoin Parliament to consider as a matter of some urgency whether reform in this area might be appropriate.

The law of common ownership

The basic rules of the law of common ownership have recently been summarised in the revised reprint of the *Stair Memorial Encyclopaedia,* volume 18, at paragraphs 22-33. In a common ownership situation, the sole right of ownership which exists in a piece of property is shared between two or more persons, known as common owners or co-owners. Each common owner holds a *pro indiviso* share of ownership of the property in question, entitling her to make use of the whole property, enjoy its fruits and dispose of her share through sale, succession or otherwise, just as would be possible were she the sole owner. Her use is, however, constrained by three rules designed to ensure that each of the co-owners may enjoy the property. First, all the co-owners are entitled to use every inch of the property in question. Second, only "ordinary" use may be made of the property, with the question of what uses are "ordinary" determined in relation to the facts and circumstances of each case. Finally, no co-owner may receive "excessive benefit" from the property at the expense of her fellow owners. Such benefit would normally be obtained by one co-owner taking exclusive possession of an area of the property, although no doubt other examples can be imagined. Co-owners may contract amongst themselves for exclusive rights to an area of the property, or to restrict use to certain areas or times, but such agreements create personal obligations only and cannot bind successors.

In addition to these rules on use, specific rules regulate alterations to the subjects. No co-owner is entitled to make alterations to the common property, beyond essential repairs and maintenance (albeit that the extent of these can be hard to define), without consent of all other owners. The rule, in other words, requires unanimity before works can proceed.

Human nature dictates that unanimity may sometimes be difficult to achieve, and the more co-owners there are in respect of a piece of property, the more challenging it is likely to be. The law provides remedies in recognition of this difficulty. It is possible for the court to appoint a judicial factor to manage the co-owners' affairs, although in practice this is very rare (see *Allan* (1898) 6 SLT 106*,* OH, affd (1898) 6 SLT 152). In volume 18 of the *Stair Memorial Encyclopaedia*, para 30, Professor Reid suggests that in principle the remedy of judicial regulation, in which the court lays down a set of rules to govern management of the property, is available. Professor Reid notes, however, that in the one reported case in which this remedy was sought (*Menzies v Wentworth* (1901) 3 F 941), Lord Stormonth Darling concurred with views expressed by Lord Deas in *Menzies v*

Macdonald (1854) 16 D 827 as to the remedy's impracticability: the court is not an appropriate body to manage use of a property on an ongoing basis, not least on account of the time and cost that would be involved every time a change to the rules were required, or a situation arose which the rules had not anticipated. Instead, the main solution to intractable disagreement lies in the remedy of division and sale.

It is integral to our law of common property that no owner should be compelled to remain in common ownership with another. Note the words of Lord President Dunedin in *Grant v George Heriot's Trust* (1906) 8 F 647, at p 658: "I have no hesitation in saying that to give a thing in common property and at the same time to say that you are not to pursue a division is an impossibility in the law of Scotland." Accordingly, the remedy of division or sale is available. This is the right of any co-owner to have the commonly owned property divided into separate pieces, each in the sole ownership of one formerly common owner or, if such division of the thing is not practically possible, to have the property sold and the proceeds divided between each of the owners. In principle, division is the primary remedy and sale available only where division cannot occur. In practice, division is often impractical, whether from a physical perspective (a suburban house with one bathroom, one kitchen, one turn-off from the road and so on cannot easily be turned into two separate houses with the same essential facilities) or a financial perspective (the two houses which result may be worth a combined total significantly less than the value of the intact house, particularly once the cost of the renovations is taken into account.) Accordingly, sale is the remedy more usually employed. The availability of division and sale is not conditioned on a standard of reasonableness or any other equitable consideration: any common owner may seek it and, if sought, the court has no option but to grant it (*Upper Crathes Fishings Ltd v Bailey's Exrs* 1991 SLT 747). It provides the escape route from co-ownership that the law deems necessary.

Notwithstanding the importance of this remedy, however, there are some situations in which it is not available. First, common owners may validly contract out of their capacity to use the remedy. As with agreements as to use, such contracts cannot last in perpetuity and cannot bind singular successors. Secondly, common owners may personally bar themselves from insisting on division and sale by words or actions leading a fellow common owner to believe an agreement to exclude division and sale is in place, to that owner's prejudice (*Upper Crathes Fishings Ltd v Bailey's Exrs* 1991 SLT 747). Third, special statutory rules are in place to regulate the availability of division and sale where the common owners are husband and wife (Matrimonial Homes (Family Protection) (Scotland) Act 1981, s. 3).

