

# Decision of the Scottish Land Court

Richard Fyffe (Applicant)

v

John Esslemont (Respondent)

Case reference SLC 67/15

before

Iain F Maclean, Deputy Chairman, and John A Smith

28 March 2018

## Introduction

[1] The Applicant and the Respondent respectively are the Landlord and the Tenant of the Farm of Muirton of Corsindae (“the Farm”) conform to Minute of Lease between the Rt Rev Rolleston Sterritt Fyffe and Another, Proprietors in Trust of the Estate of Corsindae, and John French Esslemont dated 14 and 21 January 1944 (“the Lease”) [Production 2]. The tenancy, as so constituted, was a tenancy of an agricultural holding in relation to which the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) applied; in the nomenclature of section 1(4) of the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”), it was a “1991 Act tenancy.” The issue in this case, explored at a diet of proof before answer extending over twelve days, came to be whether the tenancy still retains that status, or whether that status has been lost, with the tenancy continuing, shorn of its previous statutory protection, in consequence of the Respondent, as the Applicant would have it, having wholly or substantially abandoned agricultural activity upon the Farm. The Respondent had, from in or about 1996 onwards, conducted a home improvement, double glazing and conservatory business from the Farm. That business, incorporated in 2003 as Monarch Conservatories Scotland Limited (“Monarch”), a private limited company of which the Respondent and his son were the directors and the Respondent the sole shareholder, came to occupy the whole area of the Farm steading, to the exclusion of agricultural use, and its turnover and profits to dwarf those generated by such residual agricultural activity as may have continued upon the farmland, the extent of which, and whether that residual agricultural activity is properly attributable to the Respondent as tenant of the Farm, were issues in dispute at the hearing.

[2] The Respondent on 15 October 2015 gave the Applicant notice of diversification in conformity with section 40(1) of the 2003 Act. The non-agricultural purpose specified in the notice was “the storage of building materials in connection with conducting building activities and the administration of the business” of Monarch, and the date on which he proposed to commence using the land for that purpose was specified in the notice, as required by section 40(2)(d) of the 2003 Act, as 26 December 2015, notwithstanding his acknowledgment in the notice that he had “informally been using” parts of the Farm for that purpose since 1996. The Applicant objected to the Respondent’s notice of diversification, and in Application RN SLC/85/16, the Respondent applied for an order in terms of section 41(1)(a) of the 2003 Act that the Applicant’s objection to his notice of diversification was unreasonable. The Applicant’s arguments that the Respondent’s notice of diversification was ineffective and incompetent, on the grounds that (1) the procedure for giving notice of diversification in Part 3 of the 2003 Act was entirely prospective, and was not available to provide retrospective authorisation for a use of the land for non-agricultural purposes that had commenced before notice was given; and (2) the use of the land for the non-agricultural purpose specified in the notice had to be use by the tenant, and not a third party such as Monarch, were sustained, and Application RN SLC/85/16 was dismissed: see *Esslemont v Fyffe* (RN SLC/85/16 – Order of 7 December 2016). In the course of the proceedings before this Court, there were concurrent Sheriff Court proceedings at the instance of the Applicant [copies of the Applicant’s summary cause summons and the Respondent’s defences (as adjusted 28 September 2016) form Production 200 A & B], the outcome of which was that the Applicant secured the removal of Monarch from the Farm, the Respondent ultimately not opposing the passing of decree against him. Monarch’s operations were relocated to new premises purchased by the Respondent at Bridgend Farm, Kintore. Thus, when the members of the Court attended to inspect the Farm on 10 July 2017, the steading area had been denuded of the considerable quantity of building and waste materials pertaining to Monarch previously stored there and elsewhere on the Farm, as had been evidenced at the hearing by the many historic photographs lodged in process [see, especially, Productions 7 A, E, F, G, H; 8 A, B, C, D, E, F, G, H, I, J, M, N, O, P; 9 D, E, F, G; 10 M, N, O; 11 C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, X, Y, Z, BB, CC, DD, EE, FF, GG, HH; 12 H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, and Y]; and spoken to by witnesses.

## The Applicant’s crave

[3] The Applicant’s crave, until just before the Court made *avizandum*, was for an order finding and declaring that the Respondent, “having inverted its possession, no longer holds the Farm ... under a lease governed by the Agricultural Holdings (Scotland) Acts 1991 and 2003.” In a Note dated 9 December 2015, issued by us after being addressed by parties’ procurators at a procedural hearing, we observed that whilst the Applicant had here invoked the concept of inversion of possession in his pleadings, his position, in contrast to that of the landlord in *Cayzer v Hamilton (No. 2)* 1996 SLT (Land Ct.) 21, appeared to be not

that the Respondent having inverted possession, the Applicant, in response, either had terminated, or was entitled to proceed towards termination of, the Lease, but rather that in consequence of such inversion of possession, the Farm was no longer an agricultural holding. The Applicant having neither a crave for declarator that the Lease had actually been terminated nor any operative craves to have the Respondent remedy any such alleged breach of the terms and conditions of his tenancy or to secure the removal of the Respondent from the Farm, we inferred that the Applicant's position was that, were he to obtain decree in the terms craved, the effect thereof would be that the Lease in favour of the Respondent would endure, but no longer as a lease of an agricultural holding as defined in section 1 of the 1991 Act. At the procedural hearing, Junior Counsel for the Applicant (as he then was) confirmed that this was indeed the Applicant's position.

[4] In the course of a short reply to the closing submission advanced on behalf of the Respondent after all of the evidence had been heard, the now (having taken silk in the meantime) Senior Counsel for the Applicant moved to amend that crave by deleting the words "having inverted its possession". Counsel for the Respondent did not oppose that motion, and we allowed it. The significance of that amendment was that it represented a departure from the position adopted by the Applicant at an earlier diet of debate in these proceedings, at which both parties had argued that the application could be disposed of without hearing evidence.

[5] At the diet of debate, it had quickly become clear to us that parties' previously expressed optimism that the case could be determined on the basis of oral submissions, having regard to the admissions made in their respective pleadings, was misplaced, and that we would indeed require to hear evidence before reaching our decision. Standing that conclusion, we indicated, in the Note which accompanied our Order dated 15 September 2016 sending the case off to proof before answer, that it would be inappropriate for us, at that stage, to express any concluded views upon the substantive issues of law which we would, after evidence had been led, require to decide, and so we said no more about them than was necessary to explain why we took the view that the application was not one capable of being disposed of upon the basis of a consideration of the contents of parties' respective pleadings, reserving for argument after the facts had been ascertained, and seen in their proper setting, the parties' preliminary pleas to the relevancy of their respective averments. We did, however, record in our Note that at the hearing, the Scots law concept of inversion of possession was equated by the Applicant with that of whole or substantial abandonment of agricultural activity, derived from the decision of the English Court of Appeal in *Wetherall v Smith* [1980] 1 WLR 1290, and it was submitted on his behalf that the consequence of the Respondent's inversion of possession was that the Lease continued, but no longer as a lease of an agricultural holding as defined in section 1 of the 1991 Act. Section 1(1) of the 1991 Act provides that "agricultural holding" means "the aggregate of the agricultural land comprised in a lease ..." and section 1 (2) that "agricultural land" means "land used for agriculture for the purposes of a trade or business ...", with section 85 (1) of the 1991 Act providing that "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”. The argument was developed, in the closing submissions for the Applicant after the evidence had been led, that where agricultural land ceased to be used for agriculture for the purposes of a trade or business, the rationale for the statutory protection ceased with it, so that whilst the lease itself might endure, it would do so henceforth outwith the ambit of the agricultural holdings legislation.

[6] Counsel for the Applicant did not proffer a full explanation of the thinking that underpinned his decision to move to amend his crave by deleting the reference to the concept of inversion of possession, but in so doing he must, in our view, be taken as tacitly accepting the underlying analysis of the legal position that had been advanced by Counsel for the Respondent at the diet of debate and again in his closing submission, namely that inversion of possession and whole or substantial abandonment of agricultural activity on the subjects of let were properly to be regarded as distinct and separate concepts, giving rise, where established, to different remedies at the instance of a landlord. In particular, Counsel for the Respondent argued that where a tenant had inverted possession of an agricultural holding, the landlord’s only substantive remedy, absent an irritancy clause couched in terms apt to fence the particular breach, and leaving out of consideration proceedings at common law for interdict or for damages for breach of contract, would be to serve a demand to remedy in conformity with section 22(2)(d) of the 1991 Act, and in the event of the tenant’s failure to comply therewith, to give the tenant statutory notice to quit, to the operation of which the landlord would require to obtain the consent of the Land Court. In the interests of completeness, we would note that M. A. Hogg, in his article “*To irritate or to rescind: Two paths for the landlord*” in (1999) SLT (News) 1, has floated the idea that the remedy of rescission may be available as an alternative to irritancy in cases where the tenant had been given an opportunity to remedy a material breach but had failed to do so, but, as is noted by The Right Hon. Lord Gill in *Agricultural Tenancies* (4th Ed.; 2017) at paragraph 33-55, rescission is unknown in modern times as a remedy in the law of agricultural holdings. At any rate, Counsel for the Respondent contended, in order to achieve the outcome (*i.e.* continuance of the tenancy without statutory protection) he was seeking to secure, the Applicant would require to establish that use of the subjects of let for agricultural purposes had been “wholly or substantially” abandoned. He further submitted that it may well be easier to prove inversion of possession than whole or substantial abandonment of agricultural activity on a holding, and that whilst there may be some degree of overlap in the evidence which would be relevant to establish the one or the other, it should not be assumed that every adminicle of evidence that would be relevant to making out a case for inversion of possession would also be relevant in establishing that agricultural activity had been wholly or substantially abandoned.

[7] The point here being made by Counsel for the Respondent, as we understood it, was that the focus in any inquiry as to whether agricultural activity on a holding had been wholly or

substantially abandoned may well be somewhat **narrower** than in a case in which it is claimed that possession has been inverted. Both parties were content, at the debate and then at the diet of proof before answer, to take as definitive the treatment of the concept of inversion of possession to be found in *Rankine on Leases* (3rd Ed.; 1916) at page 236, where the learned author explained that:

“Ordinary leases are granted with a view to a particular sort of possession, and to that only – the lease of a farm for agriculture or pasture; of a garden for horticulture; of a dwelling-house for residence; of a mill for manufacture; of a shop for trading, and so forth. If the tenant trespasses beyond the limits thus generally, or by special covenant more particularly, laid down for his guidance, he is said to invert the possession. The term “inversion” is, however, confined in practice to a course of conduct on the tenant’s part inconsistent with the objects of his lease, and perhaps involving alterations on the premises let; and is not extended to isolated acts, such as (in the case of an agricultural tenant, for example) night-poaching, trouting, or illegal trapping. The question in every case is as to the fair *bona fide* construction of the contract between the landlord and the tenant, as gathered from the words of the lease and the nature of the sort of occupation contemplated when it was entered into, subject to such alterations as have been tacitly or expressly imported into it during its course. It is impossible to formulate any rule; it is only possible to indicate the class of cases which have arisen in practice, and the mode in which they have been disposed of.”

In light of that definition, it was suggested that it would be possible to figure of situations in which, whilst the tenant had indulged in a course of conduct inconsistent with the objects of his lease, still yet it could not be said, at the same time, that agricultural activity on the holding had been wholly or substantially abandoned. That was, indeed, how Counsel for the Respondent effectively invited us to approach the evidence in the instant case. The corollary of that, as Counsel for the Applicant submitted, was that whilst whole or substantial abandonment of agricultural activity **necessarily** would entail a change in the character of the holding, a change in the character of the holding might come about other than as a result of whole or substantial abandonment of agricultural activity. Not every chapter of the evidence we heard was, at least on the face of it, directly relevant to that more pointed issue, and it follows that in reaching our decision, we have required to take a step back from the evidence we heard and re-evaluate to what extent each chapter thereof is actually relevant to the particular case the Applicant now seeks to make out.

## The hearing

[8] Having set out the parameters of the impending discussion, we turn now to relate the circumstances of the hearing by way of proof before answer, at which the Applicant was represented by Gavin MacColl, Advocate, instructed by Morton Fraser LLP, Solicitors,

Edinburgh, and the Respondent by Robert Sutherland, Advocate, instructed formerly by Stronachs, Solicitors and latterly by Shepherd+Wedderburn, Solicitors, both of Aberdeen. The hearing was initially scheduled for 4 days, to commence on 6 March 2017, but the first day was, on parties' joint motion, adjourned to afford them the opportunity to discuss settlement, an initiative that ultimately proved fruitless. For reasons which we shall go on explain, the four days estimate provided by parties proved hopelessly inadequate, and we went on to hear another seven days of evidence, along with a further day for parties' closing submissions, between the end of May and towards the end of October 2017, in three instalments, making this one of the longest hearings before the Land Court in recent times. The Applicant, Richard Fyffe (aged 60 at time of giving evidence), himself gave evidence. The witnesses called on his behalf were his wife, Mrs Virginia M. Fyffe (56); his estate employee, Alistair J. Friend (53); his solicitor, James H. Rust (58), of Morton Fraser LLP, Edinburgh; his land agent, Laurence A. ("Larry") Irwin MRICS (35), then of the Banchory office of Strutt & Parker LLP; and, in the capacity of expert witness, Ian S. Thornton-Kemsley MRICS, FAAV, DipFBOM, HAD, ACI Arb, (56), consultant to the last named firm and farmer, the Applicant's agents having on 6 February 2017 intimated their intention to do so in conformity with Rule 26 of the Rules of the Scottish Land Court 2014 ("the 2014 Rules"). The Respondent, John M. Esslemont (67), gave evidence on his own behalf. His witnesses were his country neighbour Mrs Jennifer S. Abel (61), of Muirton Lodge, Sauchen; Robert Wilson (Junior) (55), a neighbouring farmer and partner in the firm of R & W Wilson, Agricultural Contractors, Mains of Corsindae, Sauchen, frequently employed by the Respondent; Ivor W. Brown (64), a handyman employed on a part-time basis by Monarch; J. Watson Bell (67), Agricultural Consultant, of Watson Bell Agricultural Consultants Limited, Lower Inchallon, Pluscarden, Elgin, and Mrs Olivia R. A. Donald (34), Agricultural Consultant, of Donald Agricultural Consultancy, Little Millbrex, Fyvie, the last two of whom successively advised the Respondent during the period about which we heard evidence.

## The Respondent's testimony

[9] The factor that could not, reasonably, have been anticipated by parties in making their initial assessment of the number of days that would be required for the hearing was the conduct of the Respondent under cross-examination. The Respondent spent some five days in the witness box. We do not doubt that being questioned over such an extended period proved to be something of an ordeal for him, but if that indeed be the case, the Respondent has no-one to blame but himself. Subjected to a well-structured and well-prepared cross-examination, the Respondent prevaricated constantly, resulting in Counsel for the Applicant frequently having to ask even the most straightforward questions on several occasions before he extracted anything resembling a meaningful answer from him. The Respondent resorted to every ruse and stratagem in the repertoire to avoid answering questions which he perceived to be directed towards securing responses contrary to his interests. He repeatedly affected not to understand what the questions put to him meant. Having had the opportunity to observe him closely over a very lengthy period, we do not

believe he was in any real doubt as to what the vast majority of those questions were getting at; he was simply trying to avoid answering them. A variant on his preferred approach to dealing with unwelcome inquiries was for the Respondent to scoff and sneer at the questions he was being asked, complete with theatrical sighs and shakes of the head. He habitually, in the answers he did eventually give, veered off at a tangent from the question he had been asked. When confronted with entries in accounts, tax returns, agricultural subsidy claim forms and other documents, the contents of which were inconsistent with or otherwise unhelpful to his stated position, his response invariably was to claim a lack of any personal knowledge in connection therewith, and to attempt to slew off all responsibility for those contents onto his professional advisers (accountant, agricultural consultant(s), solicitor) and office staff, notwithstanding that he himself was ultimately the source of the information presented in those documents. Rather than engaging with the question asked about a particular entry in the Farm or Monarch's accounts, the Respondent would launch into an extravagant encomium to the personal qualities of his accountant, and assure us that if she were here, she would be able to explain the position to us, a somewhat hollow claim given that she was not called as a witness on his behalf. The Respondent, in seeking to justify his actions, sometimes claimed to have been following advice he had received from either his accountant or his solicitor; we have little doubt that they would have wished to dissociate themselves from what seemed to us, in some instances, to be the quite outlandish positions (*e.g.* that he had always had legal advice that it was "legally correct for Monarch to be on the Farm") being attributed to them by him, had they been given the chance to do so.

[10] When all else failed, the Respondent resorted to tears, impassioned declarations that he was an honest man, or to requests for "comfort breaks", which requests became increasingly frequent as the cross-examination developed. We had not been advised in advance that the Respondent suffered from any medical condition that merited special treatment in this regard, and during one of his absences, we inquired of his legal team whether there was any such condition of which we should have been made aware, which question was answered in the negative. We came latterly to the conclusion that the Respondent was exploiting the Court's indulgence in this regard and was using his requests for comfort breaks as a means of disrupting the cross-examination and buying himself time to think how best to answer difficult questions. When, in the course of a particularly fraught exchange with Counsel for the Applicant, the Respondent asked for permission to leave the Court, only a short period after the last such comfort break, we declined his request and allowed the cross-examination to continue, without any reported ill-effect on the Respondent's part. Under pressure, the Respondent flailed around, responding to questions with what we interpreted as being a reckless disregard for whether his answers were true or not, so that there were passages in the evidence where two answers provided by him, moments apart, blatantly contradicted one another.

[11] The nadir of the Respondent's sojourn in the witness box was reached when he was forced to admit that he had, earlier on in his testimony, lied on oath. The sequence of

events that led to the making of this admission by the Respondent can be traced back to an incident which occurred on the first day of evidence at the hearing, during the cross-examination of the Applicant. In his evidence in chief, the Applicant had spoken to a copy letter, under the letterhead of his Corsindae Estate, bearing the date 18 December 1998 and addressed to the Respondent, which the Applicant had drafted and passed on to his land agent, R.R. (“Robin”) Maitland, Esq., of Strutt & Parker, for comment. The copy lodged [Production 197L] had been annotated, a handwritten note, initialled RRM, confirming that Mr Maitland had received and suggested minor changes to the draft, with the final letter to be sent by the Applicant, from which we infer that Production 197L was recovered from Strutt & Parker’s files. No copy of the final letter, as sent by the Applicant to the Respondent, was lodged in process, but it was not in dispute that a letter in such, or at least very similar terms, had been sent and received by the Respondent. The letter narrated that the Applicant had been:

“reviewing the current arrangements Muirton and I have arrived at the following conclusions:-

1. You carry no livestock of your own on the farm, and have not done so for a number of years. This farm is essentially a livestock unit and indeed, had the hill land added to it for wintering/rough grazing purposes.
2. The practice of cutting and selling hay and silage off the majority of the farm year after year, is in breach of your lease.
3. Sub-letting of grazing for both sheep and cattle on a regular basis, is again contrary to the lease.
4. You are running a non-agricultural business from Muirton, including the use of buildings for storage of building supplies etc. This is a business which should, by the way, be commercially rated.

Put all these factors together and I feel that we have to look at the whole situation from a different viewpoint.

Reflecting the fact that on may [sic- presumably the word “many” was intended] occasions you have expressed to me that you have “given up farming”, and the fact that the conservatory is your principal business, we have to review the whole lease arrangement.”

The letter concluded by proposing that if the Respondent wished to continue living at Muirton and running the non-agricultural business, then the estate should take the agricultural land back in hand, leaving a reasonable area beside the house for privacy and recreation, but that the Respondent “should go onto a commercial lease, in line with the business you are operating.”



[12] In the course of his cross-examination of the Applicant, having put to the Applicant, under reference to the contents of Production 197L, that the Respondent denied ever having said to the Applicant that he was giving up farming, Counsel for the Respondent sought the leave of the Court to put to the Applicant a document, not hitherto lodged in process, for the purpose of testing his credibility. The document in question was what purported to be the file copy of a letter from the Respondent to the Applicant, dated 5 January 1999, in response to the Applicant's letter to the Respondent dated 18 December 1998. It related that the Respondent:

“had now discussed your letter with my professional and political [sic] agents and they have advised me to restrict my comments at this time, other than to confirm the following:-

*The following other than to confirm:-*

1. I have no intention of giving up any land, which I occupy and continue to pay a negotiated rent for.
2. I believe my farming policy to be acceptable and economically sound considering all circumstances.
3. Should a legal or independent court judgment be made against my farming and diversification policy then I will comply with whatever conditions are laid down to protect my rights as a sitting tenant at Muirton.
4. Your statement, of which I have expressed to you on many occasions that I have given up farming “is totally untrue” and leaves me concerned as to your motives.
5. Your ongoing determination to remove me from the land of which my father farmed before me and now ... some 56 years is well documented and indeed does nothing for the reputation of the landed ... at this time of political discussion of land reform.
6. Although, I have to wish to disagree with you, I fully intent to continue to defend my position at Muirton, my rights and my family rights in whichever court of law that may become necessary.
7. Should it be necessary in the future to challenge you on ... it may become necessary should you continue to interface with my ... for me to challenge.”

Counsel for the Applicant asked for, and was granted, a short adjournment to scrutinise the letter and discuss it with those instructing him (the Applicant himself being in the middle of his evidence, Counsel for the Applicant did not have the opportunity to run it past him), and having done so, confirmed that he had no objection to its being lodged late as a production and put to the witness. The purported file copy letter bearing the date 5 January 1999 duly was lodged as Production 238 and expressly put to the Applicant as being the

“copy of a letter sent to you on 5 January 1999.” In response to the question whether he recollected receiving it, the Applicant replied that “Bizarrely, I didn’t. I thought I’d been through every letter. I don’t recollect it. Had I received a letter like this, I’d have forwarded it immediately to Strutt & Parker and Morton Fraser and it would certainly be in their files.” Counsel for the Applicant elicited subsequently from the Applicant’s later witnesses James Rust, of Morton Fraser, Solicitors, and Larry Irwin, of Strutt & Parker (in place of Mr Maitland, who in the intervening period had retired through ill health), who had, in the meantime, been asked to check their respective firms’ files, confirmation that no copy of the Respondent’s purported letter to the Applicant dated 5 January 1999 was held on file. The purpose of eliciting this information from these witnesses, self-evidently, was to prepare the ground for Counsel for the Applicant to put to the Respondent in cross-examination that the Applicant had never received any such letter from the Respondent, and indeed to call into question whether it had in fact ever been sent by him.

