

Decision of the Scottish Land Court

John Gunn (Applicant)

v

Sheilagh Gunn or Luyken and Reiner Luyken (Respondents)

Case reference SLC 156/16

before

Iain F Maclean, Deputy Chairman, and Tom Campbell

27 September 2017

Introduction

[1] In these proceedings, the Applicant craves orders declaring (1) that there exists no agricultural tenancy, in terms of the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”), of any part of the land known as “Hafod”, Polbain, Achiltibuie IV26 2YW, and in particular of that part thereof extending to two decimal or one hundredth parts of a hectare (0.02 ha), shown outlined in red on the plan produced by the Applicant and lodged as Production 9 and referred to in the Applicant’s pleadings as “the Disputed Land”, a convenient usage which we adopt in the body of this Note; and (2) that the Respondents have no right or title to occupy the Disputed Land. The Applicant further craves orders (3) ordaining the Respondents to flit and remove themselves and any servants or third parties acting to their order, with any goods and gear, from the land at Hafod and (4) ejecting the Respondents from the Disputed Land. The Respondents, who presently occupy the Disputed Land, assert that they are the tenants of the Disputed Land under a secure 1991 Act tenancy and they have registered their interest in acquiring the Disputed Land in the Register of Community Interests in Land (“RCIL”) in accordance with the procedure set out in section 25 of the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”). The Applicant’s fifth crave invites us to ordain the Keeper of the Registers of Scotland to rescind the registration of that interest in terms of section 25(11) of the 2003 Act.

[2] The Respondents having acceded to our suggestion that parties’ respective positions would be most readily and efficiently elucidated by way of them, rather than the Applicant, leading at proof, we proceeded to hear evidence in the clubhouse of the Ullapool Golf Club on 26 July 2017, with parties’ submissions carried over to the following day, after which we travelled from Ullapool to Polbain where we carried out an unaccompanied site inspection

of the Disputed Land and its environs. At the hearing, the Second Respondent, Mr Reiner Luyken, appeared as a litigant in person for himself and on behalf of his wife, the First Respondent. The Respondents gave evidence, by way of witness statements lodged in advance of the proof in conformity with Rule 35 of the Rules of the Scottish Land Court 2014 (SSI 2014/229) (“the 2014 Rules”), to which they spoke, and upon the contents of which the Applicant had the opportunity to cross-examine them. The Respondents called two witnesses, Mr Kenneth C. Maclellan and Mr Kenneth J. MacDonald. The Applicant was led in evidence by his Solicitor Advocate, Mrs Fiona Stephen of Messrs Anderson Strathern LLP, Edinburgh. This is a dispute that has divided a family, and as such, the hearing might easily have descended into unpleasantness and acrimony. It did not do so, for which credit is due to both the Second Respondent and Mrs Stephen, for the courtesy and restraint they each exhibited in their conduct of the proceedings.

[3] In the introduction to his written closing submission, the Second Respondent expressed the hope that we would not find it presumptuous if he tried to make a legal argument. A barrister in London with whom the Respondents have a family connection had told him that “it’s not rocket science; you just have to read up the law and apply your intelligence.” The sometimes Byzantine complexity and convoluted drafting of the Scottish Parliament’s recent agricultural holdings legislation might be considered to provide a severe test of the validity of that proposition, but we think that, in the particular circumstances of this case, it does hold good. Our decision here turns on the application of settled law to primary facts that were scarcely in dispute: issues of credibility or reliability did not loom large in reaching our decision, with parties in their closing submissions differing for the most part merely on what inferences properly fell to be drawn from the primary facts to which the various witnesses had spoken in evidence. In the paragraphs which follow, we narrate the facts as we have found them, flagging up along the way those few instances where there was any real divergence between the parties thereon, as a preliminary to setting out the applicable law, as to which the parties similarly were in no material disagreement, before applying the latter to the former in what ultimately resolved itself into a straightforward exercise in syllogistic logic.

The relevant facts as found by us

[4] The Applicant and the First Respondent are siblings. They are two of the three children of the late William Fraser Gunn (“Mr Gunn”) and his wife, also now late, Mrs Dilys Elizabeth (known as Betty) Gunn. Mr & Mrs Gunn had another child, Rhiannon Mary Gunn, from whom a signed but unsworn witness statement dated 26 May 2017 was lodged by the Respondents [Production 55] in which she confirmed, in essence, that she had no relevant knowledge to bring to bear on the issue we had to decide. Mr Gunn, a nuclear physicist, originally from the Isle of Lewis, had family connections with the Polbain area and during the nineteen seventies, when residing in Edinburgh, he acquired, in two separate transactions, neighbouring plots of land in Polbain.

[5] By Feu Disposition dated 12 November and recorded in the Division of the General Register of Sasines applicable to the County of Ross and Cromarty 2 December, both 1975 (“the 1975 Feu Disposition”) [Production 2], Mr Gunn acquired In the First Place an area of land extending to sixteen decimal or one hundredth parts of a hectare (0.16 ha), part of Crofts Numbers 196 and 197 Polbain [otherwise Croft 196/197 Polbain], bounded on or towards the South or South-west by the public road leading from Altandhu to Achiltibuie, along which it extends 37.5 metres or thereby; and In the Second Place an area of land extending to two decimal or one hundredth parts of a hectare (0.02 ha), part of Croft 196/197 Polbain, bounded on or towards the North or North-east by that same public road, along which it extends 39 metres or thereby. The areas In the First Place and In the Second Place disposed by the 1975 Feu Disposition are situated respectively above and below that public road directly opposite one another; the 0.02 ha area In the Second Place disposed is the Disputed Land with which this application is concerned. The subjects of the 1975 Feu Disposition had earlier been resumed, on the application of the then heritable proprietor of Croft 196/197, Mrs Longstaff of Badentarbat Estate, for the purpose of conveying them to Mr Gunn for the erection of a dwelling-house thereon, a purpose which the Land Court, in an order authorising resumption dated 21 August 1975 [Production 10] found to be a reasonable one within the meaning of the then applicable section 12 of the Crofters (Scotland) Act 1955. Resumption was granted subject to the standard condition that the applicant erect stockproof fences on the boundaries between each of the two areas and the remaining parts of Croft 196/197 Polbain, and the then tenant of Croft 196/197 Polbain, Miss Jemima (known as Mima) Macleod, a distant relative of Mr Gunn, was ordained, subject to the condition as to fencing, to surrender the two areas at the term of Martinmas 1975.

[6] Mr Gunn and his wife subsequently acquired the (0.215 ha) site of the dwelling-house on or pertaining to Croft 196/197 Polbain, known as Polbain House, formerly resided in by Miss Mima Macleod, title thereto being conveyed to them by Feu Disposition by Mrs Longstaff, with consent of the executor-nominate of the now late Miss Mima Macleod, in their favour dated 27 June and 21 September and recorded in the Division of the General Register of Sasines applicable to the County of Ross and Cromarty 24 September, all 1979 (“the 1979 Disposition”) [Production 3]. The Crofters Commission granted a decrofting direction in respect of the subjects of the 1979 Disposition on 10 July 1979 [Production 42]. The subjects of the 1979 Disposition adjoin the eastern boundary of the subjects In the First Place disposed by the 1975 Disposition.