Finally, and of most relevance for this case, division and sale is excluded where the use of the remedy is impractical because the common property in question is, in Professor Bell's terms, "a thing of common and indispensable use" (Bell's *Principles* (10th ed), para 1082) such as a staircase in a tenement. This exception envisages a scenario in which a *pro indiviso* share in ownership of a piece of common property is held as a pertinent of related, solely-owned subjects. In a tenement, each flat is owned individually, with a *pro indiviso* share in the common stair or elevator as a pertinent of that flat. In the case before us, the parties' *pro indiviso* shares in the solum, foundations, external walls and so on would seem best understood as pertinents of the two distinct properties created from the original building at 19/21 Rose Street. Accordingly, there can be no doubt that the remedy of division and sale was not available to the parties here.

Alterations to common property: the absolute nature of the veto

Having set out the detail of the relevant law, we turn now to the precise argument before us. As noted above, alterations (beyond essential repairs) to common property require unanimous consent of all co-owners. In other words, each co-owner has the ability to veto works going ahead. The argument made for the appellant is that in a situation such as this, where the remedy of division and sale is not available to the co-owners, exercise of the veto is subject to equitable considerations. This argument was based on selected passages from relevant authorities to which we will return below.

Looking first to the institutional writers, notwithstanding some reference to common property in the older texts (Stair, *Institutions of the Law of Scotland*, I,7,15; I,16,1; Bankton, *An Institute of the Law of Scotland*, I,8,36 and 40), a detailed institutional treatment of the law cannot be found until Professor Bell's *Principles of the Law of Scotland*, the first edition of which was published in 1829. In *Grant v George Heriot's Trust* (1906) 8 F 647 at 658, Lord Dunedin expressed the view that the law of common property up to Bell's time was not accurately understood, but that Professor Bell had made it very clear. In more recent times, Professor Reid has described Bell's views on matters concerning common property as "of particular authority" (*Stair Memorial Encyclopaedia,* vol 18, para 33). Paragraph 1075 of the tenth and last edition of Bell's *Principles* (originally published in 1899), dealing with management of common property, begins with the maxim *in re communi melior est conditio prohibentis*, translated by Professor Geoffrey MacCormack in a recent study to mean "for the case of property held in common, the person who prohibits is in the better legal position" ("The *actio communi dividundo* in Roman and Scots Law" in Lewis and Ibbetson, *The Roman Law Tradition*, p 164). This was the rule in Roman law, for which see *Justinian's Digest* at D.10.3.28. Paragraph 1075 of Bell's *Principles* continues with examples of this maxim in practice, and includes the following passage:

> [A common owner] may also prevent any operations on the common subject by which its condition is to be altered; as in a common stair or passage, he whose property lies next adjoining, is not, without the consent of the rest, entitled to break the wall, and strike out a door. In this respect, the different effects of common property and common interest are to be marked, and it is necessary to discriminate carefully whether the right be of the one class or of the other. The exception to this rule is, that necessary operations in rebuilding, repairing etc. are not to be stopped by the opposition of any of the [common] owners.

It will be noted that no reference is made in this passage to equitable considerations or the reasonable grant or withholding of consent.

The rule on alterations set out by Bell towards the end of paragraph 1075 again mirrors the rule that existed in Roman law (D.8.2.27; D.8.5.11) and, indeed, the Roman authorities are cited in support of it. However, the connection between Roman and Scots law here may not be as straightforward as that citation suggests. In the study conducted by Professor MacCormack, he notes at p 179:

> One has to wait until 1852 [in *Brock v Hamilton* (1857 19 D 701)] for an authoritative judicial statement which locates Roman law, and specifically the *actio communi dividundo*, as the source of Scots rules. Was this a piece of 'historical engineering' (even if accomplished in

> good faith), or was it a belated recognition of the true course of evolution taken by Scots law in its treatment of common ownership?...Perhaps, however, it is a mistake even to postulate a true course of evolution waiting to be discovered…With respect to the post-*Brock* development of the law of common ownership, it is difficult to avoid the conclusion that specific recourse to the rules of Roman law depends very much on the individual predilections of counsel or judges.