[13] The Applicant’s case was closed on 9 March 2017, with proceedings then being adjourned to 30 May 2017, when the Respondent’s case opened with the Respondent himself being called to the witness box. Counsel for the Respondent asked him where he had obtained the copy letter lodged as Production 238, to which the Respondent answered that it was in his files. Counsel for the Respondent then pointed out to him that the Applicant had no record of ever having received it, and that no copy of it existed on the files of either the Applicant or his agents. Against that background, Counsel for the Respondent asked the Respondent whether he was sure it had been sent. The Respondent’s answer was that he could not be absolutely sure that it had been sent, prompting his own Counsel to ask him, in a sharp tone, why, if he was not sure it had been sent, he had produced it for lodging in this case. The Respondent replied that “I handed it to yourself, but I didn’t actually say I wanted it lodged in Court”. There followed a series of rambling, equivocal and at points self-contradictory answers from the Respondent to questions directed towards establishing the likelihood or otherwise of a letter in such terms actually having been sent by him to the Applicant, of which we frankly could make little. Our best interpretation of the Respondent’s position on Production 238 in examination-in-chief was that whilst he acknowledged that the “bits missing” at the foot of the page suggested that a letter in those precise terms might not have been sent, nevertheless, because the contents of Production 238 were “very truthful”, a letter in similar terms **might** have been sent.

[14] Predictably, Counsel for the Applicant in cross-examination seized the opportunity to explore with the Respondent the issue of the origins of Production 238, and in particular to pursue with him why it had come to light only at such an advanced stage in these protracted proceedings. The Respondent stated that he thought he had given his solicitors all of the letters relevant to the case in advance of the hearing, but this letter had not been among them. He referred to finding it in his files, but then also more generally to finding things on his computer. He had brought a hard copy of it with him in his case when he attended at the Land Court in Edinburgh, and he had handed it to Counsel for the Respondent at some point in the course of the proceedings. It remains unclear to us on the evidence precisely

when this occurred, but given that Production 238 was put to the Applicant in cross-examination on the afternoon of Tuesday 7 March 2017, the Applicant having commenced his testimony on the morning of that same day, it would seem to follow that the only opportunity for such a discussion to have taken place would have been during the lunch interval that day. The Respondent, being cross-examined about all of this nearly three months later, was, even by his own standards, extremely evasive in his answers to this line of questioning, but he did reiterate that he had told Counsel for the Respondent when he handed the purported file copy letter to him that it might not have been sent. He expressly stated to the Court that “I said I’m not sure it would have been sent. It could’ve been sent. The position now is – not flippantly – it may not have been sent”, an answer that provides an authentic flavour of so much of his testimony more generally. When asked by Counsel for the Applicant whether he thought the cross-examination of the Applicant had been conducted on the basis that it may not have been sent, his answer was that it did not matter, “because the contents were relevant to my position.” In answer to a question from the Court on Wednesday 7 June 2017, at what ordinarily would have been the conclusion of his evidence, as to why he had sat silently through a cross-examination of the Applicant conducted by his Counsel on the basis that Production 238 had been sent, when, according to his own evidence, he knew that might not reflect the true position, he explained that he had not known that he could communicate with Counsel for the Respondent whilst he was on his feet, and that he had been puzzled when he had seen the Applicant passing notes to his advocate during the evidence of other witnesses, but that he had mentioned it to Counsel for the Respondent at the earliest opportunity, after the Court had risen that day.

[15] Counsel for the Applicant intervened at that point to seek an adjournment on account of what he characterised as a professional matter that had arisen. In so doing, he only just beat Counsel for the Respondent to his feet, the latter being equally alive to the implications of the evidence the Respondent had just given in connection with Production 238. The import of that evidence, put bluntly, was that Counsel for the Respondent had conducted his cross-examination of the Applicant on a basis he knew to be false, and that the Respondent having pointed this out to him as long ago as the late afternoon of Tuesday 7 March 2017 (the cross-examination of the Applicant had, in fact, continued into the next day), he had failed to act upon that (on the Respondent’s account) reminder, and had done nothing in the intervening three months to inform the Court and set the record straight. Counsel for the Respondent is a highly experienced advocate who appears regularly before this Court. We may say that, even discounting the very negative impression we had, well before the events of the morning of Wednesday 7 June 2017, formed of the Respondent’s credibility and reliability as a witness, we should have approached a claim that his Counsel had acted in such a manner with the deepest scepticism. As it was, our inclination was to treat this as the natural culmination of the Respondent’s propensity, observed by us over his previous four days of testimony, to answer questions put to him wildly, reaching for whatever seemingly self-serving response came into his mind without any real concern for whether it happened to be true or not.

[16] The Respondent was, in tendering these answers, which imputed that his own advocate had engaged in seeking knowingly to mislead the Court, presumably quite oblivious to the situation of serious professional difficulty he had created for him. We adjourned over lunchtime to afford Counsel for the Respondent an opportunity to seek guidance from an office-bearer of the Faculty of Advocates as to his options in these circumstances, and more particularly, we infer, as to whether he properly could continue to act for the Respondent. Having obtained such advice, he asked for, and was granted leave to speak to the Respondent, notwithstanding that the Respondent was still in the witness box, in order to explain the position to him. In the afternoon, Counsel for the Respondent informed us that the Respondent wished to make a statement with regard to the evidence he previously had tendered about the circumstances of Production 238's lodging, and about what had passed between the Respondent and his legal team after the Applicant had given evidence on 7 March 2017. The Respondent stated that he wished to correct his previous evidence regarding Production 238. He confirmed that:

“I did indeed say to Robert Sutherland that this letter had been sent to Richard Fyffe and I did not speak to Robert Sutherland about it after the end of the Court day. So I wish to apologise to the Court for my previous comments about that.”

[17] Counsel for the Respondent asked him to clarify what he had meant in that statement when he said that he wished to apologise for his previous comments, in response to which he acknowledged that “The evidence I gave under oath previously would be incorrect.” Counsel for the Respondent then ceded the floor to Counsel for the Applicant, who cross-examined the Respondent on the statement he had just made, in the course of which the Respondent confirmed that he had neither told Counsel for the Respondent that Production 238 may not have been sent, nor spoken to him again about this after the Applicant had given evidence. He demurred when Counsel for the Applicant put it to him that his previous answers to contrary effect had been lies, but he did acknowledge that those answers had been “untrue.” When Counsel for the Applicant sought to ask him whether, when he gave those previous answers, he had **known** them to be untrue, the Court intervened to warn the Respondent that he need not answer that question, under reference to the privilege against self-incrimination, the crime of perjury being the making of a false statement, knowing it to be false. The Respondent duly claimed that privilege. The saga of Production 238, as recounted above, which concluded in the Respondent's admission that he had lied on oath, served merely to confirm the impression created by so much of his earlier testimony that he was neither a credible nor a reliable witness. Whilst, as has already been noted, he did, under pressure in cross-examination, on a number of occasions, proclaim that he was an honest man, we regret to have to record that we cannot, on the basis of his performance in the witness box, endorse that self-assessment.

# The evidence

[18] Given the duration of the hearing, it may seem paradoxical to record that – at least in its broad outline – the evidence was not significantly in dispute. That essential truth goes some way to explaining why both Counsel insisted upon arguing their preliminary pleas at debate, proceeding upon the basis that, having regard to the admissions made in their respective pleadings, the case could be disposed of in favour of the party for whom he was appearing without the need for evidence. That this did not work out was because ultimately, as we observed in the Note appended to our Order dated 15 September 2016, the question of whether the Respondent had wholly or substantially abandoned agricultural use of the Farm was one of fact and degree, depending on the extent to which agricultural use had been abandoned and to which any other use had been adopted, with the matter having to be decided by considering the whole history of the tenancy, thereby making it inevitable that, as occurred in *Wetherall v Smith*, we would have to hear evidence in order to answer that question.

[19] The Applicant, in his pleadings, had averred that over a number of years, despite the Applicant's objections, the Respondent had been using the buildings on the Farm and the yards around those buildings for non-agricultural purposes, principally through the vehicle of Monarch, and that the on-going conduct of the non-agricultural business of Monarch was "the principal activity now carried on at the Farm." He further averred that, so far as known to him, the Respondent "carries out no agricultural activity at the Farm", all livestock thereon being owned by third parties to whom the Respondent had purported to sub-let fields, and that the Respondent had "abandoned agricultural use of the Farm and instead devotes his time to the business of Monarch", although in later adjustments, he appeared to row back somewhat from the position that the Respondent carried out no agricultural activity on the Farm, instead offering to prove merely that "in the context of the overall use of the Farm and the generation of income from it, any agricultural use made by the Respondent is *de minimis*", and that the use of the Farm as the location and base of operations for Monarch was the "predominant use to which the Farm is put by the Respondent."

[20] The Respondent, in his Answers, had admitted that since 1996 he had been using the Farm buildings and yards around the buildings for non-agricultural purposes, being the receipt, storage and distribution of building materials and fitments for the construction of conservatories, home extensions and improvements, loft conversions and other building projects off the Farm, through the vehicle of Monarch, in the face of the Applicant's past objections. He admitted that these non-agricultural activities had expanded over a number of years, and that the non-agricultural business was "now the predominant economic activity on the Farm", and that he derived the bulk of his income from Monarch, but he maintained that he had continued, and continues, to carry out various forms of agricultural activity on the holding. He admitted that he let out land each year for seasonal grazing or mowing and had regularly wintered sheep on the Farm.

[21] We commented that the Respondent's averments as to the various agricultural uses to which he claimed that other parts of the Farm had been put over the period whilst Monarch's business had been expanding were far from being a model of clarity and conveyed the impression of a somewhat "piecemeal and irregular" (as it had been characterised by Counsel for the Applicant) pattern of usage, but, conscious that not all agricultural holdings are farmed at the same level of intensity, we considered that enough had been averred by the Respondent here to stave off the grant of decree *de plano* and to justify the fixing of a hearing by way of proof (before answer), reserving for argument after the evidence had been heard and the facts had been ascertained and seen in their proper setting the parties' preliminary pleas to the relevancy of their respective averments. At proof, the factual issues upon which parties principally were divided concerned:

- i. the impact of the non-agricultural activities of Monarch activities on the Farm and on the Applicant's Corsindae Estate of which it formed part;
- ii. the extent of the residual agricultural activity that continued upon the farmland over the years from after Monarch's incorporation in 1996; and
- iii. whether that residual agricultural activity was properly attributable to the Respondent as tenant of the Farm.

We shall, in considering that evidence, and setting out the facts as we have found them to be, adopt a broadly chronological, but also a thematic, approach. We shall comment, so far as necessary, on the credibility and reliability of the witnesses from whom we heard as we come to deal with the principal elements of their respective testimonies.

## The Farm

[22] The Farm, as let, extended, in terms of Clause FIRST of the Lease, to:

"Eighty four and three quarter acres arable and five acres houses, roads and rough ground. These measurements are not guaranteed. There are also included in the subjects of let the crofts known as the Muirton Croft and East Glenwood Croft but excluding the dwelling houses on these crofts. The grazing rights of the whole of the Carsleuchie Wood are also included in the let."

It was a matter of admission in the pleadings that the Farm today extends to about 213 acres, of which 83 acres are arable and 130 acres hill ground. Although the Lease does not expressly prescribe the mode of farming the Tenant is to follow beyond stating, in paragraph VI of the General Regulations and Conditions under which it was granted, that the Farm is to be "used for agricultural purposes only", it is implicit in Clause FIRST, with its references to arable and grazing rights, that the Farm was let as a mixed farm, and there are further indications in the Lease supportive of that conclusion, such as the provision in

Clause SEVENTH that the Tenant would take over at valuation, amongst others, the threshing mill, bruiser and cattle bindings so far as belonging to the outgoing tenant.

[23] The Respondent became the Tenant of the Farm in succession to his late father. The Applicant, who lives at Corsindae House, a short distance as the crow flies from the Farm, and farms the land at Corsindae Home Farm, became the Landlord, by virtue of a disposition by his father, the now late Major L.R.K. ("Larry") Fyffe in his favour dated 14 and recorded in the Division of the General Register of Sasines applicable to the County of Aberdeen 6 April, both 1988 [Production 193]. The original granters of the Lease were the Applicant's grandparents. Relations between the Tenant and the Landlord in the previous generation were, by all accounts, good, but would appear to have deteriorated somewhat in the current generation: the Respondent declared emotionally in the course of his testimony that the Applicant had been wanting to "get him out" ever since he acquired ownership of the Farm, but whilst there was passing reference made to the Applicant having served notice to quit on the Respondent soon after he became the Landlord, the notice to quit was not insisted in, and thereafter the Applicant exhibited what struck us as being quite remarkable forbearance in not pursuing more vigorously, until very recently, a remedy in respect of the Respondent's persistent breaches of his obligations as the Tenant under the Lease, and in allowing himself to be fobbed off by the Respondent on the numerous occasions over a period of more than 20 years, commencing in the early 1990s and vouched for in the correspondence lodged by the Applicant as Productions 197A-U and 198A-E, when he or his agents expressed to the Respondent the Applicant's unhappiness about Monarch's activities on the Farm and sought to engage in discussion with him as to how the situation might be resolved. The Applicant was willing even to investigate the possibility of whether there might be another site on Corsindae Estate that might be suitable for accommodating the Monarch operation, although this initiative ultimately came to naught due to planning issues.

[24] Access to the Farm from the public road is taken via a narrow, single-track, private estate road, hemmed in and overhung by trees for much of its length. The private estate road serves also the Applicant's Corsindae Home Farm (including the Farm Cottage occupied by one of the Applicant's employees, Alistair Friend, who gave evidence at the hearing) and the property known as Muirton Lodge, occupied by one of the Respondent's witnesses, Mrs Jennifer Abel. At the entrance to the private estate road stands a large sign bearing the names Corsindae Home Farm, Muirton Farm and Muirton Lodge (Corsindae House is accessed off its own private road). Below those three names, the name of Monarch, although painted over, can still be discerned through the layers of white paint. The circumstances in which the sign at the end of the private estate road was re-erected with the name of Monarch added thereto, and Monarch's name subsequently came to be painted over, during the course of the hearing, featured at some length in the evidence. These actions were executed on the instructions of the Respondent (the painting over of Monarch's name was carried out by Ivor Brown, who was paid by Monarch to do maintenance work around the steading area) entirely unilaterally and without consulting

the Applicant. The Respondent also took it upon himself to have overhanging branches removed from the trees along the length of the private estate road, and to widen the road at certain points, to facilitate the passage of large vehicles delivering materials to Monarch. The entrance to the farm steading and farmhouse is situated just beyond, and overlooks from a slightly elevated position, a bridge over what we understand to be part of the watercourse known as the Milton Burn.

[25] The steading, farmhouse and the bulk of the farmland lie to the west of the burn, but there are two parcels of land [Fields 4 and 10] on the east side. The lower-lying, arable part of the Farm [Fields 1, 3, 5, 6, 7, 8, 10] lies predominantly to the north and north-west of the farmhouse and steading, with the hill ground [Field 2] rising to the west and south-west thereof. Between the burn and the entrance to the Farm, the Respondent constructed an area of hard standing, entered through double gates off the estate private road, which until very recently was used for storage of a large quantity of left over building materials, in the form of roofing tiles, pipework, and blocks, along with scaffolding and the like. It appeared to us that this area had been built up by a height of about one metre from the level of the ground on the burn side. The Respondent, in evidence, sought to portray the creation of the area of hard standing as having been intended to operate as a flood prevention measure, but we are wholly sceptical that the object of flood prevention played any significant part in his motivation for undertaking this development.

[26] Various skips were situated upon the area of hard standing, and it was admitted by the Respondent that Monarch's employees were wont, on a regular basis, to burn builders' waste there, although he disputed that this occurred quite as frequently as had been suggested by the Applicant and his wife, and claimed that this practice had been scaled back after they had complained to him about being bothered at their home by acrid smoke blowing over from that part of the Farm. As with the issue of the volume of Monarch traffic on the estate road, we consider that the evidence of the Applicant and his wife, which was given in a restrained and measured manner, falls to be preferred to that of the Respondent on the issue of the extent and impact of the burning of builders' waste at that locus, and whilst we do not doubt that the Respondent gave the Applicant assurances that these operations would be scaled back, we do not believe the Respondent made any serious effort to give effect to those assurances, and accept the evidence of the Applicant and his wife that this practice continued unabated. There was much force, we consider, in the line of cross-examination of the Respondent deployed by Counsel for the Applicant when he put it to him that he behaved as if he owned the Farm, and was in consequence entirely free to suit himself as to what he did with, and upon it, without reference to, or any regard for the interests of, the Applicant as the Landlord. A further instance of that attitude on the part of the Respondent may be gleaned from his actings in diverting part of Field 7 behind the farmhouse and steading from agriculture, levelling it and constructing a children's play area and laying and marking out a football pitch and a full-size tennis court upon it, again without so much as informing the Applicant as his landlord of his intention to do so. The Respondent initially asserted that the tennis court could readily be put back into



agricultural use if required, but later it emerged that it had been sown with specialist sports grass seed and would require to be grubbed up and re-seeded before being suitable for grazing purposes.

[27] The granite farm steading is of traditional U-shaped form, and at the inception of the Lease would have been used to store grain and hay and to house livestock. It has been substantially altered over time by the Respondent to accommodate the non-agricultural business of Monarch. It appeared to us on inspection be structurally sound and well maintained. The north prong of the U is of traditional stone construction with a slated roof and double doors. A slatted lean-to wood store has been built against the outer wall. The south prong of the “U”, formerly the hay shed, was first converted into accommodation for Monarch’s expanding office staff in 2001 and extended in 2006. The roof and north wall of the bottom section of the U, formerly the cattle byre, have been removed, leaving a partially enclosed area within which, when we visited the Farm, were situated two large free standing storage units. The walls forming the inner sides of the U have been heightened and the area within the “U” roofed, floored with concrete and divided internally, with one of the two parts having been at one time adapted for use as a silage pit. When we inspected the Farm, we did not enter the part of the steading used as office accommodation. The steading buildings otherwise were empty, having in the weeks before our visit been cleared of the Monarch building materials that had been stacked or stored therein for more than decades. Close to the steading stood a newer building, erected by the Respondent without reference to the Applicant, referred to in evidence by him as the “garden room”, which had been used by Monarch as a showroom for hot tubs.

[28] Away from the steading area, the only other significant items of fixed equipment on the Farm, excluding fences, gates, etc., were a Dutch barn, silage pit and cattle feeding area situated on the lower slope of the hill ground, which originally were tenant’s improvements. The Dutch barn is in a dilapidated state and the silage pit and cattle feeding area quite clearly have not been used for many years. The silage pit had a concrete floor, with earth walls on three sides. The concrete floor was aged and beyond repair and there was no effluent collection facility, so that it would not satisfy contemporary legislative requirements. So far as the cattle feeding area is concerned, whilst the blacksmith-made metal feeding barriers appeared sound, the concrete floor was badly aged and had reached the end of its useful life. The Dutch barn was stacked high with old bales of hay, dating back to the 2013 growing season. Some of these bales had toppled over and burst, many were badly marked and unsaleable, and only the very best of them would now, in our view, be of any commercial value. The Respondent asserted that there had been no real market for the hay in 2013, and explained that he had “missed the market” for selling it in 2014, 2015 and 2016, for reasons that remain unclear to us. The Respondent, in evidence, claimed that, shortly before the hearing, he had negotiated a sale of some of the hay for consumption by horses, but he was notably vague as to the details of how or where he had advertised it for sale, what quantities had been purchased, and the identity of the purchaser, and we are strongly inclined to doubt the veracity of this claim.

# Monarch

[29] In the only portion of his evidence we are inclined to accept without corroboration, the Respondent explained how, having taken over the tenancy of the Farm from his father at a young age, he found himself unable, through farming alone, to make an acceptable living from the Farm. From the age of twenty-five onwards, he had taken on various jobs off the Farm to supplement his income and support his wife and family, including working in a quarry and laying drains. The Respondent then found a job in sales with Everest Double Glazing, at which he worked hard and proved to be very adept, despite having no prior sales experience. He left Everest after three years and later joined Fersina Conservatories in a management position, setting up an Aberdeen branch for that company which proved to be very successful. His son Darren, a joiner by trade, was one of their main contractors. Major Fyffe, the Respondent's then landlord, was aware of, and did not object to, the Respondent supplementing his income with earnings from work done off the Farm, his one stipulation, according to the Respondent, being that he did not want him to engage in "manufacturing" anything from the Farm, which the Respondent insists he never has done.

[30] In or about 1996, having traded for a period as Grampian Roof Trim, which replaced external soffits and fascias on houses, the Respondent decided to set up his own home improvements (double glazing and conservatories) business, and Darren Esslemont joined him in it. The new enterprise, which was incorporated as Monarch in 2003, gradually grew into what the Respondent acknowledged was "a very good business", and in the year to 31 March 2016, achieved a turnover of £2,193,029, producing a gross profit of £508,414, an operating profit (stated after charging, *inter alia*, directors' remuneration of £72,061) of £127,280 and a profit for the financial year of £100,700 after tax, according to the profit and loss account forming part of the unaudited financial statements lodged as Production 229. The accompanying balance sheet as at 31 March 2016 disclosed shareholders' funds (*i.e.* the balance sheet value of the shareholders' interest in the company, reflecting total assets less total liabilities) of £737,043. Monarch's turnover in the period from the year ended 31 March 2009 to the year ended 31 March 2016 (being the years for which the Respondent produced financial statements in this process) was never less than £1,612,275 (in the year to 31 March 2011) and reached as high as £2,213,097 in the year to 31 March 2012, in which Monarch achieved a profit after tax of £148,440. In that year, directors' salaries were in the sum of £61,297 and equity dividends of £20,000 were paid. Five figure dividends on ordinary shares were paid out in each of the years for which financial statements were produced, with the sole exception of the year to 31 March 2015. The financial statements for the year to 31 March 2009 show that in that year, dividends of £22,000 were paid, down £3,000 from £25,000 in the year before. The Respondent claimed that as a result of a recent downturn in the North East economy, Monarch was now "on its knees", but no supporting vouching for this somewhat melodramatic assertion was placed before the Court, and any fall in either turnover or profit that Monarch may have experienced in the period subsequent to that covered in the last set of accounts lodged did not prevent Monarch securing substantial alternative premises at Bridgend Farm, Kintore ,

the sales particulars for which property are lodged as Production 209, from which to conduct its business after being ejected from the Farm. It was not disputed by the Respondent that Monarch's presence on the Farm, while it lasted, enabled Monarch to operate at a significant advantage to competitors having to pay a commercial rent for their business premises, the passing rent for the whole of the Farm as paid by the Respondent being a mere £3,200 *per annum*. Monarch has paid business rates since the Applicant in or about 2005 drew the attention of Aberdeenshire Council to its non-agricultural activities in and around the farm steading.