[7] The Respondents, after their marriage on 2 February 1980, came to live in Polbain House, which property was gifted to them by Mr & Mrs Gunn by Disposition dated 10 June 1980 and registered in the Division of the General Register of Sasines applicable to the County of Ross and Cromarty 4 September 1981 [Production 4]. In the years which followed, the Respondents extended Polbain House to the front and to the rear, to transform it from a modest traditional croft house into a substantial dwelling. The Second Respondent came to the North West Highlands from Germany in the late nineteen

seventies. He initially worked as a fisherman at the Badentarbat salmon fishing station where he lodged with a Mrs Abigail (known as Abi) Muir, an aunt of Mr Gunn. The Second Respondent was a qualified harpsichord and organ builder and was on the lookout for workshop premises in the locality, from which he could set up in business making portable pipe organs. Through Mrs Muir, he came to learn of the existence of “Big Hugh’s Garage”, a corrugated iron shed situated upon the 0.16 ha area above the public road, by then in the ownership of Mr Gunn, and he discussed with Mr Gunn the possibility of obtaining a lease of the shed. Big Hugh, it should be explained, was the late Hugh Macleod, a First World War veteran, crofter of Croft 196/197 Polbain and county councillor for the area, and the brother of the aforementioned Miss Mima Macleod, with whom he had lived in Polbain House until his death in the nineteen seventies. The idea of establishing a pipe organ workshop at Big Hugh’s Garage foundered, in part over difficulties with planning and obtaining an electricity supply, but the Second Respondent stored his woodworking equipment therein, and after their marriage, the Respondents occupied the whole of the 0.16 ha area above the public road under what the Second Respondent characterised as an “informal lease”, utilising it for the purposes of keeping pigs and poultry and growing produce.

[8] The Respondents’ occupation of the 0.16 ha area above the public road continued until 1990, when Mr & Mrs Gunn built a small bungalow, which they named “Hafod” (a Welsh term meaning “haven”), on that site and came to live there on a permanent basis. The Disputed Land below the public road was not fenced off from the remainder of Croft 196/197 Polbain, then tenanted by Miss Mima Macleod’s assignee, the now late Donald Mackenzie (Senior), until 1981. The current tenant of Croft 196/197 Polbain is his son, Donnie Mackenzie (Junior). The Respondents, with a young family to feed and support, were keen to expand their agricultural activities, and when it was suggested to them by Mr Gunn, in or about the early nineteen eighties, that they could use the Disputed Land for such purpose if they were willing to fence it, they agreed. Nothing was, either at that time or subsequently, committed to writing to record the terms of the parties’ agreement in respect of the Disputed Land, and in his witness statement, the Second Respondent acknowledged that, after so many years, it would be impossible for him to recall the exact conversation he had with Mr Gunn. No-one else within the wider Gunn family knew of the existence of any lease of the Disputed Land granted by Mr Gunn in favour of the Respondents prior to the death of the late Mrs Gunn on 26 February 2011.

[9] When Mr & Mrs Gunn came to Polbain as visitors, and when they moved there to live on a permanent basis, the Respondents supplied them, from time to time, with vegetables or berry fruit they had grown or eggs laid by their hens. The quantity of produce supplied by the Respondents to Mr & Mrs Gunn, and in her widowhood to Mrs Gunn alone, was entirely at the discretion of the Respondents, as was the frequency and timing of any such supply. Although the Second Respondent emphasised in his evidence that the Respondents maintained careful records accounting for the produce they grew and sold, which enabled them to work out how much, from a business perspective, they could afford to provide to

the Gunns, no such records were produced to the Court, and there was no evidence that in supplying the Gunns with produce, the Respondents were acting in implement of any prior agreement with the Gunns that they would do so. In his closing oral submission, the Second Respondent acknowledged that in their evidence about the supply of produce to the Gunns, the Respondents were telling the Court “how it was – a practice or *modus operandi* developed; no-one took a step back and analysed it in legal terms”. The Second Respondent’s account of how such a practice “developed” does not sit easily with the Respondents’ previous insistence that (as they averred) Mr Gunn and the Respondents entered into “an unwritten tenancy agreement for the purposes of the plot’s cultivation for our fledgling agricultural business” before the Disputed Land was fenced off from the remainder of Croft 196/197 Polbain below the public road.

[10] The Second Respondent fenced the Disputed Land in the Spring of 1982. The west end of the Disputed Land was enclosed with a post and wire fence, with a small gate installed to facilitate pedestrian access from the public road. A seven metre strip at the east end of the Disputed Land was left unfenced to allow for access by the tenant into Croft 196/197 Polbain. The Respondents produced at proof an estimate from a local fencing contractor [Production 67] purporting to show that to erect the same fence today would cost just over £1,200. The Second Respondent, in his evidence, sought to emphasise both that the obligation to fence the Disputed Land was part of the Respondents’ original bargain with Mr Gunn, and that expenditure of the equivalent sum in 1982 money was, given the Respondents’ financial situation at that time, a substantial commitment on their part, which they would not have undertaken without the assurance that they would have security in their occupation of the Disputed Land. The Applicant, in his evidence, expressed scepticism that the Respondents had themselves paid for the fencing materials, suggesting that it was more likely that the Second Respondent had utilised left-over fencing materials found in Big Hugh’s Garage. The Applicant was unable to testify to actually having seen left-over fencing materials in Big Hugh’s Garage at or about that time, and we initially were inclined to dismiss this as mere speculation on his part, but it is notable that the Respondents adduced no evidence whatsoever as to the actual costs incurred by them in erecting the fence in 1982 (by contrast, they were able to tell us, by reference to a contemporaneous “Dirtfarm Diary” entry maintained by them [Production 48] that “On 26 October 1982, we lifted 8, and sold 6½ hundredweight of tatties for £4.00 per bag”), and on inspection by us, the fence around the enclosed part of the Disputed Land did indeed have the look of one cobbled together from disparate offcuts of wire and spare posts.

[11] Once the west end of the Disputed Land was enclosed, the Respondents set about cultivating it, which they have continued to do ever since, although a comparison of what we saw at inspection with what can be seen in some of the historic photographs lodged in process indicates that it was considerably less intensively cultivated this year than in some past years, the growing crop consisting of just a few shaws of potatoes and blackcurrant bushes. The Respondents planted a beech hedge along the western boundary and erected wind breaks (shown on one of the photographs lodged as Production [44]) created out of

sheeting recovered from the demolition of the old corrugated iron back kitchen of Polbain House when the Respondents replaced it with a concrete block structure in 1984. The Second Respondent constructed a cold frame on the enclosed part of the Disputed Land, which survives to this day, although when inspected by us, it was empty. In their early years in Polbain, the Respondents grew a variety of different kinds of produce within the enclosed part of the Disputed Land, and Mr Maclellan, a well-known figure in the crofting community of that part of the North West Highlands, testified to his recollection of the Second Respondent offering new potatoes for sale at the side of the public road back in the 1980s. More recently, the Respondents installed a gravel drain (which the Applicant mistakenly assumed to be merely a path) along the top end of the enclosed part of the Disputed Land to catch and disperse water running off the public road or the hill.