The reports of cases referenced in Bell's *Principles* alongside the Roman authorities for the rule on alterations are, typically for the time period, very brief, and do not generally include the detail of counsel's submissions or the justifications for the court's findings. Accordingly, it is not possible to discern the extent to which the rules that developed relied on their Roman forebears, and to what extent they were a peculiarly Scottish creation. Nevertheless, the rule on alterations which emerges from the cases is unambiguous: the veto is absolute.

The earliest relevant authority cited by Bell, *Anderson v Dalrymple* (1799) Mor 12831, finds that a door cannot be inserted into a commonly owned wall without consent of all co-proprietors. Based on expert evidence, the court declared itself satisfied that the alterations proposed would not hurt the common owners objecting to them. The report goes on to record at p 12832:

> But this notwithstanding, the general opinion was, that, as the petitioners had not merely a servitude *oneris ferendi* on the wall from which the door was to be opened, but a right of common property in the passage, no alteration whatever could be made on it without their consent.

In *Alexander v Couper* (1840) 3 D 249, the issue was whether a tenant could prevent his landlord from inserting a door at the end of a common stair to provide access from the street, through the tenement passage, to buildings owned by the landlord at the rear of the tenement. The court noted that had the dispute arisen between "joint owners" (meaning common owners in modern understanding) rather than landlord and tenant, the co-proprietors could not only have interdicted the landlord from creating a door, they could also have insisted in the wall being restored to the state it had been in prior to any work already undertaken towards creating the doorway.

The relevant issue in *Gellatly v Arrol* (1863) 1 M 592 was whether the defender could insert a door into the wall separating a tenement flat in one building from the adjoining flat in the next building along, since both flats were in his ownership. There was some disagreement amongst the judges as to whether the right of the other tenement flat owners in respect of the wall concerned was a right of common property or a right of common interest. The significance of this distinction was noted by Lord Cowan at 601:

> Where the right is that of common interest merely, and where no one case of danger has been made out, the Court have authorised alterations to be made; whereas, if the right be one of common property, no one can touch the subjects of the common property, so as to innovate its character, without the consent of all the other proprietors.

In the event, the court was satisfied that the proposed operation would interfere with the chimneys of lower flat owners and increase the risk of fire, meaning that the work could be interdicted regardless of the interest held by the other flat owners. Nevertheless, the absolute nature of the veto for common owners was not called into question.

In *Dow and Gordon v Harvey* (1869) 8 M 118, the Inner House affirmed the decision of the Sheriff-substitute, who had expressed the view that the idea of common property upon which one of the common owners can operate without or against the consent of the other is a contradiction in terms. In his view, to permit such a proceeding without judicial authority would seem to be contrary to all principle. In *Taylor v Dunlop* (1872) 11 M 25, it was held that the proprietor of the upper floor of a house and under-ground cellars had no right to carry a flue from the cellar to the roof through a staircase in which he had not an exclusive right of property.

In his submission before us, counsel for the appellants sought to place reliance on a dictum of the Lord President (Hope) in the case of *Upper Crathes Fishings Limited v Bailey's Executors* 1991 SC 30. This case did not concern the rule on alterations, but focused rather on whether the remedy of division and sale was itself subject to equitable considerations. The court determined that equitable considerations might play a role in determining whether the appropriate order was for division *or* for sale, but had no impact on the availability of the remedy in the first place. In making this finding, Lord Hope opined (at 40):

> The right to demand division of the property at any time against the will of the other proprietor is a counterpart of the right of veto – itself of an absolute character as Rankine points out at p 587 – which all co-owners enjoy in the control or management of the property.

Counsel for the appellants sought to rely on the first part of the dictum quoted, to the effect that the right of veto is a *counterpart* of the right of division, arguing that one therefore cannot exist without the other. In the case before us, since no right of division was available, counsel for the appellants argued that the right of veto therefore could not be absolute. When this argument was presented in the Inner House, the Lord Justice Clerk (Ross), delivering the opinion of the court, placed his focus instead on the second half of the dictum quoted, to the effect that the right of veto is, in itself, absolute. Had Lord Hope's words been considered in isolation, either interpretation would, in our view, be equally plausible. However, the dictum must be considered in the context of the full weight of the institutional and judicial authorities lying behind it. The relevant paragraphs of Bell's *Principles* and the numerous case authorities described above offer little room for doubt that the right of veto in respect of alterations is absolute. We are compelled to find that the appellants' argument is incorrect.