[31] Whilst the number of persons employed by Monarch varied over time, the trend was always upwards, and had reached about ten, between administrative staff, joiners and labourers, as long ago as 2005, generating a significant volume of traffic to the Farm along the private estate road. Although it is difficult to extract from the Respondent's often confused and confusing testimony a coherent and at least seemingly reliable account of the total number of persons employed by Monarch from time to time as it continued to grow, he did accept that it could be up to as many as fifteen at any one time. The traffic involved not only the vans of Monarch's own employees travelling backwards and forwards from the Farm to job sites but also delivery vans and lorries of considerable size dropping off quantities of building materials at the Farm. The Applicant and his wife spoke to how the increased traffic along the private road altered the peaceful atmosphere of the estate. As Mrs Fyffe put it, when she and her husband first came to live at Corsindae, the traffic along the private estate road was agricultural and intermittent, rather than continuous. The speed at which some of the delivery vehicles were driven made riding a horse or walking a dog along it a potentially alarming experience. The Applicant in or about October 2007 installed a movement activated camera traffic numbers monitoring system to establish how much of the traffic along the private estate road was Monarch-related. Twelve compact discs, some marked "CCTV", with handwritten dates between 18 January 2008 and 12 July 2008, were lodged in process by the Applicant [Production 206] to show us what the monitoring system recorded, but neither party considered it necessary, in the event, to ask us to view this material. He also spoke to a document headed "Traffic on Corsindae Home Farm Road" [Production 207], the contents of which reflected the results of his analysis of the film recorded by the monitoring system over what he claimed were five randomly selected weeks or fortnights (excluding weekends, over which, as he acknowledged, Monarch traffic was much lighter) between the years 2008 and 2016. The Applicant testified that up to 80% of the traffic on the private estate road on weekdays would relate to the activities of Monarch, and that this could amount to between 60 and 80 vehicle movements each day. It was put to the Applicant and Mrs Fyffe by Counsel for the Respondent in cross-examination that these figures were exaggerated, and that a more realistic figure would be up to 50 such movements per day, a suggestion which they resisted.

[32] Corsindae Estate is situated deep in the heart of the Aberdeenshire countryside, and during the more than 2½ hours we spent on the Farm on a Summer weekday, we saw and heard little or no traffic travelling along the private estate road. Our visit to the Farm, of

course, post-dated the ejection of Monarch from the Farm, and we have no hesitation in concluding that the additional volume of traffic occasioned by Monarch's presence on the Farm, even at the sort of level that Counsel for the Respondent in his cross-examination of the Applicant was prepared to acknowledge, would have had a significant adverse impact on the amenity of Corsindae Estate, of which the Farm forms part. We found both the Applicant and his wife to be credible and reliable witnesses. The competing testimony of the Respondent and his witness, his neighbour, Mrs Jennifer Abel, was very much geared to talking down that impact, although revealingly, the Respondent himself, asked in a different context why he had constructed the children's play area, football pitch and full-size tennis court on part of Field 7, explained that this was to provide somewhere safe for his grandchildren to play, "away from the vehicles coming round the buildings at the steading." Such an acknowledgment of the dangers posed by the (predominantly Monarch) traffic at that location, in our view, speaks volumes as to the change in the character of the Farm brought about by the presence of Monarch's business thereon.

[33] Mrs Abel, a retired primary school teacher and session clerk at her local parish church, left the witness box looking somewhat shaken after being subjected to a rigorous (but in our view entirely fair and justified) cross-examination. Somewhat to our surprise, she proved to be, after the Respondent himself, the witness, the assessment of whose credibility and reliability gave us most pause for thought. Her demeanour in answering questions altered dramatically the moment Counsel for the Applicant got to his feet and bade her good morning. He commenced his questioning, in time honoured fashion, by asking her whether she had discussed the evidence she was about to give with any other person, to which she responded with an indignant denial. Counsel for the Applicant was sceptical of that answer, and proceeded to test it, eventually eliciting from her the admission that contrary to her original answer, she had indeed discussed it in advance with the Respondent's wife. Her substantive evidence as to the volume of Monarch traffic over the private estate road, and its impact on other residents in the locality, lacked credibility, in that it downplayed these matters to an extent even greater than the evidence of the Respondent. Mrs Abel, in a manner not unreminiscent of the Respondent himself, repeatedly quibbled and cavilled with the questions put to her, opting to joust with Counsel for the Applicant in preference to simply answering the questions being put to her.

[34] It was Mrs Abel's particular misfortune that she should have been followed into the witness box by Ivor Brown, a former hotelier and publican who was employed part-time by Monarch as a groundsman/maintenance man, principally around those parts of the Farm occupied by Monarch. Mr Brown contented himself with answering the questions put to him in a straightforward manner, regardless of for whom his interlocutor was acting. The contrast between his testimony and that of Mrs Abel was striking, and in consequence, his experience of being cross-examined was considerably less bruising than hers. Counsel for the Applicant put to Mrs Abel that she was motivated by animus towards either the Applicant personally or the landed classes in general. Mrs Abel demurred to these suggestions, although it did emerge that there had in the past been some dispute between

her and the Applicant about the upkeep of the private estate road off which her home, Muirton Lodge, was accessed, but whether her principal motivation was her friendship with the Respondent and his wife or personal hostility towards the Applicant, we formed the impression that Mrs Abel could not be relied upon as a disinterested and impartial witness. We accordingly reject her evidence as to the volume of the Monarch traffic and its impact upon the quality of life of the other inhabitants of Corsindae Estate, and prefer that of the Applicant and the other witnesses led on his behalf.

## The various phases of agricultural activity on the Farm

[35] Even before the Respondent set up the business that became Monarch, the nature of the agricultural activity on the Farm had undergone significant change, such change reflecting the reduced amount of time the Respondent was able to devote to farming on account of his various off-farm commitments. What originally had been let as a mixed arable and livestock farm was by the mid-1980s almost wholly in grass. The Respondent sold off his breeding herd of cattle in the early 1980s, opting instead to raise store cattle and bulling heifers for onward sale. He relied increasingly upon the services of agricultural contractors for the baling of hay and the making of silage. The Respondent sold off all of the cattle on the Farm in 1994, having formed the view that this mode of operation was no longer financially viable. The Respondent spoke of getting out “in the year of BSE”, an observation which surprised us somewhat, given that 1996 would generally be considered to be the year of the BSE crisis in British agriculture, but he also revealed that in his last year of keeping bulling heifers, from 40 heifers, 37 of which tested in calf after artificial insemination, he had to deal with seven sets of twins, and two births by way of caesarean section, which suggests that 1994 was a difficult year for him from an animal husbandry perspective, irrespective of outside influences.

[36] From the sale of the last generation of bulling heifers in 1994 until the Spring of 2015, the Respondent kept no livestock of his own on the Farm. Such cattle and sheep as were present on the Farm in the intervening period belonged to third parties. Up until 2002, the Respondent continued himself to make some hay on the Farm, doing most of the cutting and turning himself, but bringing in contractors to do the baling with the 4 foot balers that, by this time, increasingly had come to replace the more unwieldy 5ft balers of which the baler he himself owned was an example. The resulting hay crop up until 2000 was sold to or through Aberdeen and Northern Marts, but the 2002 crop was entirely lost through adverse weather conditions at harvest time, and the Respondent thereafter ceased to play any active role in making his own hay and silage. He no longer possessed viable agricultural machinery and so was thus now wholly reliant on the services of contractors. The fact that the steading building had been made over entirely to the activities of Monarch restricted the range of farming activities that the Respondent could undertake on the Farm, had he been minded to do so. When asked if she had ever seen the Respondent himself engage in agricultural activity, Mrs Fyffe conceded that it was possible he may have done so back

when she first arrived at Corsindae, but not since; strikingly, she observed that she had “never ever seen him in wellies”; usually he passed her very smartly dressed in a smart car.

[37] By the time Monarch came into being, then, agricultural activity on the Farm had already dwindled to a low level. We made reference earlier in this Note to the Applicant’s letter to the Respondent dated 18 December 1998 in which he related the decline in activity that had occurred and noted that the Respondent had told him he was giving up farming. We are quite satisfied that the Respondent did make such a remark to the Applicant, and that this was the *de facto* position on the ground at or about that time. The Respondent had, by the mid-1990s, embarked on a cycle of entering into arrangements with seasonal graziers and selling hay and silage to or through Aberdeen & Northern Mart. The latter practice was in breach of the obligation, set out in paragraphs VI and VII of the General Regulations and Conditions under which the Lease was granted, to cultivate the Farm in accordance with the rules of good husbandry, it being a rule of good husbandry “that the whole straw, forage, and green crops shall be used upon the farm; and none thereof shall be sold or given away excepting potatoes”. That provision of the Lease is overridden by subsection (1)(a) of section 7 (**Freedom of cropping and disposal of produce**) of the 1991 Act, which provides that the tenant of an agricultural holding shall, notwithstanding any custom of the country or the provisions of any lease or of any agreement respecting the disposal of crops or the method of cropping of arable lands, have full right, without incurring any penalty, forfeiture or liability – (a) to dispose of the produce of the holding, other than manure produced thereon; and (b) to practice any system of cropping of the arable land of the holding. The exercise of those rights is subject, however, to section 7(2) of the 1991 Act, which provides that section 7(1) shall not have effect unless, before exercising his rights thereunder, or as soon as is practicable after exercising them, the tenant makes suitable and adequate provision – (a) in the case of an exercise of the right to dispose of crops, to return to the holding the full equivalent manurial value to the holding of all crops sold off or removed from the holding in contravention of any such custom, lease or agreement; and (b) in the case of an exercise of the right to practise any system of cropping, to protect the holding from injury or deterioration. Whilst the Respondent may have availed himself of the rights conferred by section 7(1) of the 1991 Act, we heard little or no evidence that he ever satisfied the countervailing obligations imposed by section 7(2) of the 1991 Act. The Respondent did not receive an allocation of payment entitlements upon the introduction of the new Single Farm Payment Scheme (“SFPS”), which indicates that he did not claim any form of agricultural subsidy during the 2000 – 2002 reference period.

[38] At the beginning of March 2003, the Respondent contacted the Scottish Environment and Rural Affairs Department (“SEERAD”), as it then was, to inquire about his eligibility for agricultural subsidy. He explained that he had not claimed any farm subsidies for many years, as he had no livestock and had merely been making hay for selling on. He stated that in 2003 he planned to let the land for seasonal grazing “and would appreciate your confirmation that all my land qualifies for LFA and what requirement do I have to put in place prior to letting the grass and hill grazing”: see the Respondent’s letter dated 5 March

2003 [Production 147]. SEERAD responded to this inquiry by letter dated 24 March 2003 [Production 149], in which it was confirmed that the Respondent's land was classed as Less Favoured Area – Severely Disadvantaged – Class A, and as such was potentially eligible for support under the Less Favoured Area Support Scheme (“LFASS”). LFASS is an area-based scheme. It is not payable on crops, but actively farmed grassland is eligible. The SEERAD letter went on to explain that SEERAD had written to producers who claimed LFASS in 2003 providing details of grazing categories where these were known from information provided in previous claims, but that “there will be land which has not supported an LFASS eligible activity in the reference period.” In that situation, the incoming tenant or occupier could submit a request to have an assessment made and a grazing category allocated. The Respondent was advised that if he was planning to let land that year for which no category had been allocated, then he should:

“advise the tenants to contact us. I can though confirm that field NJ/67510/07992 has been allocated a grazing category ‘D’. The business which occupied this land in previous years will have been notified of this grazing category.”

The letter went on to advise the Respondent which fields on the Farm were deemed AAPS eligible (for which, see paragraph [39] below). The field which bore the field identifier NG/67510/07992 was Field 2, the approximately 40 hectares of hill ground, and what the quoted passage from the SEERAD letter dated 24 March 2003 thus discloses is that not only was it occupied by another business in the years previous to 2003, but also that those 40 hectares had supported an LFASS eligible activity in respect of which that business had made a claim (or claims) in the reference period. The only year in the period from 2003 onwards in which the Respondent indicated on his SAF that he wished to claim under LFASS was 2010 [for which, see Production 174], but in the absence of LFASS eligible activity on his part, he had no entitlement to payment thereunder, and he did not do so again in subsequent years.

[39] The Farm, and the Respondent's interest in it, now being, as a result of the Respondent's communications with SEERAD in the early part of 2003, “on the system”, the Respondent proceeded to submit an Integrated Administration and Control System (“IACS”) Area Aid Application Base Form in 2004 (“the 2004 AAA”) [Production 155], in which he advanced a claim under the Arable Aid Payments Scheme (“AAPS”) in respect of 11 hectares of the Farm, upon which a crop of spring barley had been sown. The Respondent claimed that his motivation in planting spring barley that year was because it was an ideal way to break up the ground and thereby improve the quality of the grassland, but as with so many of the Respondent's answers, we took, and take, this with a considerable dose of salt, and think it far more likely that this initiative was prompted by a desire on his part to gain entry to the agricultural subsidy regime in advance of the introduction of the SFPS on 1 January 2005. The AAPS claim was successful, the Respondent being advised by letter dated 3 November 2004 that he would shortly receive a payment in respect of his AAPS claim in the sum of £2,278.99 [Production 158].

[40] The possible significance for present purposes of the contents of the 2004 AAA submitted by the Respondent lies in how the balance of the eligible land on the Farm was treated on the Field Data Sheet (“the FDS”) appended thereto and signed off on by the Respondent himself. It is on the FDS that an applicant declares the areas of land in respect of which a claim under either the AAPS or the various livestock schemes is being made. The FDS consists of three sections, each section containing a number of columns, into which the applicant must insert the requested information. All of the fields on the holding require to be accounted for on the FDS. In the first section, on the left hand side of the form, the fields are listed under their field identifiers, with basic information about each field (total field area, crop grown and area declared the previous year, maximum area eligible for SFP arable and LFASS forage) supplied in the appropriate column. The details of the areas of land in each field in respect of which a claim is being made are entered in the middle section, with each area allocated a code to show its use in that year (*e.g.*, “SB” = spring barley; “PGRS” = permanent grass). The appropriate codes for each use are set out in a list contained in an annex to the Explanatory Booklet, which was distributed along with the 2004 AAA and which contains a detailed guide as to how the 2004 AAA and FDS are to be completed. The third section of the FDS, on the right hand side of the form, is headed “Other Land on the Holding.” In it, an applicant requires to declare all other areas of eligible land on the holding in respect of which no claim is being made, and to indicate the usage to which those areas of land are being put, by entering one of the codes set out in another list in the annex to the Explanatory Booklet. One of the codes in that list is “LLO”, and the description to which it applies, according to the list in the annex to the Explanatory Booklet, is “LAND LET OUT TO OTHERS.”

[41] In the FDS appended to his 2004 AAA, the Respondent declared 11 hectares, in Fields 4, 5 and 7, in his claim under the AAPS, entering the code SB against each of those three areas. The total field areas of Fields 1, 2, 6, 8 and 9 and a small area of Field 4 not declared in the claim for AAPS were included in the third section of the FDS under the heading “Other Land on the Holding”. The code entered against each of those areas was “LLO”. In the interests of completeness, it falls to be noted that against Field 3 (3.66 hectares) was entered the code OTH (“OTHER LAND”). Thus, the FDS appended to the 2004 AAA submitted by the Respondent contains an unequivocal – and presumably considered – declaration on behalf of the Respondent that all but 14.66 hectares of the eligible land on the Farm tenanted by him was in 2004 let out to other people or businesses.

[42] The Respondent was first asked under cross-examination about the presence of the LLO entries on the subsidy forms in the course of an exchange with Counsel for the Applicant on Wednesday 31 May 2017 about sub-letting, initiated by the contents of Production 197G, a file copy of a letter from the Applicant’s land agent, Mr Maitland, to the Respondent dated 18 November 1994, in which the writer had narrated that:

“In your last letter to me, you confirmed that you were not sub-letting any of your land. In our previous discussions, it was made quite clear that you would not be



subletting, and that the farm would be stocked with your own cattle and/or sheep.

Can you confirm to me that the cattle and sheep that you have had on the farm this year have been your own bona fide stock? This is a matter of serious concern, and there is a question mark as to whether the stock belonged to you or somebody else. I would be grateful, therefore, if you would please confirm the position.”

The Respondent accepted that he had agreed with Mr Maitland that he would not be subletting, but he insisted that he would not have agreed that the Farm would be stocked only with his own cattle and sheep. In writing that he had so agreed, Mr Maitland was making it up. Nevertheless, the cattle and sheep on the Farm would have been his at the time of his last letter. The Respondent had already told the Court in his examination-in-chief that he had sold off all of his remaining cattle in 1994 and there was no suggestion at any point that he continued to keep sheep on the Farm into the 1990s. When asked who was claiming subsidy in respect of the farmland at that time, the Respondent, after stating that he “didn’t think” he was doing so, went on to emphasise that he had never given anyone permission to “claim subsidy off my Farm”; that he didn’t know if anyone was, and that he would have thought that if anyone was, “the Department of Agriculture would be in touch with me.” It was at this point in the questioning that Counsel for the Applicant broached the subject of the LLO entries in the 2004 and later subsidy applications, eliciting from the Respondent somewhat dismissive answer that “the two agricultural advisers will explain why they were in the columns.” When he was asked whether it was his position that he didn’t know what the acronym LLO stood for, he emphasised that he was employing them (*i.e.* the agricultural advisers) and that it “meant nothing to me.”

[43] After eliciting those answers from him, Counsel for the Applicant reverted to taking the Respondent in chronological order through some later letters that had passed between Mr Maitland and the Respondent, but on the morning of Tuesday 6 June 2017 he took the Respondent directly to the 2004 AAA, and revisited the issue of the insertion on the FDS of the letters LLO against Fields 1, 2, 6, 8 and 9 and (part of) Field 4. Once again, the Respondent asserted that he had not been aware of what LLO stood for: “they were just letters to me.” His position was that when a professional person had completed a form for him to sign, he would sign it, and in this case, it had been his agricultural consultant, Watson Bell, who had done so. Notwithstanding his acceptance that Watson Bell would have filled in the form on the basis of the information supplied by him, the Respondent insisted that he did not know why Watson Bell had completed the form in this manner, because the land was not let out: it was just seasonal grazing. He (the Respondent) did not know what the letters LLO meant, and he had not bothered checking this out because he knew what he himself was doing on the Farm.

[44] The problem for the Respondent with the position he had adopted on the LLO issue is that it was not backed up by the evidence of Watson Bell. The 2004 AAA and the appended FDS were dated 27 April 2004 and they required to be completed and returned to the Respondent’s local SEERAD Area Office by 17 May 2004. The Respondent, under cross-

examination, had overlooked the fact that he did not engage Watson Bell as an agricultural consultant until the Autumn of 2004 and Watson Bell, when he came to give evidence, refuted the suggestion that he had played any part in completing the 2004 AAA. It was not suggested that the Respondent was assisted by any other agricultural adviser at that time. We have no hesitation in concluding that the Respondent completed the 2004 AAA himself; that in completing the 2004 AAA, he well knew what the letters LLO stood for; and that in claiming otherwise in Court, he was not merely mistaken, but was lying. The evidence we heard does not allow us to make any positive finding as to whom the farmland on the Farm was let out in that year, or upon what basis, but on the balance of probabilities, we find that there was some such arrangement with a third party (or third parties) in place over this period, and that such persons were declaring the farmland on the Farm in their subsidy applications.

## Watson Bell's advice to the Respondent and the purported contract farming arrangement

[45] Watson Bell has been in private practice as an agricultural consultant since 1989, having worked previously as an agricultural adviser with the North of Scotland College of Agriculture. In or about October 2004, the Respondent contacted Watson Bell, having been introduced to him by his neighbour Robert Wilson (Junior), of the firm of R & W Wilson, farmers and agricultural contractors, a previous client of Watson Bell. Watson Bell was aware that Robert Wilson grazed cattle and cut hay on the Farm, but, as he initially put it, "I wasn't a party to their arrangement at that time." He later stated that "from memory, I'd've understood Robert Wilson would have been using the farm on a seasonal basis." Watson Bell was not employed to complete R & W Wilson's subsidy claim forms. Watson Bell visited the Respondent at the Farm, and the following day, wrote to the Respondent "to put down on paper some key points from our discussion". His letter bears the date stamp 20 October 2004, which we understand to have been applied by the Respondent on receipt rather than by Watson Bell before sending [Production 20]. In his letter, Watson Bell noted that because he did not claim any subsidies in 2000 – 2002, the Respondent had no allocation of Single Farm Payment. Having advised that the Respondent did not fall into one of the categories of producers who might be able to apply successfully to the National Reserve for an allocation of SFPS payment entitlements, Watson Bell observed that the Respondent thus had what was known as "naked acres": *i.e.* land to which no SFPS payment entitlements had been applied. In those circumstances, Watson Bell informed the Respondent, he had two choices: either lease out the naked acres to someone who had SFPS payment entitlements, but insufficient land to attach them to, or himself purchase payment entitlements when, from November 2005, they became tradable, and apply them to his land. Significantly, Watson Bell pointed out that:

“Currently the profit per acre from keeping stock or growing cereals or oil seed rape is less than the subsidy received on each acre. It follows that once the system settles

**down, land without subsidy will have virtually no rental value and therefore you cannot look to a continuation of your current policy beyond 2005 [our emphasis].”**

Demand for land would, however, be the same in 2005 as in the last two or three years, because in order to confirm their SFPS payment entitlements, and then to be able to sell them, producers had to use 80% of them for a ten month period in 2005, which would entail them occupying the same area of ground in 2005 as they did on average in the 2000 – 2002 base years.