[12] The parties were at odds as to who planted the two black poplar trees that formerly grew by the southern boundary of the enclosed part of the Disputed Land. The Applicant testified that they were planted by his father in or about 1991/92, on the advice of his father's uncle, William "Ruadh" Fraser, a retired Chief Constable of Inverness-shire, who had told him that poplars were the only species of tree that would survive in that location. The Applicant spoke to having counted 26 rings on the stumps of the two trees, which he complained the Respondents had cut down without his permission in 2016. The Respondents' position was that they had nurtured the two poplars from cuttings taken from William Fraser's garden in or about 1982, and they claimed support for this position from an entry in the Dirtfarm Dairy dated 12 March 1982 [Production 57] in the terms "PLANTED 6 BLACK POPLARS (GROWN FROM CUTTINGS IN ROAN MORE ON THE W-SIDE OF THE ORCHARD ...". They acknowledged that they had cut down one of the two poplars, for "safety reasons", but contended that the other had blown over rather than been felled. On the disputed issues of fact which arise in this chapter of the evidence, for what limited, if indeed any, relevance it may have, we favour the Applicant's position. On inspection, we found that the evidence of the tree rings was indeed more consistent with the approximate date of planting spoken to by the Applicant than by the Respondents, and we were also struck by the discrepancy between the actual location of the two tree stumps by the southern boundary fence and the reference in the Dirtfarm Diary entry to the planting of the black poplars "ON THE W-SIDE". Both of the tree stumps appeared to have been sawn off, and such is the proximity of the two stumps to one another that it is difficult to conceive of how one tree could have come down, whether as a result of the wind or the intervention of human agency, without damaging the other.

[13] The Respondents subsequently acquired landholdings in or around Polbain, in the form of the tenancies of (i) Croft 191A Polbain (with associated common grazings share); and (ii) the agricultural holding of Badentarbat Parks. The combined area of these two landholdings extends to nearly 27 hectares. The Respondents are registered with SGRPID under Main Location Code 91/757/0323 in the business name "The Eggman's Croft" [Production 46]. The Disputed Land forms no part of the Respondents' registration, the whole being too small to be accepted for registration as a land parcel and the part thereof

that consists of an area of hard standing being, in any case, ineligible for agricultural subsidy purposes. Mr MacLennan acknowledged the Second Respondent's contribution as one of the few remaining active crofters in the area, still keeping sheep and taking a dog to the hill at gathering time. The Second Respondent, who impressed us as a practical and resourceful individual, during his years in Polbain, has supplemented his income by working as a journalist, and the First Respondent has worked part-time as an art and supply teacher. The Respondents have established a business on their croft providing high-end self-catering accommodation for tourists which they operate through the medium of a limited company, The Brochs of Coigach Limited. Whilst accepting that the Disputed Land could never be farmed profitably on its own, the Respondents contended that it nevertheless was "integral" to their tourism and agricultural businesses, pointing, by way of example, to how they grew flowers within the enclosed area for display in the Brochs of Coigach self-catering units, and claiming that when not under crop, the enclosed part of the Disputed Land was useful as a holding pen for tups. We are doubtful of the suitability of the enclosed part of the Disputed Land for the latter purpose – the fencing is simply not up to the job – and more generally we are not persuaded, on the evidence, that having the use of the Disputed Land is a factor of any material significance in the Respondents' business activities.

[14] Mr Kenneth J MacDonald described himself as a civil engineer and surveyor, now semi-retired. In the early nineteen nineties, he was managing director of a local building and contracting company, ATF Urquhart (Ullapool) Limited ("ATF Urquhart"). ATF Urquhart were employed by Mr Gunn in the building of "Hafod". Mr MacDonald recalled Mr Gunn as a meticulous individual, who, unusually for such a job at that time and in that area, had insisted that the parties enter into a formal building contract (Scottish Minor Works Contract 1986 Edition (April 1989 Revision)) in respect of the works [Production 19], and who had even taken the trouble to visit the factory in Grangemouth to see the timber frame for the dwelling-house being made.

[15] The questioning of Mr MacDonald was directed towards the issues of by whom, and at whose expense, an area of hard standing, situated between the access gateway into Croft 196/197 Polbain and the enclosed part of the Disputed Land, had been constructed. The Applicant contended that the construction of the area of hard standing formed part of the works contracted for by Mr Gunn, founding upon an entry in the specification of external works appended to the building contract in the terms "Hardcore to parking area 100m² finished with quarry scalplings." The Second Respondent testified that the area of hard standing was created by the Respondents as somewhere to park their Land Rover and livestock trailer "in or around 1990". The building contract for the erection of Hafod contemplated that the works would be commenced on 26 February 1990 and completed by 29 June 1990. Mr MacDonald, who had visited the locus shortly in advance of the hearing to reacquaint himself with what was to be seen there, was clear in his evidence that the creation of the area of hardstanding across the road from Hafod was not the work of ATF Urquhart. He pointed out that the building contract, when it was entered into, had made no

provision for a garage at the western gable of Hafod, the erection of which Mr Gunn subsequently instructed, and in the absence of any reference to a garage, it would have been assumed that the parking area pertaining to the dwelling-house would be the area at the west gable at the top of the short drive. He was inclined also to think that the materials used in the external works around the dwelling-house differed from those utilised in making up the area of hard standing, the former having been finished with granite chips and the latter with a mixture of granite chips and limestone. Because limestone supported weed growth, whilst granite did not, this would explain why the area of hard standing exhibited a greater degree of weed penetration than was apparent within the curtilage of the dwelling-house. For our part, on inspection, we noted that the red-hued quarry scalplings with which both areas were finished were identical in size and composition.

[16] Mr MacDonald's conclusion that the area of hard standing had not been constructed by ATF Urquhart as part of the contracted works was, however, based primarily on his assessment that it had not been done to the sort of professional standard that Mr Gunn would have insisted upon or ATF Urquhart would have provided. The photographs spoken to in evidence by the Respondents [Productions 35, 53 & 68], showing how it was retained in place by old sheets of corrugated iron (according to the Second Respondent, and we have no reason to disbelieve him, a redeployment of the corrugated iron sheets that originally formed the back kitchen of Polbain House and which thereafter were used as windbreaks in the enclosed part of the Disputed Land) and old timber piled up on the seaward side of the post and wire fence around the area of hard standing, support that impression, and our own observations on inspection endorse the view that this was a functional but somewhat makeshift construction, undertaken with whatever materials happened to be to hand at the time. Mr MacDonald was unable to confirm that ATF Urquhart had supplied the Second Respondent with a load of quarry material to provide bottoming for the area of hard standing at or about this time, as such a minor transaction would not have been brought to his notice and ATF Urquhart did not retain records extending back that far.

[17] We accept the evidence of Mr MacDonald, a thoughtful and careful witness, that the area of hard standing on the Disputed Land was not constructed as part of the contracted works, for the reasons he gave, and we conclude that it was indeed constructed instead by the Second Respondent. We consider it likely that materials left-over from the Hafod external works were incorporated by him into the finishing of the area of hard standing.