In the Inner House, the Lord Justice Clerk noted at 1388:

> If counsel for the defenders' proposition were to be upheld, the result would be that the long-established rules in relation to the rights of co-owners of common property would be very seriously altered. The right to veto has long been recognised, and there is no justification for holding that its exercise is subject to equitable considerations.

We agree with these observations and therefore consider that there is no alternative but to refuse the appeal.

Alterations to common property: the case in favour of reasonable exercise of the veto

As explained above, we do not consider there to be any real doubt about the legal rule which applies in this case. However, reviewing the authorities in which the rule is established has led us to question the fitness for purpose of that rule, bearing in mind the relevant policy considerations. To put the point briefly, a rule such as this, which promotes conflict and recalcitrance, seems to us an ill fit in an area of law, such as common property, where the law should promote cooperation and responsible behaviour, in pursuit of the broader objective of promoting good use of land. These policy considerations underpin the broad scheme of our law of common ownership. It is not clear why they have not held sway in relation to this particular rule, but it is suggested the time may have come for Parliament to rethink the position.

The roots of our concern can be located in the references throughout the authorities to the policy motivation for the remedy of division and sale. Unlike the majority of the law on common property, institutional recognition of this remedy can be found even in the works of the earlier writers, and when the remedy is discussed, so too is its basis in public policy. In the *Ius Feudale*, Craig notes that no person can be compelled to remain in the position of co-owner along with others and that agreements between co-owners not to divide were treated as void on the ground of public policy (2.8.35). Bankton (I, 8, 36) notes the availability of the *actio communi dividundo* "to remedy the great inconveniency of possessing in common, whereby the subject is for the most part neglected; for, as the law expresses it, *natural vitium est negligi quod communiter possidetur*." (Our translation of the maxim is that "it is natural to neglect that which is possessed in common".)

The precise nature of the relevant public policy considerations is teased out by Lord Rutherford in *Brock v Hamilton* (1857) 19 D 701, in which he noted at p702-3:

> There can be no question, it is thought, after the authority of Lord Stair, referring to the Roman Law, that an action for division of heritable property, held *pro indiviso*, though by singular titles, was imported into the common law of Scotland in the form of a brief of division in very ancient times (Bell's Comm, I, p 64)….That law, and our common law following it, proceeded upon the principles that no one should be bound to remain indefinitely *in communione* with another or others as proprietors of common property: that for reasons of public policy, and especially to ensure the advantageous management of such property, any joint proprietor should have it in his power, against the will of the others, to put an end to the communion.

Similarly, in *Grant v Heriot's Trust* (1906) 8 F 647 at 658, Lord President Dunedin, with whom Lord M'Laren, Lord Kinnear and Lord Pearson concurred, noted that the remedy of division and sale was made available because common ownership is, "from the motive of public policy, an absolutely cumbrous state of matters to keep up for perpetuity".

The leading authority on the law of common ownership in the current century is that of the Inner House of the Court of Session in *Magistrates of Banff v Ruthin Castle Limited* 1944 SC 36. The decision is notable for resolving a long history of terminological confusion between common and joint property, the latter arising principally in the case of trusts, with no joint owner holding an individual share of ownership. The court in *Magistrates of Banff* noted the availability of the remedy of division and sale as a defining feature of common (as opposed to joint) property. Reviewing the older authorities, Lord Wark offers a summary of Lord President Dunedin's position in *Grant v Heriot's Trust* (with "joint" here meaning what we would now understand as "common"), at 63:

> The reasons for the law of Scotland holding that the state of joint property may be brought to an end at the instance of any of the joint proprietors pursuing a division or a division and sale are stated to be reasons of public policy.

The Lord Justice Clerk (Cooper) at 68 describes the distinctive feature of common property as the absolute right of every co-owner to terminate the community at will, and states that this characteristic has been uniformly explained by reference to considerations of public policy by Roman and Scots Law, citing some of the references referred to above.

Although the policy justification for the remedy of division and sale is not spelled out in lengthy terms in any of the authorities, it seems clear nevertheless that the concern is to prevent heritable property falling into neglect and disuse as a result of irresolvable disagreement between the common owners. Avoiding this outcome obviously addresses the specific interests of the owners themselves, who want their property to serve them whether as a home, a place of business, a source of income or in some other way. However, this approach also serves the broader and more systematic interests of society as a whole in ensuring that property, particularly land, is used efficiently. Land is essential for many of our basic human needs (food, water, shelter) and is also a cornerstone of the economy. Yet, as Mark Twain's famous aphorism notes, "they aren't making any more of it". There is a finite amount of land available within Scotland's borders. A piece of land removed from the pool for one owner means one less piece available for anyone else. Accordingly, it is in the general interest to ensure that discrete pieces of this finite resource are not robbed of their utility.