[46] Watson Bell then turned to address what he characterised as “one of your problems”, being the restriction on sub-letting contained in the Lease. He evidently did not, when writing his letter to the Respondent, have a copy of the Lease before him, because he couched his advice in terms of what might, or might not, be contained within it. He noted that:

“the Land Court have judged, in the past, that seasonal grazing lets do not constitute “sub-letting” within the agricultural holdings acts. You have to watch however that there is not a “catch-all” clause in your lease which restricts you to having only your own stock on the holding. If there is no restriction then in 2005 you can let your grass for grazing to Bert [this being a reference to Robert Wilson, Junior] or to anyone else at around last year’s levels. If you want to grow potatoes then you will have to be the grower which involves you being billed for the seed fertiliser and contract work and then selling the growing crop back to the merchant at cost plus a rental equivalent. It is not advisable simply to receive a rent as this would come under the heading of sub-letting.”

After discussing the likely economics of purchasing SFPS payment entitlements when they became tradable, Watson Bell reminded the Respondent that:

“If you buy such a payment, then you require to maintain the land in ‘good agricultural condition’ you could simply top it twice a year but that would incur a cost. The preferable option is to contract someone to meet your cross-compliance obligations by grazing, cutting or cropping the land free of charge.

The ‘free of charge’ bit is important. Land to let without the SFP likely to be valueless anyway but giving it away without payment in cash or kind avoids any suggestion of a sub-tenancy. For a tenant sub-tenant relationship to exist there must be a clearly defined payment from the user of the land to the official occupier. The mechanism proposed is that of you being the farmer and the user of your land as your contractor.”

Watson Bell’s letter concluded by expressing the hope that:

“this covers the main areas we discussed, once you have decided on the area of potatoes you wish next year, the remainder of the unit should be let out as grazing, from November 2005 you should look at the economics of buying a SFP and then allowing the land to be farmed, on your behalf, free of charge.”

In his oral testimony, Watson Bell explained that the Respondent had come to him looking to establish SFPS payment entitlements, because he had not been part of the subsidy system. Asked by Counsel for the Respondent in examination-in-chief, what information he had sought from the Respondent at their first meeting, and more particularly whether he needed to know whether “anyone else had rights of occupation” over the farmland, Watson Bell replied that his understanding was that the Respondent had not completed previous IACS returns, and so “previous croppings were not in his name”. Watson Bell was made aware that the Respondent was operating a conservatory business that he had been “concentrating on” in recent years. The proposals embodied in his letter to the Respondent addressed the problem that without subsidy, it would not be cost-effective for the Respondent to farm the land himself. Under the SFPS, to receive subsidy payments, “you didn’t have to actively farm the land, just maintain it in GAEC [for which, see paragraph [64] below].” The Respondent’s income would be the subsidy less the costs of topping the grass twice a year.

[47] Watson Bell visited the Respondent again in May 2005, to check on what cropping was being done on the Farm, for inclusion in the Respondent’s 2005 IACS return (now referred to as the Single Application Form (“SAF”)). No copy of the SAF submitted to SEERAD by Watson Bell on the Respondent’s behalf in 2005 was produced (nor SAFs for the years 2006 and 2007), but a computer print-off of the FDS was lodged and spoken to [Production 185] by him. He noted that some 11.5 hectares of seed potatoes (code “SPOT” – ineligible for support) had been planted, together with a field of rape or kale for feeding (code “OCS”), with the remainder of the Farm being in grass. Receipt of the Respondent’s 2005 SAF declaring a total land area of 66.77 hectares for SFPS purposes was acknowledged by SEERAD by letter dated 16 June 2005 [Production 23]. Because of the absence of any claims by him during the historic (*i.e.* 2000 – 2002) reference period, the Respondent, on the introduction of the SFPS, as has been noted, had received no automatic allocation of payment entitlements to activate against his land, and he received no subsidy payment in 2005.

[48] Whilst the Respondent had gone to Watson Bell for guidance, he did not always follow the advice he received. In relation to the 2005 potato crop, he chose to ignore what Watson Bell had told him about not being seen simply to receive a rent from the grower. The Respondent explained that he had proposed to the potato merchant, Gordon Dow, that they enter into an arrangement on the lines suggested by Watson Bell, but Mr Dow was not keen, and so the Respondent did not press the point, instead simply sub-letting the land on which the potatoes were planted at a rent of £160 per acre, in breach of the prohibition on sub-letting contained in the Lease, as is confirmed by the contents of the letter from the

Respondent to Mr Dow dated 30 March 2005 [Production 58]. The Respondent opted not to purchase payment entitlements after they became tradable and consequently, whilst he had eligible land, he had no payment entitlements to set against it after the commencement of the SFPS on 1 January 2005.

[49] The advice tendered by Watson Bell to the Respondent, and the work he carried out for him, extended beyond the contents of the letter date stamped 20 October 2004, and the completion of the Respondent's 2005 SAF. It emerged during the evidence that he also played a pivotal role in the devising, and the practical implementation, of a scheme to give effect to his advice as to how the land might be farmed on the Respondent's behalf, whilst avoiding the creation of a sub-tenancy. Watson Bell drew up the undated document headed "CONTRACTING 2003/2004 CROP" [Production 56] which provided a guide for R & W Wilson and the Respondent to follow in issuing invoices to one another representing, in respect of the invoices issued by R & W Wilson, the cost to R & W Wilson of supplying the seed, fertiliser and herbicide/fungicide sprays, and ploughing, sowing, cultivating and spraying the ensuing crop of spring barley, and in respect of the invoices issued by the Respondent, the price to R & W Wilson of what was referred to therein as the sale of the standing crop. The guide anticipated that the respective invoices issued by R & W Wilson and the Respondent would bring out the same sum (£3,645), the only difference being that VAT was levied on the services element of the R & W Wilson invoices (the cost of the seed and the sale of the standing crop being zero-rated for VAT purposes) that the Respondent might then reclaim from HMRC. The invoices themselves were then drawn up by R & W Wilson and the Respondent in conformity with the contents of the guide and exchanged. Invoice no. 0832 issued by R & W Wilson to the Respondent bore the date 9 December 2004 [Production 54], notwithstanding that much of the work that purportedly was being charged for on the invoice had been carried out by R & W Wilson many months before. Likewise, the Respondent's invoice to R & W Wilson supposedly in respect of the sale of a standing crop of spring barley was dated 13 December 2004 [55], several months after the crop would have been harvested.

[50] In examination-in-chief, Watson Bell, asked to explain why he had produced the "CONTRACTING 2003/2004 CROP" document, said that it was "to show the various parties how you operated a contract farming arrangement to make sure the person farming was the farmer not the contractor". Whilst the contents of the guide, insofar as relating to the invoice to be issued by R & W Wilson to the Respondent, at least purported to have been informed by information supplied to Watson Bell by R & W Wilson, the price brought out in the invoice in respect of the "sale" of the standing crop by the Respondent to R & W Wilson did not represent a genuine valuation of the standing crop at any particular date. As the creator of the scheme, Watson Bell, acknowledged, the invoice issued by the Respondent to R & W Wilson was there simply to balance the invoice raised by R & W Wilson, to ensure that there was no "financial consideration" (a euphemism in this context for rent) and thus, no sub-let.

[51] Put to him by Counsel for the Respondent that under a normal contract farming arrangement, the farmer assumed the risk and the contractor just got paid for the work he actually did, Watson Bell replied that it depended on the type of contract farming arrangement. This was a simple form, about which he had taken legal advice, although he did not identify its source, and there were 3,000 – 4,000 acres being farmed on this basis under his charge. For taxation purposes, as long as there was a crop being sold, this was sufficient for the farmer “to be seen to be trading.” In response to Counsel for the Respondent’s suggestion that it might be said (as indeed Counsel for the Applicant in due course proceeded to do) that this was really just a “zero sum game”, in which no money (other than the VAT element) changed hands at all, a paper exercise to disguise the fact that the contractor was in fact a sub-tenant, Watson Bell’s response was to assert that you couldn’t be a sub-tenant if there was no consideration, and therefore the contractor under this arrangement could not be a sub-tenant. In cross-examination, Counsel for the Applicant observed that under this arrangement, it was obvious what R & W Wilson were getting out of it: a crop of spring barley at cost price. But what, he asked of Watson Bell, was the Respondent getting out of it? Watson Bell’s reply was that “We were trying to establish him as a farmer for agricultural subsidy purposes, so he had to be **seen to be farming** [our emphasis].” Watson Bell accepted that he did not recall what the original arrangement between the parties about the 2004 spring barley crop had been, that his template was “rewriting history on the instructions of [the Respondent]”, and that the reality was it was merely “a paper exercise.” He acknowledged also that (except for the VAT element) no money actually changed hands as a result of the passing between the Respondent and R & W Wilson of these (as he referred to them) “contra-invoices”.

[52] Watson Bell confirmed that he had orchestrated a similar exchange of invoices between R & W Wilson and the Respondent in respect of another (27 acre) crop of spring barley in 2006, his guide “CONTRACTING 2005/2006 CROP” [Production 63] having been sent out to the Respondent under cover of his letter dated 15 November 2006 [Production 62], with the resulting invoice raised by the Respondent for the “sale of 27 acres standing barley and supplying grass” in the sum of £3,645 being dated 21 November 2006 [Production 64A] and the corresponding invoice no. 1197 from R & W Wilson in the same amount, exclusive of the reclaimable sum by way of VAT anticipated in Watson Bell’s letter dated 15 November 2006, being dated 30 November 2006 [Production 65]. Once again, the price at which the barley was “sold” by the Respondent to R & W Wilson was based not on its value as a standing crop at or about the end of June or beginning of July or at any other date, but by reference to what was said to be the cost of R & W Wilson’s total inputs in relation to the establishment and cultivation of that crop. The value of the standing crop at any time had no bearing on the price stated in the Respondent’s sales invoice because it was central to Watson Bell’s advice to the Respondent that no consideration should pass from R & W Wilson to him.

[53] We are satisfied that Watson Bell’s account of the practical workings of the arrangements documented in Productions 54, 55, 56, 63, 64A and 65 reflects the reality of

those arrangements (although, as we shall later explain, we do not agree with him that they constitute true contract farming). We consequently reject the competing accounts thereof provided by the Respondent and Robert Wilson (Junior), which were both internally inconsistent and inconsistent with one another. The Respondent was anxious to emphasise that the firm of R & W Wilson merely grew the spring barley for him, and that the resulting crop was his to sell, but it is impossible to fashion into any coherent form for the purposes of recapitulation in this Note the contents of the evidence he gave in examination-in-chief and under cross-examination as to what was agreed between him and Robert Wilson (Junior) about the spring barley crops grown on the Farm in 2004 and 2006, when it was agreed that the firm of R & W Wilson would purchase the crops, how and when the price was to be fixed, whether by reference to a valuation of the standing crop or otherwise, which party bore the risk of market fluctuations or crop failure, and whether any money actually changed hands in settlement of the invoices. His answers to questions on these topics were frequently self-contradictory, seemingly more the product of guesswork than a real attempt to remember what had actually happened. His answers to Counsels' questions about the making of the arrangements for the cultivation of the spring barley crops were almost invariably couched in terms of what he would have done, rather than what he did, conveying strongly to us that he was not here talking from genuine recollection, a position which the Respondent himself ultimately came to acknowledge. Attempting, during the course of re-examination, to clear up some of the many outstanding contradictions, ambiguities and evasions in the Respondent's previous testimony, Counsel for the Respondent asked him whether he actually remembered any conversation he had had in any year with Robert Wilson (Junior) about the planting of the spring barley crop. The Respondent belatedly admitted that he could not: it could have been discussed at any time, but he didn't remember much about it at all. For him, it had been "completely unimportant." He had no recollection of any actual discussion with Robert Wilson (Junior), although obviously, such a discussion must have taken place. While he would have decided the price of the spring barley crops grown on the Farm between 2003 and 2008, he could not remember how he would have worked out what that price would be. He accepted that Watson Bell had not fixed the price of the crop.

[54] Robert Wilson (Junior)'s evidence similarly was riven with inconsistencies. In examination-in-chief, he was keen to refute any suggestion that it was pre-ordained that his firm would be purchasing the crop he had established and tended on the Farm, and he sought to insist that the "price" supposedly paid to the Respondent was the result of a valuation of the spring barley as a standing crop, based on how it was looking round about harvest time towards the end of August, and with a view to its prospective yield. If this was the agreement, Counsel for the Respondent inquired, why then would anyone need to go to Watson Bell for advice about the invoicing? Robert Wilson (Junior)'s answer was that it was "probably Watson who had a quick look" at the standing crop, although he immediately qualified this with the suggestion that it might possibly have been themselves. Every year, he told us, would be different, for prices, which begged the follow up question of why the price (of £135 per acre) was the same in 2004 and 2006. He rejected the suggestion that in

2006, that figure had simply been brought forward from the previous template; the value of the crop just happened to be the same in these two years. The reason the price paid balanced exactly the invoices his firm had issued was because “I wouldn’t give him [Mr Esslemont] any more than the costs I’d incurred. I couldn’t offer him more than the cost [to me] had been.” That answer, of course, undermined his earlier assertion that the price paid reflected an actual valuation of the standing crop. Like the Respondent, he could not explain why, given that the drawing up and exchange of the invoices did not take place until several months after the crops were gathered in, when information as to the **actual** yield achieved would be to hand, the price should be fixed by reference to a valuation of the standing crop made months earlier. He assented to the proposition that he would have received a cheque or payment into his bank account in settlement of the firm’s invoices and that the invoices issued by the Respondent in respect of the sale of the crop would actually have been paid by his firm, and when asked as to his understanding of the purpose of the arrangement, he said that it was “just so that John Esslemont could break up his fields for a few years and get back into grass.”

[55] It emerged, when the credibility of Robert Wilson (Junior)’s account was subjected to more sustained scrutiny under cross-examination, that he was well aware that Watson Bell and the Respondent had discussed “wanting to avoid the appearance of sub-letting”; that at least part of the reason for the arrangement that had been entered into between the Respondent and the firm of R & W Wilson was that the Respondent “couldn’t afford to be seen to be sub-letting”, and that if the firm of R & W Wilson itself grew crops on the Farm, “it might be sub-letting.” He persisted in the claim that the price paid for the spring barley crop in 2004 and 2006 represented a valuation based on how the standing crop looked upon inspection a short time prior to its being harvested, but he did eventually acknowledge that the Respondent “wasn’t out to make money on the arrangement”, and instead just wanted to get the ground broken up and to cover his costs. Whilst he resisted when Counsel for the Applicant put to him that his evidence to the effect that R & W Wilson, having harvested and removed the crop of spring barley at the end of August, would in December exchange cheques with the Respondent for the identical sums they respectively had invoiced each other, was “patently absurd”, we were not moved by his protestations, and did not believe him. No credible or reliable evidence – the most obvious and readily accessible form of which would be entries in bank statements – was adduced before us to prove that such money transfers ever took place. Watson Bell did not enter into the picture as the Respondent’s agricultural adviser until October 2004. The 2004 spring barley crop had been harvested and removed before he even arrived on the Farm, and so there can be no question of his having been involved in its valuation as a standing crop. We reject the seeming implication of the evidence of Robert Wilson (Junior) that the apparent “zero sum game” effected by the “contra-invoices” in both 2004 and 2006 was just a coincidence, and we accept Watson Bell’s evidence that producing such an outcome was the intended object of the exercise.



[56] Watson Bell in 2005 attended, on the Respondent's behalf, along with Hamish Lean, Solicitor, then of Stronachs, Aberdeen, a meeting between the Applicant and the Respondent and their respective agricultural and legal advisers, to discuss the situation on the Farm in respect of the presence of Monarch and what to do about it, and the Applicant's concerns about the manner in which the land was being farmed. The Applicant was accompanied at this meeting by Mr Maitland and James Rust. It was at this meeting, a handwritten minute of which is lodged as Production 198C, that there was discussion about the possibility of Monarch moving off the Farm to other premises, in the form of an old smiddy down the road, but this initiative came to naught, apparently due to planning restrictions. Watson Bell contacted the Respondent in the Spring of 2006 by way of a standard form letter [Production 24] to remind clients of the deadline for the submission of IACS forms of 15 May 2006, and to encourage them to make an appointment for the completion of their forms, but the Respondent did not take him up on that offer, and Watson Bell ceased to act for him. No explanation was proffered by either party as to why the Respondent took his business elsewhere, but thereafter Olivia Donald, then an employee of Buchan Agricultural Services Limited, Fridayhill, Maud, Peterhead, took on the responsibility of acting as the Respondent's agricultural consultant.

[57] Notwithstanding that he was no longer employed by the Respondent, Watson Bell's influence endured, in that there was contained amongst the productions another document, headed "CONTRACTING 2007/2008 CROP" [Production 66], in the same format as the two previous examples, albeit with one important difference. Watson Bell was clear in his evidence that he had not acted for the Respondent after 2006, and that he had no recollection of ever having seen this document, which bore to relate to a crop of 55 acres of spring barley harvested in the Autumn of 2008. We infer that the Respondent himself was instrumental in drawing it up, using the documents prepared by Watson Bell in the previous years as a template. The contents of the "CONTRACTING 2007/2008 CROP" document and the invoices it inspired, being R & W Wilson's invoice no. 1569 dated 22 January 2009 [Production 68] and the Respondent's invoice dated 29 January 2009 [Production 72], crucially differed from their predecessors in that they brought out a balance due, from R & W Wilson to the Respondent, of £1,252.27. In respect of the 2008 spring barley crop, then, the Respondent departed from Watson Bell's advice that he should allow the land to be farmed, on his behalf, "free of charge", for fear that evidence of payment by "the user of the land to the official occupier" might infer the existence of a tenant/sub-tenant relationship and thereby imperil the tenancy.

## Olivia Donald and the Rural Priorities Scheme

[58] Olivia Donald graduated with a BSC (Hons) in Agriculture with Animal Science from the Scottish Agricultural College in 2004, after which she joined Buchan Agricultural Consultants Limited, working as an employee of that business from March 2005 until the Summer of 2011. She is now a self-employed agricultural consultant, trading as Donald

Rural Consultancy. She first encountered the Respondent in the Spring of 2008, attending at the Farm in response to a telephone call from him to the offices of her then employer. She completed and submitted his 2008 SAF, an electronic record of which is lodged as Production 172, and discussed with him his options with regard to improving the return he was getting from the Farm. On the 2008 SAF, Olivia Donald entered the letters LLO against all ten fields on the Farm. She explained that she did so because, at that time, although she knew that the Respondent had no SFPS payment entitlements, she did not know why, and did not have time, in the annual rush to get the form in before the deadline, to find out. He might have had payment entitlements and lost them (as for instance because, having been allocated payment entitlements, he had failed to activate them within the time permitted) or because someone else was claiming on the land. Asked by Counsel for the Respondent in examination-in-chief whether she knew if the Respondent was leasing out land in any form, her initial answer was that she did not believe so. The Respondent had told her that he was growing barley and hay and making silage, and she took him at his word that he was indeed doing these things. When asked if she had any idea who actually was doing that work, she replied that “I’d phone John and he’d moan about not getting hay cut or silage made because of the weather. I knew he was using contractors for the spring barley. He didn’t have a plough.”

[59] Olivia Donald explained that this approach to the completion of the SAF “was just office policy” at that time: it was by way of a holding position, until such time as she had figured out why the Respondent was not receiving any subsidy. Under cross-examination, she qualified that position somewhat: this had occurred on a few occasions over the years. The letters LLO cropped up again marked up underneath the field numbers on the IACS map appended to the letter from the Respondent to the Applicant dated 14 April 2009 [Production 197R], in which the former gave the latter notice that he recently had been accepted into the Scottish Rural Development Programme (“SRDP”) Rural Priorities Scheme (“the RPS”), and had decided to proceed with some of the projects offered to him thereunder (for which, see paragraphs [63] – [64] below).

[60] When pressed by Counsel for the Applicant in cross-examination as to whether she had asked the Respondent why he did not have any SFPS payment entitlements when she first commenced to act for him, she replied that she was still not 100% sure why not: “John Esslemont had never been able to explain why.” When asked whether it was possible that some other party might have been claiming against the Respondent’s land, she initially volunteered that it was possible that someone was doing so “without his permission”, before going on to assert that the Respondent had told her that no-one else was claiming on his land. She insisted that “we definitely had that discussion before I submitted the form”, on the basis that she “always” had that conversation with new clients. That evidence is not readily reconcilable with the evidence she gave in examination-in-chief about her reasons for entering LLO on the 2008 SAF she submitted on the Respondent’s behalf, and later on in the course of her cross-examination, her position shifted to stating that “John Esslemont

didn't tell me that land **was** being let out on the Farm." She now recognised that entering LLO on the 2008 SAF had been a "poor decision".

[61] We must confess that when we heard her account in examination-in-chief of why she had entered LLO against all the fields on the Farm in the Respondent's 2008 SAF, we were inclined to be sceptical: if Olivia Donald did not know why the Respondent had not been receiving subsidy, she surely only had to ask him, and her apparent lack of curiosity on this issue struck as somewhat surprising. On further reflection, we can perhaps understand where she was coming from with that answer: if, in 2008, a farmer for whom a SAF was being completed had eligible land in respect of which he was **not** making any claim, the natural assumption would be that someone else **was**. The difficulty we face in assessing this chapter of the evidence, however, is that Olivia Donald's position on this issue appeared to change markedly twice under cross-examination, on the first occasion to one in which the question of whether someone else was claiming subsidy against the farmland on the Farm was actually broached by her with the Respondent, and he denied it, and then mutating into the rather more equivocal one that the Respondent did not **positively** assert to her that land was being let (or, more strictly speaking, sub-let) on the Farm.