[18] Mr & Mrs Gunn resided together at Hafod until the former's death in or about 1994. Mrs Gunn thereafter lived on alone in Hafod, next door to her daughter and son-in-law, until her own death in 2011, although in the later years of her widowhood, she took to spending increasingly lengthy periods of time away from Polbain, staying with her brother back in her native Wales. Mrs Gunn was, of course, grandmother to the Respondents' four children and she saw much of them when they were at home as young children and during their holidays from boarding school in Edinburgh. Mr. Gunn had, by Disposition dated 18, and recorded in the Division of the General Register of Sasines applicable to the County of

Ross and Cromarty 30, both October 1981 [see the penultimate entry in the Search Sheet lodged as Production 54], conveyed to his wife a one half *pro indiviso* share of Hafod and after his death, his widow become the sole heritable proprietor of Hafod, by virtue of Disposition in her favour of her late husband's remaining one half *pro indiviso* share dated 13, and recorded in the Division of the General Register of Sasines applicable to the County of Ross and Cromarty 24, both February 1994 [see the final entry in the Search Sheet lodged as Production 54].

[19] Mrs Gunn and the Applicant in Wales on 25 March 2008 executed before a witness a Minute of Agreement which subsequently was completed and on 31 March 2008 registered in the Books of the Lords of Council and Session for preservation and execution [Production 6]. The Minute of Agreement was prepared by Balfour & Manson, Solicitors, Edinburgh, a firm which had acted previously for Mr & Mrs Gunn in connection with the building of Hafod [see the solicitors' account lodged as Production 20]. It narrated that Mrs Gunn had resolved to make a gift to the Applicant of a one half *pro indiviso* share in the title to Hafod, the gift to be effected by the granting of a disposition conveying such share in the property to the Applicant for no consideration. The Minute of Agreement sought to regulate future disposals of the property and further provided, in Clause (FOUR) thereof, that the parties thereto:

“shall be jointly responsible for maintaining the property in good order and repair, and for the maintenance of the garden ground above and below the public road, payment of all expenses arising in connection therewith; and all Council tax and other Local Authority charges, utility accounts, insurance premiums for Buildings Insurance and all other charges or expenses incurred In respect of the property; ...”

[20] The Applicant has produced a copy of a subscribed but not completed disposition by Mrs Gunn in her own and his favour in implement of the gift of a one half *pro indiviso* share in the title to Hafod referred to in the Minute of Agreement [Production 5]. The copy disposition does not disclose upon what date it was executed by Mrs Gunn, but we note that her signature thereto bears to have been witnessed by the same person who witnessed the execution of the Minute of Agreement. The Applicant averred that Mrs Gunn conveyed a half share in Hafod to the Applicant “in or about March 2008” and we did not understand it to be disputed by the Respondents that the Applicant is now the sole heritable proprietor of Hafod. Proceeding upon the basis that the copy of the subscribed but incomplete disposition produced by the Applicant reflects the terms of the disposition subsequently registered on his behalf, we would observe in passing that the Minute of Agreement, in narrating merely that Mrs Gunn had resolved to make a gift to the Applicant of a one half *pro indiviso* share in the title to Hafod, did not tell quite the whole story: the disposition contained a survivorship destination that meant that in the event of Mrs Gunn predeceasing the Applicant, which duly occurred, absent a validly executed *inter vivos* or *mortis causa* evacuation by her, Mrs Gunn's remaining one half *pro indiviso* share would pass automatically to the Applicant rather than form part of her estate for distribution in

conformity with her will or, where she left no testamentary disposition, in conformity with the laws of intestacy.

[21] The significance, for the Applicant, of the contents of the Minute of Agreement in the context of these proceedings was that in treating of the “the garden ground ... below the public road”, Clause (FOUR) not only did not acknowledge the existence of any agricultural tenancy in favour of the Respondents over those subjects but also, in making Mrs Gunn and the Applicant jointly responsible for the maintenance thereof, tended to negate any claim by the Respondents to have exercised exclusive possession of the Disputed Land. The extent to which Mr & Mrs Gunn maintained a practical involvement with the cultivation of the Disputed Land after Mr Gunn permitted the Respondents to make use of it was a matter of dispute. The Applicant’s contention was that the Gunns “shared” it with the Respondents. That even before Mr & Mrs Gunn moved permanently to Polbain, they at least on occasion helped out with their daughter and son-in-law’s gardening activities is confirmed by an entry in the Dirtfarm Diary dated 19 July 1982 [Production 58] written, according to the Second Respondent’s witness statement, by Mr Gunn himself, which relates how he had finished weeding and planted drills of carrots and sprouts. The Second Respondent, in his witness statement, suggested that this entry “refers to weeding and planting carrots and turnips in a growing patch by our house”, but we note that there is no such specification as to the location at which these activities were carried out in the diary entry itself, and in any event, there is no reason, on the evidence, to suppose that if Mr Gunn were participating in such activity in a vegetable patch by Polbain House, he would not also have been doing so in the enclosed part of the Disputed Land.

[22] When Hafod was built, the septic tank for the dwelling-house was installed within the Disputed Land, just to the east of the area of hard standing, and for two years the Applicant kept a catamaran upon that ground. Although Mr Gunn parked his car on the Hafod driveway, visitors to both Hafod and Polbain House, including the Applicant, would park on the area of hard standing that forms part of the Disputed Land. The Applicant averred that Mrs Gunn “remained active in the vegetable garden on a regular basis from the time she moved to Polbain in 1990 until 2008, when back pain reduced her mobility”, and while the evidence to support that averment was limited in both quantity and quality, we are prepared to accept his evidence that Mrs Gunn did, over that period, spend time in the enclosed part of the Disputed Land, and that whilst there, she may have carried out a little light gardening work. The Respondents themselves, in their pleadings, averred that after the death of Mr Gunn, Mrs Gunn asked one of the two people whom she employed to help her in the garden of Hafod “to stick willow branches along part of the perimeter” of the Disputed Land, and at inspection we saw growing the somewhat unkempt and straggling results of that endeavour. We are, however, satisfied that from the early 1980s onwards, the enclosed part of the Disputed Land was used predominantly by the Respondents rather than by Mr & Mrs Gunn. Whilst we recognise that Clause (Four) of the Minute of Agreement referred to “the maintenance of the garden ground above and below the public road”, we consider it likely, on the evidence we heard, that in practice, as contrasted to what

may have been provided for in that deed, such gardening as was done by Mrs Gunn in the period between the date of execution of the Minute of Agreement and her death was confined to the garden ground above the public road. We do not believe that the Applicant, over that same period, expended any material amount of time or effort in the “maintenance of the garden ground ... below the public road”. His evidence as to what he actually did by way of gardening work within that area was sketchy in the extreme, and upon the basis that, as we have held, it was the Respondents who predominantly had used it over the course of a quarter of a century by the date the Minute of Agreement was entered into, it seems to us to be highly unlikely that its maintenance would have been a priority for the Applicant during his periodic stays in Hafod.