This desire to avoid sterilisation of land underpins many of our foundational rules of property law. The numerus clausus principle, which prevents areas of land being fragmented into too many individually-held rights and interests, works towards this goal. The abolition of long-term controls over the circulation of land through devices such as entails serves the same purpose. Law plays it part in ensuring effective and efficient land use.

In the common property context, the law seeks to avoid sterilisation of land in two ways. First, it promotes cooperation between co-owners over use and management of land, not least through the rule prohibiting any one common owner taking excessive benefit at the expense of the others. Secondly, it provides for dissolution of common ownership and reversion to sole ownership without the need for agreement where the relationship has failed. The remedy of division and sale works in support of both these approaches. Its most obvious effect is to bring the common ownership to an end. However, the way in which it does so operates as a disincentive to its use. In division and sale,

all common owners are impacted by their inability to agree. If the relationship fails, the property as a whole will be sold and all parties will lose their share of ownership. Responsibility for the relationship, and consequences for its failure, is equally shared. Through this "carrot and stick" effect, division and sale encourages a cooperative approach to use and management of property.

It seems to us that the absolute nature of the common owner's veto in a situation where division and sale is unavailable runs counter to these policy concerns. In these circumstances, dissolution of the relationship cannot provide a solution to the risk of sterilisation. Accordingly, the law should focus on the promotion of cooperative behaviour. As it stands, the law effectively does the opposite. A recalcitrant or neglectful owner is at liberty to persist in this behaviour. She carries no responsibility for making the relationship effective and suffers no penalty if it breaks down. An owner who is proactive in relation to management of the property – an approach, we note in passing, which is likely to better secure the efficient and effective use of land – may be frustrated entirely by an owner who does not care. The responsible owner has no mechanism by which to compel her counterpart to take on an equal share of responsibility. She may, of course, exit the relationship by selling her share. But this solution for one individual does nothing to encourage cooperation in relation to the property in future. What is more, taking such action is likely to result in significant upheaval for the seller. It is difficult to understand why the owner who has attempted to make the relationship work should be the one to suffer the fallout from its failure.

Our law of common property should promote reasonable behaviour and cooperation between or amongst co-owners in order to promote efficient use of land. Allowing a co-owner the absolute right of veto regardless of her reasons (or lack of them) seems likely to produce a contrary result. In our view, this leaves the rule on alterations unfit for purpose.

The role of the judiciary is not to create new law. However, it may be observed that bringing the rule on alterations into line with the broader policy motivations in this area would require little more than the creation of a standard of reasonableness in relation to the exercise of the co-owner's veto as regards indivisible subjects. This standard is commonly applied to other property rules regulating neighbourly behaviour, from the requirement that servitudes be exercised *civiliter* (Erskine, *An Institute of the Law of Scotland*, II.ix.4) to the equitable considerations taken into account in enforcement of common interest obligations (Bell, *Principles of the Law of Scotland* (10th ed), para 1086). Indeed, even within the scheme of common property, owners are required to make only "ordinary" use of the property concerned. The change to the law would not be dramatic.

We should make clear that, even if the law were changed as we suggest, it would not necessarily alter the outcome of this particular case. The disadvantage to the respondents in terms of damage likely to be caused by the proposed alterations to the substance, value or enjoyment of their co-owned property may have been such that their refusal to consent was entirely reasonable. The evidence upon which such an assessment could be based is not before us. However, a change in the law to allow such issues to be taken into account would bring it into line with the policy considerations underpinning the law of common property generally.

In conclusion, we will refuse the appeal for the reasons given above. However, we would enjoin Parliament to have regard to the comments made about the law as it stands, and consider reform.

On writing a feminist judgment: Rafique v Amin

Property law as a subject area does not lend itself as easily to a feminist reimagining as some others. Unlike, for example, family law or criminal law, property law rarely contends with the different ways in which individuals are compelled to interact with the world on account of their gender. Historical restrictions on the capacity of women to own certain types of property have long since been removed.[1] So-called "sexual property law"[2] – the group of rules regulating property within intimate relationships[3] – offers some opportunity for gender-based analysis, [4] but the Scottish case law in this area left me, I felt, with little new to say.