[62] Under cross-examination, Olivia Donald was inclined to be defensive, and her trait, readily discernible during her examination-in-chief, of conflating what she "would have done" with what she actually did in any particular given circumstance, so that it was left unclear whether she was speaking from actual memory or not, become even more pronounced. It may be that her answers under cross-examination on this issue are a case in point, and, in fairness, given that, in the run up to the annual mid-May deadline for the submission of SAFs, she might be completing up to 300 such forms under considerable time pressure, it would hardly be surprising if the detailed circumstances of a particular applicant might, at this remove, elude her, and be displaced in her mind by her recollections of standard practice. Alternatively, her lack of certainty on this point may be the result of her having encountered the same difficulty we ourselves did during the course of his evidence of extracting from the Respondent straight factual answers to straight factual questions. It is entirely conceivable that Olivia Donald **did** raise the issue with the Respondent prior to completing the 2008 SAF but did not receive a satisfactory answer to it and, *faute de mieux*, resorted to inserting LLO against all of the fields. This seemed, ultimately, to be the position adopted by Counsel for the Respondent in response to this conflict in Olivia Donald's testimony, in that in re-examination, he elicited from her an assent to the proposition that the position was that she had asked the Respondent why he did not have an allocation of SFPS payment entitlements, "but you hadn't got to the bottom of that". From 2009 onwards, changes to the instructions for completing the SAF meant that the designation LLO was no longer one of the options, with the actual use to which a land parcel was being put having to be inserted (*e.g.* "PGRS" = permanent grass), even it was not being claimed against on that form.

[63] As well as assisting the Respondent with his 2008 SAF, Olivia Donald gave the Respondent advice as to how he might improve the Farm's profitability. The Respondent had informed her that he had been growing barley, but the returns were "not that great", an outcome she attributed to the fact that he had to rely on the services of contractors. Having considered his situation, she concluded that he would achieve a better return by putting the Farm wholly into grass, and she drew up and submitted on his behalf an application (incorporating a budget, management map and plan) under the RPS. The Land Managers Options ("LMOs") selected in the Respondent's proposal were RP21409 (Open Grazed or Wet Grassland for Wildlife), RP21421B (Water Margins – reduce diffuse pollution), RP21434 (Extended hedges) and RP21440 (Arable reversion to grassland). In the competition for funding under the RPS, the application submitted by Olivia Donald on behalf of the Respondent was successful, and in 2009 the Respondent entered into a Rural Development Contract with the Scottish Ministers [Production 18].

[64] The Respondent received capital payments from the Scottish Government Rural Payments and Inspections Directorate ("SGRPID") towards the costs of renewing stock fences on the Farm and establishing 300 metres of new hedging (although some of the latter had to be repaid following the failure of a length of hedging to become established) and then recurring income payments for each hectare of land which was subject to a LMO, for a period of what was to become 6 years to 31 December 2014. The Respondent's participation in the RPS required him to undertake to comply with certain conditions, as set out in the Rural Development Contract he signed, some of which were standard for all such contracts, and others were specific to each particular LMO. Under the (Open Grazed or Wet Grassland for Wildlife) LMO, restrictions were placed upon the intensity with which those parts of the Farm (initially extending to 32.50 hectares) subject thereto could be grazed and upon when they could be harrowed, rolled, sprayed, fertilized or topped, for the benefit of certain species of (particularly ground-nesting) birds. The (Water Margins – reduce diffuse pollution) LMO entailed fencing off land, amounting to 0.47 hectares on the Farm, bordering still water or water courses, to protect water margins from erosion and diffuse pollution. The aim of the (Arable reversion to grassland) LMO, to the conditions of which 21.10 hectares of the Farm were subject, was to reduce diffuse pollution, soil erosion and nutrient loss in run-off, emissions of nitrous oxide and ammonia by changing land previously in arable production to permanent grassland, leaving it either ungrazed or grazed at low stocking rates and with zero or low fertiliser input. Failure to adhere to the conditions might result in the aid payable under the RPS being withheld or, if already paid, recovered by the Scottish Ministers. Amongst the conditions was that the Respondent satisfy sundry statutory management requirements, including the good agricultural and environmental conditions ("GAEC") specified in Regulation 4 of and the Schedule to the Common Agricultural Policy Schemes (Cross-Compliance) Regulations 2004 (as amended). After he was accepted into the RPS, the Respondent would, from time to time, and particularly during its first year, telephone Olivia Donald for guidance as to whether a proposed action on his part would be permissible under the RPS conditions. What entry

into the RPS under the selected LMOs did **not** oblige the Respondent to do was keep or graze livestock or grow crops.

## The pattern of usage of the farmland after the Respondent entered into the RPS

[65] In his letter to the Applicant dated 14 April 2009, the Respondent had related that he would be “re-fencing a substantial area of my fields which will allow me the opportunity to graze more sheep on a regular basis.” With the renewal of the fencing and the reversion of the arable areas of the Farm to grassland, the Respondent was well placed to do just that: Olivia Donald had advised him to graze sheep rather than cattle to reduce the risk of poaching of the ground. What is so perplexing about the evidence we heard over such an extended period is how little Court time was spent by parties in exploring what agricultural activity was going on upon the farmland in the years immediately preceding the making of the present application to the Court on 29 July 2015, as compared to the amount that was expended poring over the detail of what had been going on during the mid-2000s. For the record, the only documentary evidence produced by the Respondent to vouch for actual grazing lets or sales of grass since the turn of the millennium were (summarised by year, activity and identity of lessee/purchaser): Productions [59] – 2005 – grazing (*Ross*); [75] – 2009 – hay and silage (*Thom*); [79] – 2010 – hay (*Thom*); [80A-B] – 2010 – silage (*Thom*); [81] 2011 – grazing (*Willox*); [84A-B] – 2012 – grass (*Fowlie*); and [88] – 2013 – grass (*Black*).

[66] We heard from Olivia Donald that she had introduced Wendy Willox to the Respondent as a suitable grazier; the narrative on the invoice (issued by the Respondent in the guise of “E & J Esslemont”) to Wendy Willox dated 1 May 2011 reads “To use of fields for grazing only – no management”, and is in the substantial sum of £8,900. The invoice does not disclose which fields Wendy Willox took, nor for how long, and the Respondent was unable to elaborate on these matters in his oral testimony. The invoice which bears to have been issued on 26 May 2012 to Ms Elizabeth Fowlie in the sum of £7,500 is made out “To sale grass season 2012”. The only invoice for the year 2013 was issued to W.A. & S.M. Black on 21 May 2013. Its contents are even less illuminating than those of its immediate predecessors, being “To supplying grass”, with the sum invoiced the lesser one of £2,000. The Respondent produced no documentary vouching for the sale of his grass, whether by way of seasonal grazing or as baled hay or silage, subsequent to that issued to the Blacks on 21 May 2013, so we have nothing in writing to vouch for the uses to which the farmland was put in the years 2014 and 2015. The impression conveyed by the above sequence is that such sales have petered out in recent years. We did, in the course of the evidence, hear passing reference to the names of a number of other people who were said to have grazed their livestock on the Farm over the years, but nothing by way of specification that would enable us to identify in which fields, for what periods of which year, and on what terms, they did so.

[67] It was notable that there was no evidence adduced from the Respondent of any system followed by him for making known to potential graziers that his grass was available, and at what cost. There was no suggestion, for instance, that after 2000 he offered it for sale each year to or through the local mart. When asked, in re-examination, when he offered his hay for sale, how he found a buyer, and how he fixed the price, his answers descended into the impersonality of what “you” would do; *e.g.* “you’d try to keep it [*i.e.* the hay] ‘til after the year”; “you’d put an advert in the P & J [*i.e.* the Press & Journal newspaper]”; “you’d get a valuation every Saturday in the P & J from [the reports of] Friday sales at the mart.” The overall tenor of this chapter of the evidence was that the Respondent was reactive, rather than proactive, so far as the “marketing” of his grass was concerned: the actual sales to which he spoke were the result of him being approached by people who had heard on the grapevine that he had empty fields available, rather than of he himself going out looking for the business. There equally was no evidence of any proper system of management on the part of the Respondent for maintaining the quality of the sward after the initial re-seeding effected under the RPS. In the course of re-examination, Counsel for the Respondent elicited from him, in response to a series of somewhat rhetorical questions as to who it was that decided what would be grown in a particular field in a particular year or who would take which fields as seasonal grazing, that it would have been him. The Respondent himself, in the course of his evidence, was keen to emphasise that, albeit that most of his time was devoted to Monarch’s affairs, he remained in “control” of what was happening on the Farm. We are not inclined to attach much weight to these answers, because the substance of the Respondent’s evidence, as we have endeavoured to explain, was redolent of an exceedingly “hands off”, *ad hoc*, and reactive approach, not amounting to active management or control in any meaningful sense of those terms.

[68] The firm of R & W Wilson on 30 July 2015 issued an invoice to the Respondent [Production 90] in the sum of £3,070.08 in respect of the mowing, raking, baling, wrapping, stacking and carting of 312 bales of what we take to be silage, but what happened to those bales is not disclosed in any of the documentary productions and no reference was made to this invoice by either party during the course of the hearing. We certainly did not, in the course of our inspection, see those 312 bales retained anywhere on the Farm. The Farm accounts for the years to 31 May 2014 [Production 219] and 31 May 2015 [Production 220] continue to report gross income from “crop and occasional grazing” in the amounts of £18,388 and £5,188 respectively, but bizarrely, given that it might have been thought to be very much in his interests to do so, the Respondent omitted to lodge any documentation to establish what agricultural activity underlay those amounts. For reasons which we shall go on to explain, we place little faith in the contents of the unaudited accounts of the Farm. In the interests of completeness, we would add at this juncture that the Respondent testified to having let seasonally 35 acres (hill and arable) of grass to Ron Downie and 38 acres of arable grass to Calum Moir in 2016, but he provided no further details of these arrangements, and no vouching was produced therefor. In any event, what happened on the Farm after the date these proceedings were commenced is not strictly relevant to the issue we have to determine, which may be summarised as being whether use of the Farm for

agriculture for the purposes of a trade or business had been either wholly or substantially abandoned by the Respondent on or before 29 July 2015.

## The post-RPS subsidy position

[69] When the system of agricultural support changed again in 2015, with the introduction of the Basic Payment Scheme (“BPS”), Olivia Donald succeeded in securing payment entitlements for the Respondent via the National Reserve, according to her oral testimony, in the category of “New Entrant”. Of the eligible agricultural land on the Farm, 35.93 hectares had been allocated to Payment Region 1 and 20.26 hectares to Payment Region 2. Production 159 lodged by the Respondent is his “Illustration of Entitlements” letter from the Scottish Government showing how many payment entitlements he might be allocated per Payment Region, the expected value of those entitlements for 2015 and the projected entitlement values for the years from 2016 to 2019. The Respondent’s Production 183 is a print-off from the Scottish Government Rural Payments and Services website summarising his 2015 entitlements. In order for the Respondent to be eligible for an allocation of payment entitlements from the National Reserve, he had to demonstrate that he met the criteria for being an active farmer, and with that end in view, Olivia Donald asked him to produce to her evidence of that fact in the form of invoices, farm accounts and the like. She testified that this request generated “lots of emails going back and fore.”

[70] It is a matter within our judicial knowledge that under the rules of the BPS, the persons eligible to apply to the National Reserve in the New Entrant category were persons who started farming in 2013 or later who had not had any agricultural activity in their own name or at their own risk in the five years before the start of their current farming activity, documentary evidence to confirm the date of which had to be submitted with the application to the National Reserve. Where the application to the National Reserve was successful, and the person had submitted a 2015 SAF declaring at least three hectares of eligible land and met the active farmer criteria, that person would be allocated a number of BPS entitlements, equal to the number of eligible hectares he or she had at their disposal on 15 May 2015. Proceeding upon the basis that the Respondent’s application for an allocation of BPS entitlements from the National Reserve was indeed as a New Entrant, the evidence placed before the Court did not disclose the starting date of the current farming activity founded upon by him in support of his application, but whatever form of activity it was, it must, on the face of it, have commenced in 2013 or later, and for the Respondent to be eligible he must not have had any agricultural activity in his own name or at his own risk in the 5 years preceding the start of that activity. In the interests of completeness, we note that in the Respondent’s pleadings, it was averred that he had applied in May 2015 for an allocation from the National Reserve, not as a New Entrant, but under the distinct and separate “Specific Disadvantage” category, but this was not Olivia Donald’s evidence in Court and no other evidence was adduced for the Respondent to explain how the

Respondent might have satisfied the criteria of either part of the Specific Disadvantage category.

## The Respondent's own sheep

[71] At the end of May/beginning of June 2015, the Respondent purchased, in two batches, at Aberdeen & Northern Marts, some nineteen ewes with lambs at foot [Productions 141 and 142 are the invoices in respect of these purchases]. He had consulted Olivia Donald in advance and she had talked him through the various legal requirements in relation to registration with the local animal health office, tagging and the keeping of movement records. The ewes and their lambs (approximately seven weeks old at date of purchase) were sold in the Autumn of the same year and the exercise repeated in subsequent years, although no paperwork of any sort, whether in the form of invoices, sales notes, movement or flock records, was produced by the Respondent to vouch for the subsequent goings and comings of either the initial or later cohorts of ewes with lambs at foot. On our inspection, however, we did see grazing on Field 10 to the east of the burn a flock of ewes and lambs of similar size to that purchased by the Respondent in 2015, and we understood from his evidence that this was the field in which his own ewes and lambs habitually were kept.

[72] Olivia Donald, in her evidence, when asked about the Respondent's motives in purchasing the sheep, explained that in order to claim payment under the BPS for agricultural land allocated to Payment Regions 2 or 3, an applicant had either to carry out an environmental audit, or have breeding livestock. The Respondent, on her account, had thought about acquiring some Highland cattle, but decided instead to acquire some sheep because they were less labour intensive "and could be left for a few days if he were away in Winter." Buying in ewes with lambs at foot was sufficient to meet the "breeding livestock" qualification. The Respondent himself in evidence eschewed any suggestion that his purchase of the ewes with lambs at foot was motivated by subsidy considerations, explaining that it was inspired by the desire to afford his grandchildren the opportunity to experience the sort of country childhood, working with animals, which he and his own children had enjoyed. Buying in ewes with lambs at foot avoided the complications of having to lamb them himself, for which, in any case, he did not have enough gates or pens, and other than clipping, there was not a lot of work involved. Calum Moir, who the Respondent had spoken of in another context as one of his seasonal graziers in 2016, assisted him with tasks such as worming. We would observe in passing that we saw no sheep handling facilities on our inspection of the Farm, but the Respondent, when asked in cross-examination to confirm that the cattle feeding area had not been used since the early 1990s, initially claimed that it was used now for penning sheep by whoever had the seasonal grazing from time to time. When Counsel for the Applicant pressed him for the specifics of such use, he immediately backtracked, emphasising that he was not there when people were taking their sheep in, but that the cattle feeding area was "suitable for that purpose", a claim which does not accord with our own observations of the facility. The



absence, whilst Monarch remained on the Farm, of available buildings, meant that indoor lambing was simply never an option for the Respondent. It was not disputed that a flock of this number has no pretensions to being a commercial enterprise, and we consider that Counsel for the Applicant was justified, in his closing submissions, in characterising the sheep owned by the Respondent as being essentially a “hobby flock”.

## The Farm Accounts and their interplay with entries the Monarch accounts

[73] The Respondent produced farm accounts for a run of seven years, for the years from year ending 31 May 2009 to the year ending 31 May 2015 [Productions 214 – 220], and Monarch accounts for a run of eight years, for the years from year ending 31 March 2009 to the year ending 31 March 2016 [Productions 222 – 229]. Both sets of accounts were drawn up by Williamson & Dunn, Chartered Accountants, Aberdeen, and both bore the conventional explanation and disclaimer that they had been prepared from the accounting records and information and explanations supplied to them, but that they had not been instructed to carry out an audit of the accounts, and that for that reason, they had not “verified the accuracy or completeness of the accounting records or information and explanations you [*i.e.* the Respondent] have given to us and we do not, therefore, express any opinion on the accounts.” The Respondent, in signing off, in his personal capacity, the approval statement on the Farm accounts each year, acknowledged his responsibility for the Farm accounts. In signing off, as director, the balance sheet forming part of the Monarch accounts each year, he acknowledged his duty to ensure that the company had kept proper accounting records and to prepare financial statements that gave a true and fair view under the Companies Act 1985.

[74] The Farm accounts for the year to 31 May 2009 [Production 214] brought out a net loss for the year of £3,543. In the following six years, at least according to the unaudited accounts, the Farm generated modest annual net profits of £5,180, £6,459, £5,979, £7,090, £11,060 and £2,870. However, the recurring presence in the Farm accounts of anomalous entries that served to enhance the apparent profitability of the Farm (whilst correspondingly diminishing the net profit before tax achieved by Monarch), the factual basis for which the Respondent was wholly unable to explain to our satisfaction during his testimony, causes us to approach these ostensibly reasonably positive figures with considerable caution. The Respondent is the prime mover behind a company that he has built up from nothing and turned into a business with a seven figure annual turnover: it is simply not good enough for a man of his considerable business experience, when asked to explain what lies behind inconvenient entries in elementary financial statements, whether they be of the Farm or of Monarch, which he himself has approved, and lodged in process, to dismiss them as just “accountancy figures” and attempt to slew off all personal accountability for them and deflect it on to his accountant. By “accountancy figures”, we came to understand the Respondent to mean notional figures that were the product of the

application of accounting conventions, but it is important to emphasise that we are here treating not with the writing down of book values in the balance sheet or the like, but rather with entries in the profit and loss accounts that are supposed to reflect both income actually received and the true costs of sales.

[75] The Farm accounts for the year to 31 May 2009 [Production 214], in conformity with convention, showed the comparative figures for the previous year to 31 May 2008. Counsel for the Applicant drew the attention of the Respondent to the figure in the profit and loss account in the 2008 column for total cost of sales of £8,250, made up of £2,921 in respect of contracting and £5,329 in respect of seeds, fertilisers, lime and consumables. He pointed out that the figure of £8,250 corresponded to the amount (exclusive of VAT) of the invoice issued by R & W Wilson to the Respondent no. 1569 dated 22 January 2009 [Production 68], to which reference was made in paragraph [57] above. That invoice had been said to relate to the spring barley crop grown in 2008, in respect of which the Respondent in turn had issued an invoice to R & W Wilson dated 29 January 2009 [Production 72], which begged the question why these transactions apparently featured in the accounts for the previous year to 31 May 2008. The 2008 column contained a blank in the space for posting the value of closing stocks, and thus the accounts for the year to 31 May 2009 carried forward no value for opening stocks (closing stocks had a value of £9,682 attributed to them). The Respondent was unable to explain why the transactions in respect of the 2008 spring barley crop were not included in the accounts for the year to 31 May 2009 in which they actually took place. That was “an accountancy thing ... any figure that’s down there will be legally correct.” He could not explain how the value posted in respect of closing stocks in the year to 31 May 2009 and subsequent years was calculated, or suggest what stocks it represented.

[76] The Farm accounts for the year to 31 May 2009 disclosed gross income of a mere £2,525 from “CROP SALES AND OCCASIONAL GRAZING”, but “OTHER INCOME” of £5,230, made up of a “Trading bonus” in the sum of £29, “Subsidy” (£400), “Provision of services” (£2,166), “Private rent of farmhouse” (£600), and “Private heat and light” (£2,035). The sum of £2,166 in respect of “Provision of services” recurred in the accounts in each of the next four years, before reducing by one third to the sum of £1,444 in the accounts for the year to 31 May 2015. The sum of £600 in respect of “Private rent of farmhouse” was a constant in the entire run of the Farm accounts produced by the Respondent. What, Counsel for the Applicant inquired, were the services, the provision of which generated such income for the Farm? The services in question, according to the Respondent, related to the use by Monarch of an old Nissan hut that had been erected on the Farm behind the farmhouse. The Nissan hut belonged to the Respondent, and upon that basis, he considered himself entitled to charge Monarch for its use, although he resisted the classification of any such payment as rent. If Monarch was being charged by the Respondent for the use of the Nissan hut, Counsel for the Applicant inquired, why not for its occupation of the buildings at the farm steading? How was that use accounted for? The Respondent, after taking some time to study the farm accounts, confirmed that he didn’t

see anything there about that, before reverting to his answer that he was entitled to charge Monarch for the use of the Nissan hut because – as we understood him – the fabric of the building belonged to him. Counsel for the Applicant then asked the Respondent about the £600 annual “Private rent of farmhouse.” This was not rent, insisted the Respondent, but a payment for “services”. In answer to the question who was paying it, the Respondent replied that this was Monarch, but he denied that this was a sub-let, and then insisted that “No-one pays any money to me.” When asked whether, as at 2009, anyone had paid him “Private rent” in respect of the farmhouse, he replied in the negative, insisting that this was “an accountancy matter”. This was his answer also to questions about the sums of money accounted for in the Farm accounts as income in respect of “Private heat and light”. It was “an accountancy thing against the income of the Farm.” He had never discussed it with his accountant, but this was “a standard wording that many farmers will have.”

[77] Counsel for the Applicant then directed the attention of the Respondent to the contents of certain entries in the Monarch financial statements. The Notes to the balance sheet forming part of the financial statements for the year to 31 March 2009 [Production 222], for instance, under the heading “TANGIBLE FIXED ASSETS”, stated “Tenants Improvm’ts” at cost, at 31 March 2009, of £10,911. What, Counsel for the Applicant, was Monarch the tenant of? The Respondent’s initial answer was that he did not know. He then volunteered that Monarch had loaned the Farm £10,000 in 2008, and that was probably what this figure represented. When it was put to him that his answer was “just guessing”, the Respondent replied that he was sure that Counsel would find the £10,000 loan somewhere in the accounts. When Counsel for the Applicant pointed out to him that a similar entry featured in the financial statements for the year to 31 March 2016 [Production 229] (in fact, it is carried forward from year to year through each of the intervening financial statements), the Respondent admitted that he could not explain that either. As at 31 March 2016, asked Counsel for the Applicant, was Monarch the tenant of something it had improved, the costs of which it might want to recoup in future? The Respondent denied that this was the case, explaining that he did not check every entry in Monarch’s financial statements in the manner of an accountant. When asked if he seriously was saying that his accountant had accounted for a loan by Monarch to the Farm as a tenant’s improvement, he affirmed that he was, prompting the scornful rejoinder from Counsel that he was just making up his answers as he was going along. There is no entry in any of the Farm accounts as lodged showing a loan from Monarch as a current liability, although loans from the Respondent’s wife and from a Mrs E. Esslemont (who we understand to have been his mother) are so acknowledged. The Respondent did lodge as Production 70 a spreadsheet billed as “Account for February 2009” that appeared to be an internally (to the Respondent’s and Monarch’s shared office) generated abstract of entries from a bank account showing a sum of £10,000 received from “MONARCH CONSERVATORIES” on 6 February 2009, but the evidence of who produced this, and for what purpose, was so unsatisfactory as to leave us in considerable doubt as to how much reliance could be placed upon it, and its isolated presence, along with a similar document for January 2009, begged the question why the

actual bank statements, from which this information is supposed to have been derived, were not themselves lodged.