[23] In advance of the proof, the Respondents introduced extensive averments into their pleadings charting what they referred to as Mrs Gunn’s “severe cognitive decline” from in or around 2005 onwards. The object of those averments, we inferred, was to ground a challenge by them to Mrs Gunn’s capacity to enter into the Minute of Agreement and by that means seek not merely to undermine whatever evidential value its contents otherwise might be argued to have, but to exclude the Minute of Agreement entirely from the Court’s consideration. Having thus themselves first introduced into these proceedings the issue of whether Mrs Gunn retained the mental capacity to enter into the Minute of Agreement, however, the Respondents went on to submit that their preferred outcome would be for “everything from the date of Mrs Gunn’s first referral to the psychiatrist of the elderly ... up to and including her death” to be held inadmissible as evidence, a proposal which the Respondents’ agents treated as a motion under Rule 30 (**Objection to document or deed**) of the 2014 Rules. Rule 30 provides that:

“Where an objection to a document or deed founded on in a case is stated and maintained by an opposing party, the court may–

- (a) for the purposes of the case, dispose of the objection; or
- (b) sist the proceedings if it thinks it necessary or more convenient to do so in order to allow the party to proceed by way of reduction.”

[24] In the Note which accompanied our Order dated 18 May 2017, we explained to the Respondents the procedural and evidential implications for them of attempting to secure the complete exclusion of the contents of the Minute of Agreement from our consideration, and we posed the question whether, in order for the Respondents, after the evidence has been heard, to dispute the significance of the contents of the Minute of Agreement so far as they may be said to bear on the status of the Disputed Land, there was actually any need for them to have the Minute of Agreement set aside or reduced, as both parties hitherto seemed to have assumed. The Respondents, on reflection, came to the conclusion that it was not necessary for them to do so, and in their closing submissions, they contented themselves with arguing that the contents of the Minute of Agreement were of no relevance here, given that the lease, upon the existence of which the Respondents were founding, had been

granted by Mr Gunn in their favour rather than by Mrs Gunn. The Second Respondent conceded, under questioning from the Court, that in accepting "gifts" [sic] of produce grown in the enclosed part of the Disputed Land from the Respondents, Mrs Gunn may well not have been aware that this was being tendered by them by way of "rent." We shall revert at a later point in this Note to the issue of how the evidence about "rent" we heard falls to be assessed, but for present purposes, we would state our view that the Respondents' acknowledgement that Mrs Gunn either was, or at least may have been, ignorant of the terms of the tenancy agreement they claim to have reached with the late Mr Gunn effectively resolves, in the Applicant's favour, any argument as to what inferences properly fall to be drawn from the omission from Clause (FOUR) of the Minute of Agreement of any reference to the garden ground below the public road being subject to an agricultural tenancy, without any need for us to make an assessment of Mrs Gunn's mental acuity as at the date of its execution by her.

[25] The Applicant, a divorced father of two adult daughters, enjoyed a varied and peripatetic career which took him to live in a number of different locations across the United Kingdom whilst working for institutions including the CBI and the Forestry Commission. After his parents moved to Polbain, the Applicant and his family visited them periodically, the frequency of such visits being dependent upon where he was living and what he was doing from time to time: by way of example, whilst employed by the Forestry Commission, his work took him to the North of Scotland several times each year, which afforded him the opportunity to tie in trips to Polbain to see them. Recently divorced, and having taken early retirement from his work in 2005, the Applicant used Hafod as his base in the United Kingdom, staying there with his mother for part of the year but spending significant periods abroad, in India or the Far East. In the period between the Applicant coming to live at Hafod and the death of Mrs Gunn in 2011, cracks developed in the relationship between the Applicant and his sister and brother-in-law. A contributing factor was a planning application submitted by the Respondents in connection with what was to become their Brochs of Coigach development. Mrs Gunn became aware that the Respondents had represented to the planning authority that the area of hard standing in front of Hafod would be available for car parking if they could not obtain permission for the construction of an access road, leading off the public road, to afford vehicular access to the development. Mrs Gunn, according to the Applicant, was upset that the Respondents had not consulted her about this beforehand and that she had only learned about it from other sources. The precise mechanics of how Mrs Gunn came to hear about her property being implicated in the Respondents' development plans was not clearly vouched by the evidence we heard, but we did not understand the Respondents to dispute that they had indeed flagged up this possibility in their discussions with planning officers, as paragraph 6.18 of the Report on their planning application by the Highland Council's Area Planning and Building Standards Manager [Production 21] relates.

[26] A further factor giving rise to tensions in the relationship between the Applicant and the Respondents appears to have been their disagreement as to what was best for Mrs Gunn

in light of her declining mental faculties, with the Applicant contending that she should be assisted to remain in her own home, and the Respondents arguing that Hafod should be sold to fund nursing home care for her. After the death of Mrs Gunn, relations between the Applicant and the Respondents soured still further, that deterioration fuelled by the contents of Mrs Gunn's will (not before the Court) and the Minute of Agreement, of the existence of which the Respondents had not been made aware whilst Mrs Gunn was alive. The Respondents initially questioned Mrs Gunn's capacity to grant these deeds, and although they did not, ultimately, instigate any formal challenge thereto, we have wondered whether this hard-fought litigation, over what is a tiny sliver of land of nugatory agricultural value, may be for them a proxy for a battle, ultimately not joined, over the contents of Mrs Gunn's testamentary dispositions.

[27] The Applicant, having become aware that the Respondents had registered a notice of interest in acquiring the Disputed Land in the RCIL on the basis that they were tenants thereof under a secure 1991 Act tenancy [Production 8], challenged the registration of that interest as provided for in section 25(8) of the 2003 Act. His, and his agents', correspondence with the Keeper in connection therewith is assembled in Production 22. There occurred between the parties some unedifying confrontational spats on the ground, the detail of which it would serve no useful purpose for us to recount, as having no bearing on the legal issue we require to decide. The Respondents took to tendering annually to the Applicant in November a payment of £10, in the form of either a banknote or a cheque, characterised by them as being by way of rent, which the Applicant declined to accept. The Applicant decided to sell Hafod, and put it on the market, under exclusion of the Disputed Land, for fear of it being argued against him by the Respondents that the agricultural tenant's pre-emptive right to buy under the 2003 Act had thereby been triggered. Some discussion took place of the possibility of the Respondents purchasing Hafod and/or the Disputed Land from the Applicant, and the Applicant, through his solicitors, offered the Respondents the sum of £750 to procure the removal from the RCIL of their registered interest in acquiring the Disputed Land [Production 73] but nothing came of these initiatives and Hafod has been withdrawn from the market pending resolution of these proceedings.

[28] Section 25(9) of the 2003 Act provides that where the owner of the land challenges the registration of the tenant's interest in acquiring the land on the grounds that any matter contained in the extract of registration sent to the tenant and the owner by the Keeper is inaccurate,

“the Keeper is to make such inquiry in connection with the tenant's interest in acquiring the land as the Keeper considers appropriate; and following such inquiry, if the Keeper considers that the notice of interest is inaccurate, the Keeper:

- (a) must, if the inaccuracy is material, rescind the registration of the tenant's interest; and

(b) may, if the inaccuracy is not material, amend that registration.”