Instead, I wanted to explore the challenge feminist scholarship has presented to the norms accepted as underpinning the institution of property in western legal thought in recent decades.[5] The dominant liberal-economic model of property is based on the idea of human beings as self-interested, acquisitive individuals.[6] Since we need material possessions to survive, acquisitiveness is an inherent aspect of human nature. Property law provides secure rights in our acquisition to reduce conflict and encourage activity that enhances the value of our securely-held possessions.[7]

Carol Rose challenges this understanding of individuals as self-interested and individualistic, and critiques its presentation within legal thought as an objective or scientific truth. She turns to feminist theory to provide an explanation of property law rules as the result of cooperation and negotiation,[8] and which incorporate the fundamental interdependence of human beings as an underpinning norm in contrast to classic liberal theory's individualism:[9]

> Feminist theorists have made the point in another way: at least since Carol Gilligan, and really for some time before, we have realized that Mom or the Good Citizen – the caring, cooperative person generally – is just as much "there" as the indifferent non-cooperator … So why is cooperation the preference ordering that seems to need the story? There is, of course, the point that is made so tellingly by critical theory, and even more so by feminist theory: the dominant story-teller can make his position seem to be the natural one. [Citations omitted.]

[1] The last major restrictions on women's proprietary capacity were removed by the Married Women's Property (Scotland) Act 1920. Rights in succession became gender neutral following the Succession (Scotland) Act 1964.
[2] G Gretton and A Steven, *Property, Trusts and Succession* (4th ed) (Bloomsbury Professional, 2017), ch 11.
[3] For example, property-based responses to intimate partner abuse in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, and the protections for spouses providing security for the business debts of their spouse set out in *Smith v Bank of Scotland* (1997) SC (HL) 111.
[4] R Auchmuty, "Judgment: Royal Bank of Scotland Plc v Etridge (No 2)" in R Hunter, C McGlynn, and E Rackley, (eds) *Feminist judgments: from theory to practice* (Hart Publishing, 2010) 155-169;
[5] Carol M Rose, "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory" (1990) 2(1) *Yale Journal of Law and the Humanities* 37-57. See also R West, "Jurisprudence and Gender" (1988) 55 *University of Chicago Law Review* 1-72.
[6] This critique draws on classic accounts of property by Hobbes, Locke and Blackstone.
[7] Rose, "Property as Storytelling", 40-43.
[8] Rose, "Property as Storytelling", 53-54.
[9] Rose, "Property as Storytelling", 54.

In writing the fictional appeal judgment in *Rafique v Amin*, I was guided by two main principles extracted from Rose's feminist account of the law. First, I was keen to look "beneath the bonnet" of the rule on alterations to common property to see the norms contained within it. All property rules incorporate values, although those values (in Scotland at least) are infrequently articulated. Although the rule was clearly stated in the authorities, I sought to challenge the idea that it was therefore somehow neutral or objective by exploring the policy motivations for it. The repeated references in the authorities to the policy justification for the connected remedy of division and sale provided a useful point of comparison for the silence on this subject in relation to the rule on alterations.

Secondly, I sought to challenge the norms themselves. The absolute nature of the co-owner's veto arguably incorporates precisely the individualistic understanding of ownership which Rose critiques in the classic liberal property model. This approach seems particularly ill-suited within the common property context, in which owners might be expected to accept that ownership cannot connote the "sole and despotic dominion"[10] it is said to entail elsewhere. A feminist critique would suggest that property law rules recognise the ability of human beings to cooperate and promote that behaviour where possible. A change to the rule on alterations seems an obvious place to incorporate that norm of cooperation.

For me, the challenge and the joy of writing the judgment – and participating in the project as whole – lay in exploring the connections between feminisms and (other) counter-capitalist perspectives on property. Foregrounding cooperation between neighbours as a property norm may not be the most dramatic feminist re-reading of the law. However, finding a way to make the case for it within the strictures of an appeal judgment provided me with a real and timely reminder that the master's tools can (and must) be repurposed to build a different house.[11]

[10] William Blackstone, *Commentaries on the Laws of England (1765-1769)*, vol 2, 1.
[11] Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in *Sister Outsider: Essays and Speeches* (1984).