[78] Matters moved on to an examination of entries in the detailed profit and loss accounts forming part of the financial statements of Monarch for the year to 31 March 2009 [Production 222] and subsequent years. One of the “OVERHEADS” set against Monarch’s gross profit for that year was “Rent” in the sum of £3,235, up from £1,083 in the previous year. In the detailed profit and loss account forming part of the financial statements of Monarch for the year to 31 March 2010 [Production 223], the sum of £3,235 appears in the comparative 2009 column, but re-categorised as “Share of services”. The corresponding sum for the year to 31 March 2010 is £2,166, which in the financial statements for the year to 31 March 2011 [Production 224] increases to £5,968. In the detailed profit and loss account forming part of the financial statements of Monarch for the year to 31 March 2012 [Production 225], the corresponding sum is £5,858, this time re-categorised as “Premises expenses”. It is similarly categorised in the detailed profit and loss account forming part of the financial statements of Monarch for the year to 31 March 2013 [Production 226], where it leaps to £12,033, before falling back to £11,113 in the financial statements for the following year [Production 227]. The corresponding sums in the detailed profit and loss accounts for the years to 31 March 2015 and 31 March 2016, still labelled “Premises expenses”, are £11,145 and £9,803. There was no suggestion at any stage in the evidence that during the period covered by these financial statements, Monarch had premises off the Farm which it was renting. What rent, then, was Monarch paying in the year to 31 March 2009 in the sum of £3,235, and how was that sum arrived at? The Respondent answered that he was not sure how it had been arrived at, or why it had increased from £1,083 the year before. These were just “accountancy figures.” He suggested that they might be payments in respect of the Nissan hut and the garden room. When asked if the sum of £3,235 represented a payment to him personally, his initial reply was “Yes, I think it would be”. When asked who else it could be, after some equivocation, he settled on “Nobody else.” Counsel for the Applicant then referred the Respondent to his self-assessment tax return for the tax year 6 April 2008 to 5 April 2009 [Production 230]. In the supplementary pages for reporting rental income and other receipts from UK land and/or property, the Respondent had declared that he rented out one UK property, from which he had derived income in that tax year of £7,930. This was a residential letting property he had purchased in Aberdeen, about which we had earlier heard evidence. Was the income he claimed to have received from Monarch reflected in his tax return, and if so, where? The Respondent replied that “I’d be certain it is. Completely convinced. I can assure you my accountant will be absolutely correct.” He was, however, quite unable to explain where that rental income was declared in his personal tax returns, a run of which from the years from the year ended 5 April 2009 to the year ended 5 April 2016 had been lodged by the Respondent as Productions 230 – 237.

[79] Returning to the issue of the fluctuating nature of the sums entered as outlays in the detailed profit and loss accounts forming part of Monarch’s financial statements variously

as “Rent”, “Share of services”, and “Premises expenses”, which he previously had referred to as “accountancy figures”, the Respondent claimed that it was his accountant rather than him personally who was “in charge” of what these figures would be. When asked by Counsel for the Applicant whether these were then just notional figures, not real at all, the Respondent replied that there was nothing in writing about any of it, the figures did not have to be the same from year to year, and there was no reason for them not to change. They related to the two buildings he had on the Farm (*i.e.* the Nissan hut and the garden room) that Monarch used. The Respondent prevaricated when pressed again by Counsel to the Applicant to answer the question he had asked, prompting the Court to intervene to have him clarify, under reference to these supposed Monarch outlays, whether money actually had changed hands, or whether they were merely, to adopt his own expression, “accountancy figures”, eliciting from the Respondent the somewhat curious answer that he “couldn’t say.” The re-categorisation, in the financial accounts for the year to 31 March 2010, of rent as “Share of services” was not, according to the Respondent, in answer to the renewed questioning of Counsel for the Applicant, something he had discussed with his accountant. He speculated that the sum of £2,166 entered therein in respect of “Share of services” represented either work that was done for Monarch or was for the use of the Nissan hut and garden room. When asked what those services might be, the Respondent suggested that they might relate to the use of some of the equipment in the Monarch office, such as photocopiers or printers. Who owned the photocopiers or printers, the Respondent was asked, to which he replied that Monarch would own most of them. Then, surely, it was put to him, Monarch would not be **sharing** these services? There were indeed, separate categories of outlays in the profit and loss account for “Hire of equipment” and for Printing, stationery and postage.” The Respondent weakly replied that he had a computer himself as well. The Respondent was unable otherwise to say what the services shared between Monarch and he might be.

[80] Moving on to the Monarch financial statements for the year to 31 March 2011, and the further re-categorisation of “Share of services” to “Premises expenses”, the Respondent was asked what premises Monarch had in that accounting year. The Respondent acknowledged that Monarch worked from the Farm, but also from his son’s house “and we have two mobile steel cabins as well”. The steel cabins to which he was referring can be seen in some of the photographs lodged in process [*e.g.* Productions 12F and G], situated behind the U-shaped steading. Later in his evidence, during the course of re-examination, it was to emerge that the steel cabins were themselves owned by Monarch (the Respondent indeed volunteered that he was thinking of purchasing them from Monarch himself), thereby rendering his earlier suggestion that the sum supposedly paid by Monarch by way of Premises expenses had anything whatsoever to do with its use of the steel cabins patently absurd. When asked to whom this money (the now increased sum of £5,968) was being paid, the Respondent’s answer was “Either to me or to the Farm.” When pressed to explain what he meant by “to the Farm”, the Respondent replied that “we” (by which we take him to mean the Farm) continually were putting “chuckies” (*i.e.* small stones or gravel) around the Farm steading. No invoices were issued by the Farm to Monarch in respect of this “service”,

and there is no corresponding entry in the Farm accounts recording the receipt of such a sum from Monarch, the recurring entries in the profit and loss account in respect of “OTHER INCOME” from “Provision of services” in the years from the year to 31 May 2009 to the year to 31 May 2014 being in the lesser sum of only £2,166. When challenged to explain this discrepancy, the Respondent yet again resorted to the expedient of hiding behind the skirts of his accountant, Kathleen Kirkland. He could not answer for her, he could only support what she had done, which would be “legally reflected.” He himself “could not comment on why she came to these figures.”

[81] Confronted with the entry in the Monarch accounts for the year to 31 May 2013 showing “Premises expenses” in the substantially increased sum of £12,033, the Respondent was quick to volunteer, when asked in neutral form what it represented, that it was **not** rent, but he was much less clear in his answers as to what it **did** represent. “Expenses”, he contended, covered a wide range of things. He employed people to deal with all these things. Everything was “above board and legal.” Counsel for the Applicant reminded the Respondent that he was not permitted to sub-let, and the Respondent accepted that he was aware of that. That was why, Counsel for the Applicant asserted, the Respondent was trying to deny what was obvious, namely that the payments represented by these entries in the Monarch accounts were by way of rent in respect of the illegal sub-let of part of the Farm. The Respondent’s response to this suggestion was curious, namely that “There is no paperwork to say I am sub-letting any of the buildings belonging to the Farm.” When it was put to him that he had been very careful to ensure there was no such paperwork, the Respondent retorted, we think revealingly, that “There never has been. It’s always been very important to me to protect my lease.” In a typed note [Production 71] with handwritten annotations, unsigned and undated, identified by the Respondent as probably the work of the full-time secretary employed by Monarch who also dealt with the paperwork associated with the Farm, the sum of £2,166 appears again in a handwritten annotation “Rent 2166 2 years.” The typed note appears to be a response to queries received from someone in the Respondent’s accountant’s office in connection with the preparation of accounts, the handwritten annotation being linked with a pen mark to the typed sentence “The receipts of £4,332 [ $£2,166 \times 2 = £4,332$ ] and £2,525 were for hay sales”. No receipt in the sum of £4,332 was produced by the Respondent, and it is difficult to know quite what to take from this evidence, beyond that it tends to confirm an association between the sum of £2,166 and the concept of rent, unless the handwritten annotation is by way of a correction of part of the information contained in the typed sentence.

[82] Counsel for the Applicant’s cross-examination of the Respondent sometimes seemed to betray a degree of uncertainty as to whether the better line of attack was to treat the entries by way of overheads in the Monarch accounts for Rent, Share of services, and Premises expenses as evidence of illegal sub-letting by the Respondent (if the sums referred to were actually paid by Monarch) or of false accounting (if they were not). Such uncertainty is quite understandable, given that the Respondent himself proved quite unable to adhere to a consistent answer as to whether these sums were ever actually paid or not.

We hold, on the balance of probabilities, that these sums were not paid by Monarch to the Farm, but that it suited the Respondent's purposes to present them in the accounts as if they had been. He has, accordingly, been somewhat hoist with his own petard, and ended up with the worst of both worlds.

## The impressions of the Farm we formed on our inspection

[83] Our inspection of the Farm occurred nearly two years after the making of the application, and what we saw was, at least in relation to the steading area, not reflective of the position as at that date, Monarch having finally decamped to another site shortly before our arrival. As we previously have noted, the level of agricultural activity on the Farm as at 10 July 2017, when we made our visit, is not, in our view, directly relevant to our decision, if the point in time against which the issue of whether the Respondent has wholly or substantially abandoned use of the Farm for agriculture for the purposes of a trade or business is indeed, as we understand both parties accept, that of the date upon which the proceedings were commenced. That said, however, as an expert Court, we consider that we are entitled to draw conclusions from what we observed during our inspection of the Farm on 10 July 2017 as to the general level of agricultural activity that has been maintained on the farmland in recent years, because what we saw that day reflects how the land has been utilised over a period of years, and not merely over the months immediately preceding our arrival. In any event, the picture presented by what we saw on our inspection was entirely consistent with what we had heard in evidence as to the use of the farmland in the years running up to 29 July 2015 when the proceedings were commenced. This is not a case in which it appears that, in respect of the use of the farmland, anything materially has changed over the subsequent two years.

[84] When asked by his own Counsel in evidence on 30 May 2017 about the uses to which the farmland was being put in 2017, the Respondent spoke only to the presence of his own small flock of bought-in ewes with lambs at foot in Field 10, which field he indicated would also be mowed for silage, and to his intention to direct drill a crop of hybrid kale in Field 7, which had been sprayed off for him by R & W Wilson in preparation therefor. As we approached the Farm, we saw the Respondent's latest batch of ewes and lambs grazing in Field 10, which had been mown recently, and a small quantity of silage bales stood by the gate in the corner. We saw also a somewhat desultory crop of kale beginning to emerge in Field 7 behind the farm steading. Having made the fact of our arrival known at the farmhouse to the Respondent's wife, we proceeded along the extension of the private estate road that bisects the Farm and passes by the entrance to Muirton Lodge resided in by Mrs Abel before continuing westward up the hill to the Dutch Barn, silage pit and cattle feeding area. The fields lying to the north of this section of the private estate road are, running from east to west adjacent thereto, Fields 8, 3 and 1. Fields 6 and 5 lie north of Field 8. These fields constitute what was formerly the arable heart of the Farm. From the elevated position provided by this section of the road, we could also, looking northward, see the farmland

with which the Farm marches on its northern boundary. The contrast between the land farmed by the Respondent and the land farmed by his neighbours to the north was striking. The fields beyond the northern boundary of the Farm were all clearly well managed and productive, with crops of spring barley or grass which had been cut for silage. We observed in those fields both stacks of wrapped bales and some fields in which bales were awaiting stacking. The grass in Fields 1, 3, 5, 6 and 8 was so long and rank that our initial impression of these fields was that they were almost entirely devoid of stock. Looking more carefully, however, we gradually came to discern the presence within them of a substantial number of sheared sheep. Notwithstanding the benefit of our elevated position, the grass in these fields was so overgrown that it had concealed those sheep that were lying down. It was obvious to us, given the long and unflattened state of the grass, that the sheep had only very recently been introduced into these fields, which we strongly suspect had not previously been grazed during the 2017 growing season.

[85] Having inspected the Dutch Barn, silage pit and cattle feeding area, our impressions of which are related briefly in paragraph 28 above, we ascended, in a more or less south westerly direction, to the highest point of the hill ground [otherwise Field 2]. There was only a very light scattering of sheep across this approximately 100 acre (40 hectare) area of permanent pasture interspersed with occasional individual or clumps of deciduous trees. The grass here was mainly good and plentiful and could have been much more productively utilised, but has instead been left undergrazed. We continued in an easterly direction, effectively circumnavigating the hill ground in an anti-clockwise direction, descending through a steeper and more heavily wooded area and returning to the farmhouse and steading along a route running from south to north parallel to the burn. After completing our inspection of the Farm, we turned left when exiting the private estate road and took the opportunity to continue on by car along the public road past the entrance into the farm of Mains of Corsindae occupied by R & W Wilson and then on to Kebbaty and Comers, thereby gaining some sense of how the approach of the Respondent to farming compared with that of his immediate neighbours. We saw at least two good fields of oilseed rape and numerous fields of spring barley around Mains of Corsindae and at least three good fields of winter wheat and more spring barley at Kebbaty. Silage had been made on many fields in the neighbourhood and the stacks of bales we saw conveyed to us the general impression that this was productive land. Whilst we, of course, recognise that the harvest in this inland part of Aberdeenshire will be later than in coastal regions, the plentiful evidence we saw nearby of good crops nearing maturity in early July tells us that with proper management, the farmland of the Farm could be far more productive than it has been under the Respondent's management over the course of the better part of the last quarter of a century. Fields 3, 5, 6, 7, 8 and 10 and the eastern part of Field 1 are gently sloping and readily accessible from the private estate road. They are of a size which renders them suitable for being worked with modern machinery for growing arable crops. The Respondent declared in evidence that he had always kept the Farm in "first class order." We disagree. The land is severely under-utilised, the level at which it is currently "farmed" being well below both its own potential, and that achieved by other farms in the immediate locality.



# The evidence of Ian Thornton-Kemsley

[86] The Applicant's intimation, in terms of rule 26 of the 2014 Rules, that he intended to call Ian Thornton-Kemsley to give evidence at the hearing as an expert witness indicated, as required by paragraph 1 (b) thereof, what the substance of that evidence was to be, namely:

- whether the IACS returns made by the Respondent, or lack thereof, supported his assertion that he was continuing to carry out agricultural activity at [the Farm] through his own activities;
- the meaning of LLO on IACS subsidy returns made by the Respondent;
- having carried out a review of the documentary evidence lodged by the Respondent (Inventories of Productions First to Fourth for the Respondent), the extent of agricultural activity undertaken by the Respondent himself;
- the purpose of the Respondent's purchase of lambs and ewes in 2015 & 2016, after a period of not keeping his own livestock at [the Farm];
- having reviewed the admissions made by the Respondent in his Answers (as adjusted to 7 June 2016), together with all of the factual background to this case whether the Respondent has substantially abandoned any agricultural use of [the Farm].

The Applicant duly lodged a lengthy report dated 20 February 2017 [Production 202] in which Mr Thornton-Kemsley sought to address each of those bullet points. At the commencement of the hearing, Counsel for the Applicant sought leave for Mr Thornton-Kemsley to be in court to hear the evidence of the other witnesses to fact. That motion was opposed, on the stated basis that the Applicant's rule 26 intimation had indicated that Mr Thornton-Kemsley would be speaking to a report compiled by him upon the basis of a review of the papers, and his presence in court might have the effect of encouraging him to stray beyond the confines of the intimation given. It is suggested in Walker and Walker in *The Law of Evidence in Scotland* (4th Ed. by Margaret Ross and James Chalmers; 2015) at paragraph 16.3.14 that since the skilled witness is to give an opinion on the facts, it is usually helpful that the witness should be in court to hear the evidence of the witnesses to facts relevant to the area of skilled testimony, and as a general rule this is allowed unless objection is taken. We did not consider that there was any merit in the stated objection to Mr Thornton-Kemsley remaining in court to hear the evidence of the witnesses to fact, particularly given that he himself would be providing his testimony before the Respondent and his witnesses were called to the witness box (there had been no motion at the instance of the Applicant for the Respondent to be ordained to lead), and we granted leave, to the extent that such leave was necessary. After the date of compilation of the report, the Respondent lodged a further three Inventories of Productions, but Mr Thornton-Kemsley confirmed, in the course of his oral testimony, that the contents of the items contained

therein did not cause him to alter the conclusions he had expressed on the basis of the documentation he had originally considered.

[87] When Mr Thornton-Kemsley entered the witness box, we ourselves queried whether the contents of his report were properly the subject of expert evidence. We would wish to emphasise that in so doing, we were not in any way casting doubt upon his expertise in agricultural matters; Mr Thornton-Kemsley is well known not only to the members of the Court but also throughout the Scottish agricultural community, and he is eminently well qualified to give expert evidence on a wide range of matters pertaining to agricultural practice in Scotland; our concerns arose rather out of the scope of his instructions, as set out in Appendix 1 to his report, the terms of which tended to suggest to us that what he effectively was here being asked to do was to usurp the function of the Court. Those concerns were focused, in particular, by the contents of the first, third and fifth bullet points narrated in the immediately preceding paragraph. We struggled also to conceive as to how Mr Thornton-Kemsley's speculations as to why the Respondent purchased ewes and lambs in 2015 and 2016 (as *per* the fourth bullet point) could be of any evidential value. On a somewhat more prosaic level, under reference to the contents of the third bullet point, we would, respectfully, point out that, as an expert court, we really do not need expert evidence led to enlighten us as to the meaning of the acronym LLO on IACS subsidy returns.

[88] In *Kennedy v Cordia (Services) LLP* 2016 SC (UKSC) 59, the Lord Ordinary's decision after proof in a personal injuries action, brought by a carer injured when slipping on ice on a pavement on a public street on her way to visit an elderly client in the course of her employment, was first reversed by an Extra Division of the Inner House, and then reinstated by the Supreme Court. In the Inner House (reported at 2015 SC 154), the reclaiming defenders argued that the Lord Ordinary had erred in admitting, in the face of their objections, opinion evidence from a Mr Greasley, a health and safety expert, as to what the defenders both could and should have done by way of providing protective footwear to the pursuer, and in accepting that evidence in its entirety. The Extra Division upheld that submission. Lord Brodie, who gave the leading judgment, with which Lady Smith and Lord Clarke agreed, at paragraph [15], explained that the rule, in normal circumstances, in both criminal and civil cases, was that "witnesses may only give evidence about matters within their direct knowledge; they are not permitted to express opinions ... The admission of expert evidence is an exception to that rule." Here, the dispute was as to whether, on the basis of essentially uncontroversial primary facts, as a matter of law, the defenders were under a duty to take a particular precaution (providing attachments to footwear and ensuring their use) and, had they taken that precaution, whether the pursuer would have suffered injury. That was, according to Lord Brodie, "something that the Lord Ordinary was fully equipped to do without any instruction or advice; it was squarely within his province as judicial decision-maker. No additional expertise was required ... [at paragraph [15]]."

[89] Mr Greasley's opinion evidence as to what ought to have been done in the circumstances was unnecessary, and for that reason alone inadmissible. It was unnecessary

because the judicial process provided a person with a knowledge of the relevant law whose function was to decide what ought to have been done in the circumstances disclosed by the evidence of fact. The objection to Mr Greasley's evidence being received as expert evidence went further. "Health and safety" was not an area of expertise, because it was not a "generally recognised and specific discipline with a core of organised principle and practice shared by the exponents of that discipline and accordingly amenable to forensic examination and evaluation". An opinion from someone skilled in such a craft or science might be able to instruct or advise the judge on a particular area of knowledge or experience, but "Any other sort of opinion is no more than the expression of the personal views of the witness and, as such, of no evidential value [at paragraph [16]]." Mr Greasley's expressions of opinion were of the latter sort. They did not constitute expert evidence, as properly to be understood, and accordingly, they were not admissible.

[90] That said, however, not all of Mr Greasley's evidence was inadmissible. Where he was speaking to fact, as for instance to measurements he had made, or to photographs he had taken, during a visit to the locus of the accident, he was able to report on what he had seen. Likewise, he might speak to the fact that there were available on the market a variety of attachments that might be fitted over the soles of ordinary footwear with a view to increasing the grip of the user's footwear in conditions of snow and ice. It was, Lord Brodie explained,

"one thing to say that a precaution could have been taken; that is simply a matter of fact and is, accordingly, in the context of litigation, within the province of a witness. It is another thing to say that a precaution should have been taken, that is a matter of judgment to be exercised by reference to the applicable rules of law and, in the context of litigation, generally within the exclusive province of the judge [at paragraph [14]]."

[91] The Supreme Court held that the Extra Division had erred in treating much of what was, on a proper analysis, factual material in Mr Greasley's report as inadmissible on the basis that it was not skilled evidence that assisted the court. His expressions of opinion as to what Cordia should have done were capable of being interpreted as legal opinions that Cordia had breached statutory regulations and thus objectionable, but this did not vitiate the Lord Ordinary's decision, because he had applied his own mind to the legal issue he had to decide. In the leading judgment, delivered by the two Scottish Justices, Lords Reed and Hodge, with whom the other three (the then Deputy President, Lady Hale, Lord Wilson and Lord Toulson) agreed, four matters were identified at paragraph 38 as falling to be addressed in the use of expert evidence: (i) the admissibility of such evidence, (ii) the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the court's policing of the performance of the expert's duties, and (iv) economy in litigation. It was observed that a skilled person could give expert factual evidence either by itself or in combination with opinion evidence. At paragraph 44, the Supreme Court set out the four considerations that governed the

admissibility of both skilled opinion evidence and skilled evidence of fact (the latter being “where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent)”:

- i. whether the proposed skilled evidence will assist the court in its task;
- ii. whether the witness has the necessary knowledge and experience;
- iii. whether the witness is impartial in his or her presentation and assessment of the evidence; and
- iv. whether there is a reliable body of knowledge and experience to underpin the expert’s evidence.