The Keeper, faced with a situation in which the Respondents were representing to her that they were the tenants under a verbally constituted agricultural lease and the Applicant was disputing that claim, explained to the Applicant that her role in respect of RCIL was administrative in nature, and that while it was within her purview to determine whether or not an inaccuracy contained therein was material, she was not permitted to arbitrate disputed matters. Given that the information she had received from the Applicant and the Respondents was in “direct contradiction”, she was not in a position to rescind the Respondents’ entry in the RCIL, and the Applicant was told that “Unless you are in a position to provide [sic] irrefutable evidence that an agricultural tenancy does not exist I regret that the Keeper will be unable to review her original decision in respect of your challenge”: letter from Registers of Scotland to the Applicant dated 14 August 2013. That letter advised the Applicant of his entitlement to appeal to the Land Court against that decision in terms of section 25(11) of the 2003 Act, which provides that in such an appeal, the Land Court may make such order as it considers appropriate. The present application is framed not only as an application for declarator but also as an appeal against the decision of the Keeper not to rescind the registration in the RCIL of the Respondents’ interest in acquiring the Disputed Land. The Keeper was notified of these proceedings, but she has, in conformity with her usual practice, opted not to intervene.

The parties’ respective positions

[29] The Respondents claim to be the tenants of the Disputed Land under a secure 1991 Act tenancy, upon the basis of a verbally constituted agricultural lease granted by the late Mr Gunn in favour of the Respondents. It is important to emphasise that, as presented by the Respondents, this is not an “accidental lease” case of the *Morrison-Low v Paterson* 1985 SC (HL) 49 type. The Respondents here periled their position on establishing that Mr Gunn, as the grantor of the lease they sought to set up, understood and accepted from the beginning that the arrangement was to be for the long term.

[30] The Applicant disputes that the Respondents possessed the Disputed Land under any form of lease, arguing that the evidence adduced by them fails to establish the existence of consensus between the parties as to each of the four cardinal elements of a lease, being parties, subjects, duration and rent (*Gray v University of Edinburgh* 1962 SC 157), and in particular he points to a lack of evidence of agreement as to rent. He contends that the Respondents occupied the Disputed Land merely by tolerance of the owners from time to time, with whom possession of the Disputed Land was shared. The Applicant accepts that, if indeed the arrangement between Mr Gunn and the Respondents was constitutive of a lease at common law, the real right conferred on the Respondents as the tenants thereunder would survive the subsequent changes in title and be enforceable against his singular successors.

[31] Before the proof commenced, based on our reading of their pleadings and witness statements, we had understood the Respondents to be arguing that what they characterised as the rent paid by them in respect of their possession of the Disputed Land was made up of two elements – (i) the capital costs incurred by them in carrying out improvements to the Disputed Land; and (ii) the produce supplied by them from time to time to the Gunns. We note from the contents of paragraph 3b of her written closing submission that this also had been Mrs Stephen’s understanding of the Respondents’ position, but in answer to questions from the Court during his closing oral submission, the Second Respondent expressly disavowed an intention to argue that the costs incurred by the Respondents in respect of improvements were an element in the rent. The rental element was solely in the form of the produce supplied to the Gunns by the Respondents. The relevance of the Respondents’ expenditure on fencing, drainage and the creation of the area of hard standing, as we understood the Second Respondent’s closing oral submission, was that the Respondents would not have incurred such expenditure, and Mr Gunn, whilst alive, would not have allowed them to do so, had it not been Mr Gunn’s intention that the Respondents should have the Disputed Land on a long term basis.

The applicable law

[32] As the Respondents observe in their closing written submission, correctly at least in so far as the pre-2003 Act position is concerned (section 1(2) of the 2003 Act now provides that a 1991 Act tenancy requires both to be constituted in writing and expressly to state that the 1991 Act is to apply thereto), an agricultural lease need not take written form, but the absence of writing in a case where one of the parties seeks to argue that the constitution of such a lease was the intention of parties yet may be a factor of some significance in the Court’s assessment of the evidence. As it was put by the Lord President (Emslie), delivering the opinion of the First Division of the Inner House of the Court of Session in *Strachan v Robertson-Coupar* 1989 SLT 488,

“It must never be forgotten that a lease is a contract under which the parties agree to enter the relationship of landlord and tenant, in respect of defined subjects, with all the incidents of tenancy. In the case of agricultural land one of the incidents of the lease of such land for agricultural use is security of tenure of the subjects dedicated to the lease. The existence of such a lease can no doubt be discovered as an inference from the way in which two parties, the alleged landlord and the alleged tenant, act towards each other (see *Morrison-Low v Paterson*). But the inquiry must always be, where there is no direct evidence of a contract of lease entered into at a particular time, whether the whole circumstances are only to be explained upon the basis that both parties must have agreed to the creation of the essential relationship of landlord and tenant in respect of defined subjects [at page 490L – 491A].”

[33] Where the parties intend to enter into a relationship of landlord and tenant, and the tenant has been put into possession of agricultural subjects without the parties having specified a duration, the law will imply a duration of one year (*Gray v University of Edinburgh, op. cit., per* Lord Justice Clerk Thomson at page 164), but it is essential that there should be agreement on the cardinal element of rent either at a specific sum or at a sum to be calculated by an agreed method: The Hon Lord Gill; *Agricultural Tenancies* (4th Ed.; 2017) at paragraph 5.01 and cases cited therein. Technically speaking, rent need not be in the form of money, but can be a return based on a share of fruits or produce or specific services (Professor Robert Rennie, *Leases* (2015) at paragraph 154), but whatever form it takes, if it is not in a fixed amount, we consider that it must be capable of ascertainment by reference to some agreed formula or method.

Discussion

[34] Here, the only “direct evidence of a contract of lease entered into at a particular time” put before us during the proof was what the Second Respondent related about being approached by Mr Gunn and told that the Respondents could use the Disputed Land for agricultural purposes if they were willing to fence it, to which proposal they agreed. The Second Respondent was unable to elaborate on the contents of his conversation with Mr Gunn, but whilst his evidence to that effect may be reckoned sufficient to establish agreement as to parties and subjects, there was nothing in that evidence to suggest that either the duration of the arrangement or payment of rent, whether in cash or kind, was even discussed, let alone agreed between them, at that stage. It follows that, at common law, these facts cannot, by themselves, instruct the constitution of a lease in favour of the Respondents over the Disputed Land.

[35] Nor do we consider that the way in which the alleged landlord (initially Mr Gunn, and later Mr & Mrs Gunn) and the alleged tenant (the Respondents) subsequently acted towards each other gives rise to the inference that the parties must have agreed to the creation of the essential relationship of landlord and tenant in respect of the Disputed Land, the whole circumstances of the case being explicable only upon that basis. The compelling parole evidence we heard from Mr MacDonald about Mr Gunn’s meticulous nature, and his insistence that a formal building contract for the construction of Hafod be entered into, in connection with which he first sought and obtained legal advice, renders it, in our view, extremely unlikely that Mr Gunn would have countenanced granting even a member of his own family a lease of his land without first taking appropriate legal advice and then having the terms of any ensuing agreement formalised in the interests of certainty.

[36] It is, in our view, significant that the Second Respondent was wont to characterise the arrangement, in terms of which the Respondents were permitted to occupy the 0.16 ha area above the public road, in the period before the construction of the Gunns’ dwelling-house

commenced, in exactly the same way he did that relating to the Disputed Land, as an “informal lease”, with nothing said about either duration or rent. The Second Respondent talked about “letting lapse” and of “voluntarily relinquishing” the “informal lease” of that land when Mr & Mrs Gunn built Hafod, the intended implication of which language, we take it, being that the Respondents, if so minded, instead might have insisted upon staying put. For our part, we consider it to be inherently implausible that Mr Gunn would have ceded possession of a site he had acquired for the express purpose of constructing a dwelling-house thereon to the Respondents upon a basis that could, conceivably, have resulted in him being unable to regain possession of it when the time came for him to build, and although it fairly may be suggested that it was less integral to his future plans, we remain sceptical that the position would have been any different in relation to the Disputed Land.