When the first consideration was applied to opinion evidence, the threshold was the higher one of the **necessity** of such evidence. The test for admissibility of skilled evidence of fact could not be strict necessity, as otherwise the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge and experience of others in his or her field of expertise. It was for the court to decide whether expert evidence was needed, when the admissibility of that evidence was challenged. The Supreme Court quoted with approval a *dictum* of the High Court of Justiciary, in an opinion delivered by Lord Wheatley, in *Wilson v Her Majesty’s Advocate* 2009 JC 336, concerning opinion evidence, in which the test was expressed thus:

“[T]he subject-matter under discussion must be necessary for the proper resolution of the dispute, and be such that a judge or jury without instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience.”

However, the Supreme Court reiterated that “expert evidence does not extend to supplanting the court as the decision-maker [at paragraph 49].” Where expert evidence was admitted without objection, “the judge should, when assessing whether and to what extent to give weight to the evidence, test the evidence to ascertain that it complies with the four considerations which we have set out in para. 38 above and is otherwise sound [at paragraph 59].”

[92] In light of that guidance, it seems to us that whilst there was considerable assistance to be derived from the evidence of Mr Thornton-Kemsley when he was speaking as a skilled witness to matters of fact (as, for instance, his understanding of the workings of various aspects of the agricultural subsidy regime and his experience of the operation of contract farming arrangements), there were also elements of his evidence, the admissibility of which was, in our view, very much open to question, as being either unnecessary or as tending to supplant the role of the Court as the ultimate decision-maker on matters central to the outcome of the case. In contrast to the position in *Kennedy*, no objection was taken at the

hearing to the competency of the questions that elicited that evidence, notwithstanding that the point had been flagged up in advance by the Court, and so that evidence was, in the event, admitted. We have, however, come to the view that, despite that lack of objection, we should discount Mr Thornton-Kemsley's evidence, in so far as it purports to "tell the court what to think" (*cf.* Lady Smith in the Inner House in *Kennedy* at paragraph [4]), particularly on the central question of whether the Respondent has substantially abandoned any agricultural use of the Farm, but also in so far as it draws and expresses conclusions as to whether the IACS returns made by the Respondent, or lack thereof, supported his assertion that he was himself continuing to carry out agricultural activity at the Farm and more generally as to the extent of the agricultural activity undertaken by the Respondent himself.

## The Applicant's evidential objections

[93] During the examination-in-chief of the Respondent, the Court sustained an objection by Counsel for the Applicant to a line of questioning introduced by Counsel for the Respondent, the import of which seemed to be that the buildings forming part of the fixed equipment on the Farm were no longer suitable for the conditions of modern farming, thereby explaining, or indeed seeking to justify, the Respondent's failure to use them for agricultural purposes. Counsel for the Applicant maintained that this formed no part of the Respondent's case as it was set out in the Answers and in the absence of such notice, we considered that his objection was well founded. Had this line of questioning been allowed, it might have proved somewhat double edged for the Respondent, in that if the buildings provided by the Applicant are indeed no longer suitable for modern farming conditions (on the basis of our own inspection of the low-roofed traditional steading buildings, we would need little persuading on that score), it begs the question why the Respondent at no stage over the years sought to press him to meet his statutory obligation, in terms of section 5(2) (a) of the 1991 Act, to "provide such buildings and other fixed equipment as will enable an occupier reasonably skilled in husbandry to maintain efficient production as respects both – (i) the kind of produce specified in the lease, or (failing such specification) in use to be produced on the holding, and (ii) the quality and quantity thereof, and that he will during the tenancy effect such replacement or renewal of the buildings or other fixed equipment as may be rendered necessary by natural decay or by fair wear and tear". As with the evidence of the extended period during which the Respondent "farmed" without subsidy, the absence of evidence that the Respondent ever raised with the Applicant the shortcomings of the buildings from that perspective tends to confirm that this was not in any meaningful sense "agriculture for the purposes of a trade or business" in conformity with the statutory definition of "agricultural land" in section 5(2) of the 1991 Act, which definition informs the definition of "agricultural holding" in section 5(1) of the 1991 Act.

[94] The objection that was not disposed of during the course of the evidence, parties having agreed that it would be appropriate to admit the evidence to which it related under the usual reservations, permitting parties to revert to the issue at greater length in closing

submission, was developed by Counsel for the Applicant under reference to the best evidence rule. The objection arose when Counsel for the Respondent sought to elicit from the Respondent evidence that he did indeed possess, albeit that it had not been lodged in this process, documentation such as farm census returns, sheep movement records, veterinary medicine books, and chemical/fertiliser records (because the Farm is within an identified Nitrate Vulnerable Zone (“NVZ”)), in counter to that part of Mr Thornton-Kemsley’s report which identified the documents that he would have expected the Respondent to have been in a position to produce, if he himself had been actively farming the farmland on the Farm (as Mr Thornton-Kemsley himself observed, the task he had been set by those instructing him amounted to attempting to prove a negative). The Respondent, it was argued, had been afforded ample opportunity to produce that material, and the onus lay on him to do so if he was proposing to rely on it to demonstrate the level of agricultural activity maintained by him on the Farm. Where he had failed to do so, his oral testimony that such documentation did exist was not the best evidence, and so should be excluded, but if, contrary to that primary submission, the Court were to admit it, little weight should be attached to it.

[95] Counsel for the Respondent contended, under reference to a dictum of the late Lord Macphail in *Haddow v Glasgow Council* 2005 SLT 1219, that the best evidence rule was not a general exclusionary rule of evidence, but a “counsel of prudence”. It:

“was not the law that it is a fundamental condition of admissibility that evidence tendered must be the best attainable. The governing principle is not that evidence must be ‘the best’, but that it must be sufficiently relevant to an issue in dispute and must not infringe any of the exclusionary rules.”

The rejoinder of Counsel for the Applicant to that was that one of those exclusionary rules was the rule excluding secondary (including parole) evidence of the terms of a document not produced: see, *e.g.*, *Scottish & Universal Newspapers Ltd. v. Gherson’s Trustees* 1987 SC 27; *Japan Leasing (Europe) plc v Weir’s Trustee (No 2)* 1998 SC 543.

[96] In the event, disposal of this objection is rendered somewhat academic by the nugatory value of the evidence that was heard under reservation. The only evidence of specific documentation held by or for the Respondent, but not produced, that might show the extent of his agricultural activity on the Farm, came from his claims that he maintained full movement records and veterinary medicine books in respect of his sheep; and that he also had NVZ records and farm census returns kept for him by Olivia Donald. The Respondent did not offer any explanation as to why this documentation had not been produced, beyond the suggestion at one point that he had not known it was open to him to do so; more generally, his position resolved itself into one that it was a matter left entirely to his legal advisers what documents were lodged on his behalf.

[97] It was not in dispute that the Respondent bought a small number of ewes with lambs at foot in the late Spring of 2015 for onward sale in the Autumn of that year, or that he has repeated this practice in subsequent years; maintaining the requisite movement and other records is an obligation incumbent upon him in consequence thereof and tells us nothing more about the extent of the agricultural activity on the Farm. That he maintains NVZ records and has completed and returned annual farm census records similarly adds nothing to our picture of the extent of the agricultural activity which takes place at his behest on the Farm: whilst the **terms** of those records might have shed some light thereon, no attempt was made to adduce from the Respondent evidence of what their contents would have disclosed. We have no doubt that had those contents been considered materially to assist the Respondent's position, they would have been produced. We repel Counsel for the Applicant's objection to this evidence, on the basis that it does not infringe the exclusionary rule founded on by him, but we would add that we have not found the evidence so admitted under reservation to be of any real assistance to us in our deliberations.

## Summary of parties' closing submissions

[98] Both Counsel favoured us with written submissions, to which they spoke on the last day of the hearing. We have already related, at paragraphs [3] – [7] above, the circumstances which led to Counsel for the Applicant moving, of consent, to amend his crave to delete the words "having inverted its possession" therefrom. Counsel for the Applicant's closing speech otherwise, for the most part, took the form of a submission on the evidence we had heard, having little of substance to add, in terms of legal analysis, to what had been submitted on behalf of the Applicant at the debate. Counsel for the Applicant acknowledged that agricultural activity on the Farm had not, on the evidence, been wholly abandoned on the Farm, but he contended that it had been substantially abandoned. The Farm had to be looked at as a whole, and the relative commercial weight of the non-agricultural and agricultural activities being conducted thereon taken into consideration. The Respondent had, in blatant breach of his obligations under the Lease, removed what was an integral part of the fixed equipment provided by the Applicant as the Landlord from agriculture and devoted it instead to the non-agricultural business of Monarch. The dominant, or predominant, commercial use to which the Respondent had put the Farm since at least 2004 was non-agricultural, with any residual farming activity that might be attributable to the Respondent being "*de minimis* and irregular." Such agricultural activity was undertaken merely with a view to preserving the Respondent's tenancy, and was not a use of land for agriculture for the purposes of a trade or business of the sort the Agricultural Holdings legislation was in place to protect. The object of that protection being to encourage agricultural production, there was, in these circumstances, no public interest in maintaining the Respondent's privileged position of having such security of tenure.

[99] On the “whole or substantial abandonment” issue, Counsel for the Applicant reminded us of the terms of section 39(1)(a) of the 2003 Act, which provide that a 1991 Act tenancy does not cease to be such by reason only that the land is used for a non-agricultural purpose, with the reference to “land” contained therein being, by virtue of section 39(5) of the 2003 Act, a reference to the whole of the land comprised in the lease constituting the tenancy or any part of it. Section 38(4) of the 2003 Act, however, provides that section 39(1) does not apply if the use of the land, for a non-agricultural purpose, is otherwise than has been permitted under section 40 (**Notice of and objection to diversification**) and 41 (**Imposition of considerations by the court**) of the 2003 Act. This confirmed, he submitted, that before the qualified right on the part of a tenant to give notice of diversification was conferred, where land held on a 1991 Act tenancy was used for a non-agricultural purpose, it would lose its statutory protection.

[100] Under reference to the classic statement of the doctrine of personal bar enunciated by the Lord Chancellor (Birkenhead) in *Gatty v Maclaine* 1921 SC (HL) 1 (“Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time”), he submitted that there was here no evidence of any representation by the Applicant on which the Respondent had relied to his prejudice, so as to bar him from insisting in the present application; the Applicant’s representations had consistently been to confirm his opposition to the presence of Monarch on the Farm. The Respondent indeed claimed to have received his own legal advice that Monarch was entitled to remain on the Farm, upon which he had relied. In these circumstances, there was, accordingly, no merit in the Respondent’s personal bar plea.

[101] Whereas Counsel for the Applicant commented at some length on the credibility and reliability of the different witnesses, Counsel for the Respondent, we think wisely in the circumstances, opted not to do so. He commented briefly on the case law, to which we ourselves shall return in due course, from which he drew the propositions, Counsel for the Applicant having by this stage deleted from his crave the reference to the concept of inversion of possession, that in order to succeed, the Applicant had to show that “effectively agricultural activity on the Farm has been wholly or substantially abandoned”, and that in applying that test, the principal, albeit not the only, concern was “to consider the extent of the holding and the extent of ground used for agricultural activity compared to non-agricultural activity.” He accepted in principle that the relative turnovers of any side-by-side agricultural and non-agricultural activities could be a relevant factor that we would be entitled to take into account, but under reference to *Smith v Greeves* [1981] 1 EGLR 1, he emphasised that this factor was not conclusive. Because the Lease conferred on the Respondent the right to take access to the Farm for agricultural purposes, the evidence of the impact of non-agricultural Monarch traffic along the private estate road was, he acknowledged, a factor the Court could take account, but ultimately, Monarch’s occupation of the steading area did not significantly impede the use of the farmland for agriculture, so that the tenancy remained in substance a tenancy of agricultural land (*cf. McClinton v*



*McFall* (1974) 232 EG 707). He sought to argue that agricultural activity could not be said to have been wholly or substantially abandoned in the relevant sense where there was agricultural activity taking place on the Farm, albeit agricultural activity of a sort that was in breach of the terms of the Lease (*e.g.* the 2005 potato sub-let).

[102] At the heart of Counsel for the Respondent's submission was the simple but superficially powerful argument that whilst the business of the Farm might not have been very profitable (and indeed, with regard to some of the agricultural activities on the Farm about which evidence was heard, turning a profit may not have been the Respondent's principal motivation), there were many farmers in Scotland who barely made a living. The method of farming he had adopted might be a low intensity method, that involved minimal effort on the Respondent's part, but there was no requirement for him to adopt a more intensive approach that utilised every part of the Farm. Absent express provision to contrary effect in his lease, every farmer could look at the type of land he had, and take a view as to what could be done with it, and what form of input (whether in terms of time or money) it might require. That the Respondent should have adopted a low input, low return method of farming the land on the Farm did not take him outwith the ambit of the statutory protection.

[103] The Respondent's fourth plea-in-law is in the terms "The Applicant being barred by *mora*, taciturnity and acquiescence from insisting in the present Application, decree of absolutor should be pronounced." The argument presented, somewhat faintly, under reference to that plea, which was not supported by any citation of authority, consisted of three elements: (a) that the Applicant had well known for many years that the Respondent was operating a non-agricultural business from the Farm, but had never, in all of that time, given him a notice to remedy that, if not complied with, might have served as the basis for a notice to quit; (b) that a revaluation of the Farm had taken place in 2005, initiated by the Applicant having informed the Grampian Valuation Joint Board of Monarch's activities thereon; and (c) the Applicant had continued throughout to demand and accept rent from the Respondent. If the Court were minded to accept the Applicant's case on the merits, it should, nevertheless, for those reasons, decline to grant the order craved.

## The applicable law

[104] Parties ultimately arrived at a position of broad agreement as to the applicable law in this case. They agreed, in particular, that either the whole of, or none of, the Farm was subject to the protection of the agricultural holdings legislation, as a single tenancy cannot be partly an agricultural holding (*Howkins v Jardine* [1951] 1 KB 614); and that to constitute an agricultural holding, the tenancy as a whole must be in substance a tenancy of "agricultural land", in conformity with the statutory definition of that term in section 1 (2) of the 1991 Act, being "land used for agriculture for the purposes of a trade or business." The use of the land for agriculture for the purposes of a trade or business entailed that it

was “primarily directed towards an economic end and a profitable return taking one year with another” (*McGill v Bichan* 1982 SLCR 33 at page 40). They agreed that where use of the land for agriculture for the purposes of a trade or business was wholly or substantially abandoned, the tenancy would lose the protection of the agricultural holdings legislation (*Wetherall v Smith, op. cit.*). They both acknowledged that in considering the issue of whether use of the land for agriculture for the purposes of a trade or business had been wholly or substantially abandoned, it was not simply a matter of computing the number of hectares that had been diverted from agricultural use, and comparing that number to the number of hectares that remained in agriculture, and that other factors, such as the relative turnovers of, or the profits generated by, the non-agricultural and agricultural uses, were potentially relevant, although not conclusive, factors, in determining whether such a change in the character of the tenancy, from agricultural to non-agricultural, had occurred (*Short v Gleeves, op. cit.*). The test was essentially impressionistic rather than strictly empirical. Underpinning their analyses was a shared acceptance that the principles developed in the English case law, within the framework of the corresponding legislation south of the Border, were equally applicable under Scots law, and in the face of that consensus we have approached the disposal of this application upon that basis.

[105] In the leading English case, *Wetherall v Smith*, a tenant had the let of an agricultural holding (in terms of the statutory definition in section 1 of the Agricultural Holdings Act 1948, which, for present purposes, parties agreed may be taken as differing in no material respect from the definition in section 1 of the 1991 Act) consisting of a field of about an acre and a quarter for use as grazing land. The landlords purported to terminate the lease on the basis that it had ceased to be an agricultural holding protected by the 1948 Act, having for some time been used by the tenant only as a jumping paddock, which was not a use for agriculture. The landlords having served notice to quit and retaken possession, the tenant sued for damages for breach of the implied covenant of quiet enjoyment and the landlords counterclaimed for, *inter alia*, a declaration that the tenant having unilaterally changed the nature of the tenancy, the lease had been lawfully terminated. The tenant was successful after proof in the county court, being awarded damages and securing dismissal of the landlords’ counterclaim. No written judgment was issued by the judge at first instance, but a contemporaneous note of his oral judgment, which seems to have been all that the members of the Court of Appeal had before them to vouch for the contents thereof, indicated that he found as a matter of fact that the field had come to be used for agricultural purposes only to a small degree, with its major use being for the [non-agricultural] uses of grazing and schooling horses and ponies. He declined, however, to determine whether the tenancy was or was not as at the date of the notice to quit an agricultural tenancy, arguing that if the landlords’ contention was that any such non-agricultural use was in breach of the parties’ agreement, it was for them to advance that argument before the agricultural land tribunal, and for the agricultural land tribunal to determine whether such user was at the date of the notice to quit agricultural user.

[106] In the Court of Appeal, it was held that the county court judge's approach was wrong in law. He had misunderstood the landlords' argument, which was not that the tenant's non-agricultural use had been in breach of the parties' agreement, but rather that because of the non-agricultural use which had been made of it, the field had ceased to be an agricultural holding and therefore had ceased to be something which was within the jurisdiction of the agricultural land tribunal at all. It had been incumbent upon him to decide whether, as a result of change of user, the tenancy had ceased to be an agricultural tenancy, and he had erred in law in holding that, as it was put by Sir David Cairns, with whom Lord Justices Ackner and Stephenson agreed, "it was not for him to examine what he called the day to day conduct of the parties" in order to decide what was the use to which the tenant was putting the land. Sir David took as his starting point that, notwithstanding what appears in the tenancy agreement, the **character** of a tenancy can change. Following a review of the authorities, he added that, on principle, it was in his judgment right that:

"the protection of the statute should be lost if agricultural activity is wholly or substantially abandoned during the course of the tenancy even if without consent of the landlord. The object of the legislature is surely to maintain continuity in the conduct of farming and horticultural operations rather than to put people, who have at some time in the past acquired a particular type of tenancy, in a privileged position. At the same time, the cases show that the tenancy is not to be regarded as alternating between being within and outside the Act of 1948 as minor changes of user take place, and that, when the tenancy is clearly an agricultural one to start with, strong evidence is needed to show that agricultural user has been abandoned [at page 1299 F-G]".

He was of opinion that:

"the period to which attention must be mainly directed in considering whether the tenancy has ceased to be an agricultural one is the time leading up to the service of a notice to quit, where a notice to quit has been served. I would not suggest that the change can, in the absence of some very exceptional circumstances, be brought about in a matter of days or weeks; but in *Hickson & Welch Ltd. v Cann* [(1977) 40 P & CR 218] all members of this court took the view that the cesser of agricultural activities for the last two years before the service of the notice to quit was, irrespective of what had gone before, sufficient to deprive the tenant of the right to claim the protection of the Agricultural Holdings Act 1948 [at pages 1297H – 1298A].

In remitting back to the county court judge, he indicated that, whilst of course, minute examination of day to day activities was not required, it was necessary for the judge to pay attention to the following points, and to reach a conclusion on them:

“first, to what extent during about the last two years, up to the service of the notice to quit in September 1976, was the paddock used for the grazing of (a) cattle, (b) horses, (c) for any other agricultural purposes; secondly, to what extent was it used for riding lessons and jumping and other similar purposes; thirdly, were the horses, while grazed there, used only or mainly for recreation; and, fourthly, was any of the land and, if so, what part, used for the purpose of [non-agricultural] trade or business [at page 1300C-D].”

On a proper analysis, it seems to us that the period of “about the last two years” applied in *Wetherall v Smith* is not to be taken as laying down any sort of rule, even only of thumb: what period of time falls to be considered will turn on the facts of the particular case.

## Discussion

[107] As it happens, the four English cases principally relied on by parties were somewhat unusual on their facts, none of them featuring a holding conforming to the conventional idea of a farm, such as we are dealing with in this case. The holding in *Hickson & Welsh v Cann* was even smaller than that in *Wetherall v Smith*, consisting of about half an acre on which the tenant stabled a horse or pony and kept some pigeons. The holding in *Short v Greeves* was a garden centre, extending over six acres, with a greenhouse in which plants grown on the holding were potted up and sold, but in which the sale of bought-in goods had become increasingly a feature. In *Howkins v Jenkins*, the holding extended to a mere seven acres, with three cottages thereon that were let out to non-agricultural occupants. The circumstances of these four cases could scarcely be further removed from those which pertain in the proceedings presently before us.

[108] Here, the Respondent, the tenant of the Farm, an agricultural holding extending to some 213 acres, operated, through a limited company, a non-agricultural business on a part of the holding that may have represented only a very small proportion of its physical area, but which part consisted of the principal element of the fixed equipment provided by his landlord thereon. From its base on the Farm, that non-agricultural business grew, over the course of three decades, into a very substantial and successful undertaking, with a seven figure turnover, which generated a substantial income for the Respondent in the form of directors’ salary, profit shares and dividends. The presence of Monarch on the Farm meant that it did not have to pay a commercial rent for the premises it occupied. From the time of its incorporation, the vast majority of the Respondent’s time was taken up by Monarch, and whilst he maintained a strong, and quite understandable, sentimental attachment to the Farm, he no longer had either the time or the inclination to farm the land himself. When the Respondent incautiously told the Applicant, sometime in the late 1990s, that he had given up farming, as we have found in fact that he did, that was indeed the reality of the situation, and subsequently, his efforts were more directed to “being seen to be farming” than actually farming himself. That situation came about as a result of (i) the pressure

being brought to bear on the Respondent by the Applicant and his agents, who made known to him that they suspected he was sub-letting the farmland in breach of the prohibition contained in the Lease, and (ii) the advice he received from Watson Bell that if he were found to be sub-letting, his tenancy might be put in jeopardy.

[109] In the Note which accompanied our Order dated 15 September 2016, we commented that the Respondent's averments "as to the various agricultural uses to which he claims other parts of the Farm have been put over the period whilst Monarch's business has been expanding are far from being a model of clarity", and conveyed "the impression of a somewhat "piecemeal and irregular" (...) pattern of usage". We did, however, conclude that enough had been averred by the Respondent to stave off the grant of decree *de plano* and to justify the fixing of a hearing by way of proof (before answer). If those comments were interpreted as implying any slight on the draftsman, we did him or her something of a disservice. The Respondent's account in the witness box of the agricultural uses to which he claimed the parts of the Farm other than the steading area had been put over the years since Monarch was incorporated was itself very far from being a model of clarity, and the pattern which emerged from the evidence was indeed one of piecemeal and irregular usage of the farmland: the Respondent's pleadings thus anticipated with remarkable prescience the testimony we were to hear.