[37] Far from being explicable only upon the basis that both parties must have agreed to the creation of the essential relationship of landlord and tenant in respect of the Disputed Land, the whole circumstances of the present case, as they emerged at proof, in our opinion, point to an entirely informal, intra-family arrangement, in which the Gunns permitted their daughter and son-in-law to make use of a small area of land across the public road from the plot for their proposed dwelling-house, for which they themselves had no immediate or pressing need. We do not accept the Respondents’ characterisation of the produce which the Gunns received from them as constituting “rent”, there being absolutely nothing in the evidence we heard to indicate either that it was ever expressly proffered by the Respondents as such, or that Mr & Mrs Gunn, in accepting it, had any reason to believe that in so doing, they might be acknowledging the existence of a landlord and tenant relationship in respect of the Disputed Land, in terms of which the Respondents enjoyed a secure 1991 Act tenancy that would preclude Mr & Mrs Gunn from recovering possession thereof at will.

[38] To be fair to the Second Respondent, who struck us as being a fundamentally honest witness, he did not, in his account of his initial dealings with Mr Gunn, even attempt to suggest that Mr Gunn, in terms, agreed to a rent for the Disputed Land in the form of produce, supplied entirely at the Respondents’ discretion. His position, reduced to its essentials, was to point to the undisputed facts that (i) the Gunns permitted the Respondents to occupy the Disputed Land; and (ii) the Respondents gave some of their produce to the Gunns, and then (iii) invite the Court to recognise the existence of a causal connection between (ii) and (i). In our opinion, the evidence does not support the existence of any such causal connection. The obvious and natural interpretation of the actions of the Respondents in supplying the Gunns with some of the produce they grew or eggs laid by their hens, would be that they were motivated not out of any sense of legal obligation but rather by good will, and indeed the Second Respondent’s witness statement contains a Freudian slip (“After they moved into Hafod in 1991, **giving** [our emphasis] them a share of the crop became a regular feature of daily life”) which, we suspect, betrays what was really going on here whilst Mr & Mrs Gunn were still alive and sibling relationships had not

become strained. To ascribe to the gifts of produce and eggs that were made the character of payments of rent is, we consider, an after the fact rationalisation that, in our assessment of the evidence, played no part in the thinking of any of the participants before the death of Mrs Gunn.

[39] The misconception which underlies the Respondents' approach to rent can be detected in two other chapters of their evidence. In his closing written submission, the Second Respondent, founding upon the fact that the Respondents had fenced the Disputed Land at their own expense, argued that:

“It would be quite possible to argue that this original investment in fencing as rent, if annualized over a 40 year lifetime of a fence, equals a rent of £30.16 per year. This compares rather favourably with the £20 per year that we pay for our croft. But I don't need to go down that route. A share of produce was always given over to our respective landlord in variable amounts, depending on need and availability, as crop rent.”

The short rejoinder to that point is that it would only be possible to so argue if the parties had actually **agreed** to such an arrangement: it is not open to the Respondents retrospectively (and unilaterally) to impose the character of a cumulated annual rent on their initial capital outlay. Similarly, when the Respondents, after the death of Mrs Gunn, took to tendering to the Applicant annually the sum of £10, they were (accepting for the purposes of argument for the moment that the supply of produce was the agreed rent for the Disputed Land) acting unilaterally in changing the rent. If the Respondents truly had a 1991 Act tenancy of the Disputed Land, the only means of changing the rent, absent agreement between landlord and tenant, would be an application to the Land Court under section 13 (**Variation of rent**) of the 1991 Act.

[40] We reject also the Respondents' argument that the fact that they were permitted by Mr Gunn to lay out capital in enclosing part of the Disputed Land and creating the area of hard standing should be taken as providing corroboration that Mr Gunn must have intended that the Respondents should acquire rights (potentially enforceable against him and his successors) to possess the Disputed Land. The Second Respondent's own account of his initial discussion with Mr Gunn about the Disputed Land, whilst being far from expansive, in having Mr Gunn suggest to him that the Respondents could use the Disputed Land for growing vegetables if they were willing to fence it, conveyed to us the impression that it was a matter entirely for the Respondents whether they were prepared to take it on upon that basis: if they wanted any guarantee about how long their occupation would be secure, the onus was on them to ask for it. The Respondents, in choosing to spend what they did in fencing part of the Disputed Land and creating the area of hard standing, were acting *in suo* (in their own interest) and having, in the event, enjoyed the lion's share of the benefit of the use of the Disputed Land for a period of some thirty-five years now, it seems to us that they have more than got their money's worth from that quite modest initial expenditure.

[41] The sole adminicle of evidence relied on by the Respondents as representing a public acknowledgement by either of the Gunns of the existence of a tenancy over the Disputed Land concerned an incident spoken to by the First Respondent. The First Respondent, in her witness statement, described it in the following terms:

“After we built the Brochs of Coigach we started growing in that piece of ground flowers for the houses. We also sold flowers from the farm gate. When our daughter Sian was married in 2008, we grew flowers for her wedding, too. By that time, my mother was quite senile and getting very difficult. I was undergoing cancer treatment. At one point, while I was tending the flowers, she called to me from the road with my brother at her side, “I want my garden back”, or words of that meaning. Exasperated, I called back, “just take it back then and you can do the garden.” John interrupted, “no, no, it’s fine, you carry on”, which indicated to me that he didn’t want to have anything to do with it, so the *status quo* remained as before.”

In his closing written submission, the Second Respondent, in treating with this incident, submitted that “To ask for something back clearly implies a recognition that something is not one’s own any more.” We do not accept that submission.

[42] The Applicant, under cross-examination by the Second Respondent, affected not to recall the incident so described by the First Respondent. The Applicant’s demeanour whilst answering questions was on occasion somewhat evasive, and on this point, we did not believe him. We find, as a matter of fact, that some such incident did occur, but what did pass between Mrs Gunn and the First Respondent on that occasion, and then what meaning falls to be ascribed to that exchange, remain to be considered. In that regard, it is interesting to compare the account of the incident contained in the First Respondent’s witness statement with what the Respondents offered to prove. In the Respondents’ pleadings, after recounting how Mrs Gunn had told both the First Respondent and the Second Respondent at different times, while they were working the land below the road, to “get out of my land”, they related the circumstances of one particular instance that:

“sticks in mind when the [F]irst Respondent was working in the ground. Mrs Gunn, with the Applicant at her side, called on her to get out of “her garden”, it was John’s (the Applicant’s) job. Exasperated, the First Respondent called over the road to him, “you do it then!” To which the Applicant answered, “no, no, you carry on”, or words of that meaning.”