[110] The Respondent kept no livestock belonging to him on the Farm from 1994 until a matter of weeks before the present proceedings against him were commenced on 29 July 2015, and even then, what was introduced was no more than a hobby flock of ewes with lambs at foot, to be kept over the following Summer. He ceased himself to make and sell his own hay and silage as long ago as 2002. The Farm was denuded of such agricultural machinery as the Respondent may once have possessed, and the Dutch barn, silage pit and cattle feeding area were permitted to fall into desuetude. Even had he been minded to do so, Monarch's occupation of the steading buildings significantly restricted the Respondent's options so far as the farming of the farmland was concerned, and to the extent that those buildings may no longer be suitable for modern farming conditions, at no stage did the Respondent, in the extensive correspondence, through which we were taken in evidence, that took place between him and the Applicant and his agents over many years, initiate a dialogue with the Applicant about providing the sort of new clear span agricultural building that increasingly is being erected on agricultural units like this one to replace the existing vernacular steading buildings: *cf., e.g., Alston v Earl of Mansfield's Trustees* 2013 SLCR 1. Had the Respondent been engaged in using the Farm for agriculture for the purposes of a trade or business, and his conduct of that trade or business was being inhibited by the unsuitability for modern farming conditions of the buildings and other fixed equipment provided by the Applicant as his landlord, it is, in our view, inconceivable that such a conversation would not have taken place. The reason it did not is because farming himself has, in our estimation, formed no real part of the Respondent's plans over the course of the past two decades.

[111] The evidence produced by the Respondent to show the nature and extent of the agricultural activity on the Farm from the mid-1990s onwards was patchy in the extreme. The Respondent received no allocation of payment entitlements when the SFPS was introduced in 2005 because he had not claimed any form of subsidy during the 2000 – 2002 reference period. Had he been using the farmland for agriculture for the purposes of a trade or business during the reference period, it would be highly unusual for him not to have claimed some form of subsidy in respect thereof. The recurring element in the evidence we heard from the Respondent about the agricultural activity that took place on the Farm in the period between 2003 and the raising of these proceedings in 2015 is that it was conducted on a day to day basis almost entirely by others: the question becomes to what extent any of that agricultural activity properly can be attributed to him.

[112] We reject the argument advanced by Counsel for the Respondent that even agricultural activity in breach of a tenant's lease obligations might be relied on by that tenant in defending an application for declarator that the tenant had wholly or substantially abandoned agricultural activity on the holding: in our view, to be relevant for this purpose, the agricultural activity must be that contemplated in the lease itself. Thus, by way of example, the potato crop grown on the Farm in 2005, as the product of an illegal sub-let, was agricultural activity for which the Respondent is entitled to take no credit.

[113] In 2004 the Respondent represented to SEERAD that all but 14.66 hectares of the farmland on the Farm was LLO – land let out to others, and in 2008, the same representation was made to SGRPID by Olivia Donald in his name in respect of every field on the Farm. We consider, on the balance of probabilities, that those representations reflected the reality of the situation on the ground in those two years, and there was no evidence placed before us on behalf of the Respondent to suggest that the position was materially different in either the intervening years between 2004 and 2008, or in the next year of 2009, when the Respondent in the Spring supplied the Applicant with an annotated IACS map of the Farm on which every field was labelled LLO. What agricultural activity, if any, was taking place on the Farm in 2007 was neither vouched for in the documentary productions, nor spoken to in the oral testimony. It was, however, contended on behalf of the Respondent that the crops of spring barley grown on the Farm in the years 2004, 2006 and 2008 represented agricultural activity properly attributable to him, having been the subject of a contract farming agreement between him and R & W Wilson in each of those years. We turn now to assess the evidence we heard about those arrangements.

## The purported contract farming agreements

[114] Contract farming is a form of contract for services under which the landowner engages an individual or corporate entity to farm the land on his behalf. Normally the contractor provides the labour and equipment. The extent of the contractor's discretion is a matter for negotiation in every case. The normal consideration payable to the contractor is

a fee that may have a profit related element. This being a contract for services, the contractor has no right of occupation of the land: *Agricultural Tenancies, op. cit.*, at paragraph 1.17. That passage from Gill refers specifically to “the landowner”, but in a situation in which the postulated contract farming agreements were said to have been between a tenant farmer and a contractor, it was not argued for the Applicant that the tenant of an agricultural holding might not perform his obligations under a lease through the medium of a properly constituted contract farming agreement, at least absent any express provision in the lease incompatible therewith. We would, however, wish to reserve our opinion on that issue until we hear a case in which it arises squarely for decision and we are favoured with full submissions thereon: for present purposes, we would merely observe that an agricultural lease is one to which the doctrine of *delectus personae*, whereby it is assumed that the landlord deliberately chooses a particular tenant for his personal qualities such as his financial standing, his agricultural skill, or his personal habits, still applies to a limited extent (Paton and Cameron, *The Law of Landlord and Tenant in Scotland* (1967) at page 149), which explains why, at common law, it was not assignable unless the lease expressly allowed it or the landlord had given his consent. It also explains why now, in terms of section 10A(3A) of the 1991 Act, the landlord may withhold consent to a proposed assignation to a near relative of the tenant on the grounds (a) that the person is not of good character, (b) that the person does not have sufficient resources to farm the holding with reasonable efficiency, or (c), subject to subsection (3B), that the person has neither sufficient training in agriculture nor sufficient experience in the farming of land to farm the land with reasonable efficiency. Section 10A(3B) of the 1991 Act disapplies the ground of objection in section 10A(3A)(c) of the 1991 Act where the person – (a) is engaged in, or will begin, before the expiry of the period of 6 months beginning with the date of the tenant’s notice to assign under section 10A(2) of the 1991 Act, a course of relevant training in agriculture which the person is expected to complete satisfactorily within 4 years from that date, and (b) has made arrangements to secure that the holding is farmed with reasonable efficiency until the person completes that course. There is nothing in these amended provisions, which came into force on 23 December 2016 (see Regulation 2(1) of and the Schedule to The Land Reform (Scotland) Act 2016 (Commencement No. 3, Transitory and Saving Provisions) Regulations 2016 (SSI 2016/365) (“the 2016 Regulations”), to suggest that a near relative assignee who is vulnerable to the ground of objection in section 10A(3A)(c) of the 1991 Act, but is not a person who fulfils the criteria set out in Section 10A(3B) of the 1991 Act, could meet it by entering into a long term contract farming agreement with a suitably qualified or experienced contractor.

[115] We do not here require to consider the questions of whether, and to what extent, an agricultural tenant legitimately can devolve the farming of his holding onto a contractor under a genuine contract farming agreement, because we do not accept that the arrangement between the Respondent and R & W Wilson put in place by Watson Bell was any such thing. It was a sham. It was an entirely artificial, *ex post facto*, paper exercise that had as its principal object making it look as if the Respondent was using the farmland for agriculture for the purposes of a trade or business, when in reality such use was that of the

contractor, a stranger to the Lease, in relation to which use the Respondent himself played no meaningful part, whether by way of management, control or otherwise. Under a conventional contract farming agreement, as Mr Thornton-Kemsley, who has been involved in setting up and managing contract farming arrangements for over twenty-five years, explained, the farmer assumes risk with regard to his income. The only guaranteed payment is that to the contractor, with any surplus after the other costs of production have been met split between the farmer and the contractor according to an agreed ratio. Even if the contractor orders the inputs on behalf of the farmer, the farmer will pay for them, often through a separate bank account into which any resulting income is paid. The nature of such an agreement makes it essential that a formal contract regulating the rights and responsibilities of the parties and how it is to be administered is set in place. At paragraph 4.8.8 of his report, Mr Thornton-Kemsley emphasised that “Given the risk of a sub-tenancy being created the farmer in a contract farming agreement must be able to demonstrate management control of land.”

[116] Here, the 2004 spring barley crop had been sown by R & W Wilson, sprayed and otherwise looked after by R & W Wilson, harvested by R & W Wilson, removed by R & W Wilson and presumably sold by R & W Wilson before Watson Bell’s arrival on the scene in October 2004. Over the course of that period, no invoices had been tendered by R & W Wilson to the Respondent, and the Respondent had paid for no inputs in respect of the establishment of the crop. There was no credible evidence to suggest that the Respondent exercised any level of management or control over any of this activity. It appears to have been Watson Bell who came up with the idea of retrospectively recasting whatever the original arrangement between the Respondent and R & W Wilson with regard to that crop of spring barley, when it went in, may have been, as a contract farming agreement: given the emphasis in his October 2004 letter of advice to the Respondent [Production 20] of the importance of avoiding “any suggestion of a sub-tenancy”, it seems reasonable to infer that the situation he had discovered on the Farm with regard to that crop may have been vulnerable to that interpretation. Given also that, as Mr Thornton-Kemsley pointed out, margins in agricultural contracting work ordinarily are very tight, it would seem most unlikely that, prior to Watson Bell’s intervention, R & W Wilson, in the role of mere contractor, would have carried the whole costs of establishing, tending and bringing in that crop, without rendering a single invoice to the Respondent in respect of outlays and labour over a period of several months. In 2006, the retrospective drawing up and exchanging of invoices followed the same model of no risk and no reward, so far as the Respondent was concerned, but in 2008, Watson Bell’s oversight of the arrangement having in the meantime been dispensed with, R & W Wilson made a payment to the Respondent in respect of the crop, bringing about the “clearly defined payment from the user of the land to the official occupier” that Watson Bell had warned the Respondent could create a “tenant-sub-tenant” relationship. The 2008 spring barley crop thus stands in exactly the same position as the 2005 potato crop, the Respondent, characteristically, having chosen to ignore that aspect of Watson Bell’s advice that he did not like. In the years when the arrangement was intended to operate as a “zero-sum game”, the use of the land was not



“primarily directed towards an economic end and a profitable return taking one year with another”, in the words of the Full Court in *McGill v Bichan*, *op. cit.*

[117] As a result of being admitted to the RPS in 2009, the Respondent received capital payments from SGRPID which helped to defray the costs to him of renewing stock fencing on the Farm, but it is notable that he embarked on this project without any prior discussion with the Applicant, which once again underlines how different was the approach of the Respondent to the renewal of fixed equipment on the Farm to that of an agricultural tenant genuinely using the land on a holding for agriculture for the purposes of a trade or business. Where fencing has reached the end of its useful lifespan through natural decay or fair wear and tear, such a tenant might be expected to broach this with his landlord, upon whom liability for replacement or renewal has been placed by section 5(3)(c) of the 1991 Act, with a view to agreeing the terms upon which it will be replaced or renewed. Entry into the RPS enabled the Respondent to access for a period of six years an income stream that did not require him to use the land for agriculture for the purposes of a trade or business: *cf.* paragraph 4.5.8 of Mr Thornton-Kemsley’s report.

[118] It does not, in our opinion, follow that because the Respondent satisfied the qualifying conditions for receiving payment under the RPS and, more recently, those of the BPS, then he cannot at the same time be in breach of his obligations under the Lease, or be found to have wholly or substantially abandoned agricultural activity thereon. This is the sort of situation that The Hon Lord Gill anticipated in the 3rd edition (1997) of *The Law of Agricultural Holdings in Scotland* at paragraph 2.11, when he observed, under the sub-heading “*Cessation of agricultural use*”, that:

“In every case where the tenant has adopted non-agricultural options under the farm diversification schemes or under the current Countryside Premium Scheme, notwithstanding the consent of the landlord, a question may arise whether agricultural use of the subjects has in substance been abandoned.”

Returning to that theme in the corresponding paragraph [3-42] of the new 4th edition of his book, the title of which has been foreshortened to *Agricultural Tenancies*, *op. cit.*, Lord Gill commented that:

“Until 2003, it could be stated as a general principle that the agricultural character of the holding was lost if agricultural activity was wholly or substantially abandoned during the course of the lease. That principle has been substantially modified by the 2003 Act, Pt 3 of which permits the use of the holding for diversification.”

Subsection (4) of section 18A (**Irritancy of lease and good husbandry: modern limited duration tenancies**) of the 2003 Act, inserted by section 89 of the Land Reform (Scotland) Act 2016, and which was also brought into force on 23 December 2016 by the 2016 Regulations, now expressly provides, for that form of tenancy, that where such a lease

may be irritated on the grounds that the tenant is not using the land in accordance with the rules of good husbandry, conservation activities are to be treated as being in accordance with the rules of good husbandry if they are carried out in accordance with — (a) an agreement entered into under any enactment by the tenant, or (b) the conditions of — (i) any grant for the purpose of such activities paid out of the Scottish Consolidated Fund, or (ii) such other grant of a public nature as the Scottish Ministers may by regulations specify; and section 18A(5) of the 2003 Act provides that such use of any of the land, or such change to the land, for a non-agricultural purpose as has been permitted under section 40 or 41 is to be treated as being in accordance with the rules of good husbandry. We explained at paragraph [2] above why the diversification provisions introduced by the 2003 Act do not avail the Respondent any in the particular circumstances of this case.

[119] We recorded, at paragraph [66] above, the impression we had formed, from the evidence placed before us by the Respondent, that sales of grass (hay and silage) and seasonal grazing on the Farm had been “petering out” in recent years, after a passing flurry of activity, vouched for by documentation, in the period from 2010 into 2013, immediately after the reversion of the arable parts of the Farm to grass under the RPS. Credible and reliable evidence of actual sales of hay and grass off the Farm, in the years running up to the making of the present application to this Court on 29 July 2015, and of seasonal grazing lets entered into in the years from 2013 to 2015 (inclusive), was conspicuously absent. In relation to this chapter of the evidence concerning what use has been made by the Respondent of the farmland on the Farm during the most recent period in the history of the tenancy, two issues seem to us to arise, one general and one particular.

[120] The general issue is that of what we are to make of the paucity of the evidence produced by the Respondent to vouch for such more recent use. Given the very negative views we formed of both the Respondent’s credibility and reliability as a witness, in the absence of documentary vouching or some other form of corroboration, we may not have been inclined to place much reliance upon his evidence had he, in his oral testimony, spoken to a succession of previously unspecified sales of grass or of seasonal grazing, but in the event, no such evidence was proffered by him. In these circumstances, it seems to us that there are two possible conclusions that we might draw from this omission: either most of the farmland was not in any form of agricultural use during that period; or it was in agricultural use, but not by the Respondent, so that to provide the details of such use would only further compromise his position. The gaps in the documentary evidence that the Respondent has chosen to share with the Court, with whole years practically unaccounted for, so far as the agricultural use being made of the Farm is concerned (*e.g.*, for 2007 there is only Production 140, an invoice issued by R & W Wilson to the Respondent on 20 May 2007 in the amount of £174.49 for supplying and spraying 11 acres with Dockstar, a selective systemic herbicide for the control of docks in pasture), would be consistent with either conclusion. Ultimately, however, it does not seem to us that it is incumbent upon us to make a finding one way or the other on this point: it is enough for present purposes for us to hold that, the onus having shifted here to the Respondent to prove, on the balance of

probabilities, that he had used the farmland on the Farm for agriculture for the purposes of a trade or business over that period, he has signally failed to do so.

[121] The more particular issue we require to address is that of the relevance of the evidence relating to the sales of seasonal grazing. Counsel for the Respondent, in his written closing submission, under reference to *Agricultural Tenancies*, *op. cit.*, at paragraphs 9-11 and 9-12, referred to “the generally held view that seasonal grazing of livestock is not in breach of the prohibition on sub-letting”. The somewhat cautious manner in which that statement was expressed is explained by the lack of direct authority on the point, the cases mentioned in the cited paragraphs of Lord Gill’s work being principally cases under the very different statutory regime of the Crofting or Landholders Acts (*e.g.*, *Little v McEwan* 1965 SLT (Land Ct) 2), in which, for instance, there is no equivalent to the requirement that use should be “for agriculture for the purpose of a trade or business”. In *Duncan v Shaw* 1944 [not 1994, as appears erroneously in the case citation in the footnote] SLT (Sh Ct) 34, the tenant of an agricultural holding had granted a seasonal grazing let. An action for reparation was raised by the tenant in respect of damage done to turnips elsewhere on the farm caused by sheep belonging to a third party admitted onto the grazings by the seasonal grazier. The underlying question of the validity of the tenant’s contract with the grazier was not raised before the sheriff court.

[122] Whether or not the tenant of an agricultural holding otherwise is entitled, in the absence of any express prohibition in the lease, to grant [sub-]leases of the agricultural land for the purpose of its being used only for grazing or mowing during some specified period of the year (to adopt the language of section 3 (**Leases for grazing or mowing**) of the 2003 Act) is an issue of some general importance, given that, as Lord Gill notes in *Agricultural Tenancies*, *op. cit.*, at paragraph 9-11, the practice is not uncommon. Assuming for present purposes that such a tenant is so entitled (upon which issue we would wish formally to reserve our opinion meantime), it nevertheless does seem to us that a distinction falls to be drawn between the situation in which an agricultural tenant who from time to time has grass surplus to his own requirements sells it as an adjunct to his own principal agricultural activities on a holding, and that which pertained here over such an extended period, where the seasonal grazing or mowing **was** the principal (and in some years seemingly the only) agricultural activity on the holding.

[123] As was pointed out in *Buchanan v Buchanan* 1983 SLT (Land Ct) 31,

“It is in the nature of grazing lets that the land still requires to be managed either by the farmer or by the grazing tenant taken obliged to do so in his agreement. Someone must decide what application of fertiliser and maintenance of fences is to be carried out. Seasonal tenants have no incentive to do more than a minimum for the holding having no assurance that they will be able to reap the benefit of any money laid out in the following year [at page 32].”

On the facts in that case,

“the stock is now provided by graziers and the management of the livestock had been virtually discontinued by the tenant. We are now faced with a farm of 282 acres where 10 out of the 14 fields are being grazed by livestock with no resident labour and a tenant who may be on the farm at weekends but who carries on no overall management of farming activity [*ibid.*]”

The tenant was found, at page 34, to have “abrogated his management responsibilities to a series of seasonal tenants” and to be “carrying on no farming activity on his own account.”

Whilst his cropping and grazing with seasonal tenants was not in itself a breach of the rules of good husbandry, “the manner in which it was done” constituted one of several circumstances which persuaded the Full Court to grant a certificate of bad husbandry.

[124] Counsel for the Respondent argued that the provision by an agricultural tenant of grass and seasonal grazing for the use of others could itself be a use of land for agriculture for the purposes of a trade or business, and in developing that submission he sought to portray the Respondent’s role as having been one of active control and management of the grassland on the Farm. We consider that this argument fails on the facts, the Respondent’s role in reality consisting of little more, in recent years, than ceding occupation of the land, impromptu, to such third parties as happened to approach him from time to time looking for available grazing, with no evidence of any more organised or systematic approach on his part to the production, maintenance and sale of the grass crop, such as would be consistent with the use of the land for agriculture for the purposes of a trade or business. We do not, of course, suggest that the facts in the present case are as extreme as those that pertained in *Buchanan*, but we consider that there was indeed here a parallel in “the manner in which it [*i.e.* the cropping and grazing with seasonal tenants] was done”.

[125] The contrast between the turnover and profits of Monarch and those of the Farm could scarcely be more stark. By way of example, using the most recent year for which the accounts of both are available, the turnover of the Farm in the year to 31 May 2015 was £5,188, a tiny fraction of the turnover of Monarch of £1,619,526 in the year to 31 March 2015. For the reasons we explained in paragraphs [73] – [82] above, from our scrutiny of their respective unaudited accounts, we have concluded that the figures in the two sets of accounts actually understate the true extent of the differential, the profits supposedly generated by the Farm being artificially inflated (and those stated by Monarch correspondingly reduced) by sums supposedly received from Monarch which we do not believe were ever paid. Such agricultural use as has been made of the land on the Farm was not, in our view, “primarily directed towards an economic end and a profitable return taking one year with another”: it was primarily directed, over a period of more than two decades, and by various different means, towards freeing the Respondent from having to

farm it himself, whilst maintaining an appearance of its being farmed by him, so as to head off any potential threat to the continuance of his tenancy.

[126] We do not agree with Counsel for the Respondent that, as he put it in his closing written submission, “the use of the steading area by Monarch had not changed the substance of the subjects continuing to be a tenancy of agricultural land”, and that “there is no evidence that the number of vehicles attending at the Farm in connection with the Monarch business ... changed the character of the let subjects looking at the Farm as an agricultural unit.” On the contrary, we consider that the evidence we heard on both of those matters pointed decisively the other way. We are quite satisfied that the evidence we heard establishes that the non-agricultural use of an integral part of the Farm by Monarch had the effect of changing the character of the Farm, supplanting and pushing to the periphery any agricultural use, and we conclude that this is a case in which we are not only entitled, but bound, to conclude that the Respondent has here substantially abandoned use of the Farm for agriculture for the purposes of a trade or business.

## The Respondent’s personal bar plea

[127] We do not consider that there is any merit in the Respondent’s plea that the Applicant is barred by *mora*, taciturnity and acquiescence from insisting in the application. The Respondent’s complaint, reduced to its essentials, is that the Applicant could have taken action against him in respect of Monarch’s presence on the Farm long before he did, which may be true, but far from being a source of prejudice to him, the Applicant’s delay in so doing operated greatly to the Respondent’s (and indeed to Monarch’s) advantage. It is, furthermore, quite untenable, in our view, for the Respondent to contend, in the face of the Applicant’s repeated complaints over many years about Monarch’s presence on the Farm, and his unavailing attempts to secure a peaceable resolution to the problem, that the facts, taken as a whole, give rise to an inference of acquiescence on the part of the Applicant: *cf. Pollock and Others v Drogo Developments Ltd.* [2017] CSOH 64. The relevance, in this context, of the fact of the 2005 revaluation, continues to elude us.

## Decision

[128] We have, accordingly, held that the Applicant is entitled to a declaratory order in the terms that he seeks. In conformity with our usual practice, we have invited parties to lodge with the Principal Clerk any motions and submissions they may have on the expenses (including in relation to certification) of the application, allowing parties 28 days in which to do so rather than the more usual 21 in deference to the impending Easter break.

**For the Applicant: Gavin MacColl QC, Morton Fraser, Edinburgh**

**For the Respondent: Robert Sutherland, Advocate, Shepherd+Wedderburn,  
Aberdeen**