[43] In the pleadings, then, the words attributed to Mrs Gunn take the form of an order (to get out of “her garden”), which explicitly directive element is missing from the First Respondent’s actual evidence. In contrast to the situation where pleadings have been drafted by solicitors or Counsel on the basis of precognitions obtained from witnesses, it is not possible here for the Respondents to explain away discrepancies between what they

offered to prove and the evidence as it emerged by reference to the possibility that nuances were lost in the process of converting what the witness told the precognoscer into the form of averments. Mrs Stephen, no doubt on instruction, opted not to subject her client's sister to cross-examination, and thus we were not afforded the opportunity to hear the First Respondent explain why these two accounts, of what we take to be the same incident, should so differ. We accordingly are not in a position to make a positive finding as to the precise words uttered by Mrs Gunn that day, but in our opinion, even if what Mrs Gunn said was the less peremptory "I want my garden back" spoken to by the First Respondent in her witness statement, we do not consider that those words bear the implication which the Second Respondent sought to attribute to them.

[44] The Applicant here argues that the evidence shows that the Disputed Land was "shared" by the Gunns and the Respondents. We doubt that the Gunns, whilst in life, would have described the situation in quite those terms. The Disputed Land belonged to them; their septic tank was situated at the east end of it, and next to it was an area of hard standing which, as a matter of fact, was used principally by their daughter and son-in-law for parking their vehicles but which, had the need arisen, they or their visitors might have used also for parking if there was space available. So far as the enclosed part of the Disputed Land was concerned, Mr & Mrs Gunn had themselves no use for it whilst they still resided in Edinburgh, and Mr Gunn was content to let the Respondents use it for growing vegetables meantime, just as he permitted them to use Big Hugh's Garage and the land around it until the construction of the Gunns' dwelling-house began. After they moved into Hafod, it may be inferred that the by now elderly couple were quite content to let the *status quo* prevail, but there was nothing in the evidence to suggest that they at any stage perceived themselves to have "surrendered" the enclosed part of the Disputed Land to the Respondents: it remained part of their garden ground, but the Respondents could, with their blessing, make use of it.

Conclusion

[45] In *Sinclair v Sinclair* 2010 SLCR 109, a case cited to us by Mrs Stephen, the Land Court were "dealing with ... an originally amicable family arrangement which has gone sour for reasons not disclosed in the evidence": at paragraph [203]. Because the arrangement was originally an amicable one,

"there was no need to dot the i's and cross the t's at the outset ... as between the parties themselves, neither of them saw the need to formalise their agreement or spell it out in detail. There was no need to do so while all was well but the fact that it was not done means that there is plenty of room for doubt on certain critical issues now that things have turned out badly. We think that, in an attempt to deal with that problem, there has subsequently been an element of re-writing of history on both sides ... [at paragraph [204]]."

[46] The analogy drawn by Mrs Stephen with the *Sinclair* case is apposite here, in that both it and this application concerned an intra-family arrangement involving an area of what was formerly croft land, over which one party first asserted a claim to a secure 1991 Act tenancy after a family falling out. In *Sinclair*, there was an issue as to whether the parties, who were father and son, had “shared” possession of the 7.5 acre area, the fate of which was being litigated; ultimately, the son, who claimed to have such a tenancy, failed by reason of his inability to establish that there had been any agreement between the parties as to rent. Here, we hold that the Respondents fail for the same reason. There was here no lease at common law because there was no agreement between the parties as to rent. We consider that in seeking to present the produce they sporadically supplied to the Gunns over the years as having been tendered, and accepted, as rent, the Respondents have been engaged in an exercise of re-writing history.

[47] Our conclusion that there was here no lease at common law is sufficient to enable us to dispose of this application, but in deference to the argument we heard, we would, briefly, comment on the issue of whether, had the Respondents succeeded in proving the constitution of a lease, it would be a lease of agricultural land attracting statutory protection. We were, in this regard, referred to the meanings of “agricultural holding” and “agricultural land” in sections 1(1) and 1(2) of the 1991 Act, the former term being stated to mean “the aggregate of the agricultural land comprised in a lease, not being a lease under which the land is let to the tenant during his continuance in any office, appointment or employment held under the landlord”, and the latter “land used for agriculture for the purposes of a trade or business, ...” and to the definition of “agriculture” in section 85(1) of the 1991 Act, by which “agriculture”:

“includes horticulture, fruit growing; seed growing; dairy farming; livestock breeding and keeping; the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds; and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes; and “agricultural” shall be construed accordingly”.

[48] Mrs Stephen, for the Applicant, whilst conceding that the growing of vegetables fell within that definition of “agriculture”, argued that the Respondents’ vegetable growing activities on the enclosed part of the Disputed Land were not of such a scale that it could be said to be “land used for agriculture for the purposes of a trade or business”, as contemplated by section 1(2) of the 1991 Act. As is noted by Gill in *Agricultural Tenancies, op. cit.*, at paragraph 3-29, there is no minimum size for an agricultural holding, but we consider that where the status of a plot of land as an agricultural holding is at issue, size may be a factor in how the evidence is interpreted. It seems to us to be highly unlikely that so small an area of unimproved former croft land as the enclosed part of the Disputed Land would be taken on its own by a tenant for use “for agriculture for the purposes of a trade or business”. The remainder of the Disputed Land is not, on any view, land used by the Respondents for agriculture for the purposes of a trade or business.

[49] The Second Respondent himself seemed to acknowledge that the very smallness of the enclosed part of the Disputed Land militated against an interpretation of the evidence that would result in such a finding when he argued that we should not look at it in isolation, but rather as a constituent part of the Respondents' aggregated landholdings. We do not consider that submission to be well-founded. In our view, in considering whether land is agricultural land within the meaning of section 1(2) of the 1991 Act, it must itself be "land used for agriculture for the purposes of a trade or business"; it cannot become such "by association", by dint merely of being tenanted by a person who holds other land used for agriculture for the purposes of a trade or business under other leases. Here, whilst the Respondents did sell some of the small quantity of produce they grew in the enclosed part of the Disputed Land at the roadside in years gone by (evidence that they have continued to do so more recently was conspicuous by its absence at the proof), the primary purpose of their agricultural activity thereon, even back then, was not commercial, but to provide food for their own family, with only any surplus over and above what the Respondents themselves needed being offered for sale. We do not consider, on the facts, that this amounted to agriculture on a sufficient scale to constitute use for the purposes of a trade or business: *cf. Gill, Agricultural Tenancies, op. cit.*, at paragraph 3-27.

Disposal

[50] It follows from all of the above that we hold that the Applicant is entitled to the orders for declarator, removal and ejection that he craves. Mrs Stephen indicated that the Applicant would be content to allow the Respondents a reasonable time to make the appropriate arrangements to remove from the Disputed Land, something we would have insisted upon making provision for even without that very proper concession having been made, and we have, accordingly, allowed parties 28 days, from the date of intimation of our order, for lodging written motions and submissions on: (i) the date on which the Respondents should be ordained to remove from the Disputed Land; and (ii) the expenses of the application. Having found and declared that there exists no agricultural tenancy, in terms of the 1991 Act, of any part of Hafod, and in particular of the part thereof which forms the Disputed Land, the registration, in the RCIL, of the Respondents' interest in acquiring the Disputed Land, must fall, and so we have ordained the Keeper, in terms of section 25(11) of the 2003 Act, to rescind the Respondents' registration (Registration No. AT01353).