OUTER HOUSE, COURT OF SESSION

[2022] CSOH 66

A109/20, A32/21 & A30/21

OPINION OF LORD TURNBULL

In the cause

ROBERT DRYSDALE

Pursuer

against

ROBERT PURVIS and CAVELSTONE FARM LTD

Defenders

and

ROBERT PURVIS and ISOBEL PURVIS and CAVELSTONE FARM LTD

Pursuers

against

JOHN HUGH FERRIS and ROBERT DRYSDALE

Defenders

and

ROBERT PURVIS and ISOBEL PURVIS

Pursuers

against

ROBERT DRYSDALE

Defender

Robert Drysdale v Robert Purvis and Cavelstone Farm Ltd

Pursuer: Moynihan KC, Blair; Halliday Campbell for McCash and Hunter, Perth
Defenders: Lord Davidson of Glen Clova KC, Massaro; T C Young LLP for Andrew Baillie Solicitors, Kinross

Robert Purvis and Isobel Purvis and Cavelstone Farm Ltd v John Hugh Ferris and Robert Drysdale

Pursuers: Lord Davidson of Glen Clova KC, Massaro; T C Young LLP for Andrew Baillie Solicitors, Kinross
Defenders: Moynihan KC, Blair; Halliday Campbell for McCash and Hunter, Perth

Robert Purvis and Isobel Purvis v Robert Drysdale

Pursuers: Lord Davidson of Glen Clova KC, Massaro; T C Young LLP for Andrew Baillie Solicitors, Kinross
Defender: Moynihan KC, Blair; Halliday Campbell for McCash and Hunter, Perth

13 September 2022

[1] These proceedings involve three different actions concerning land at Kinross known as Cavelstone Farm. Mr Drysdale and his wife owned and farmed at Cavelstone for many years as partners in the firm of Robert Drysdale Farmers. They brought their five daughters up there. Mrs Drysdale died in 2007 and Mr Drysdale has been in a nursing home since 2019. His daughters act on his behalf in terms of a power of attorney granted in their favour in 2014.

[2] In 1995 Mr Drysdale was sequestrated and Mr John Ferris, a now retired Chartered Accountant, was appointed to act as his trustee. On his instructions Cavelstone Farm was put up for sale as a whole or in lots to be marketed by McCrae and McCrae, Estate Agents in Dunfermline. Mr Purvis lives in Kinross and has been a successful business man for many years. He has operated a number of business over the years involving plant hire, builders' merchants and construction. He currently employs around 460 people.

[3] In August 1995 Mr Purvis instructed the firm of Johnston & Herron, solicitors, in Lochgelly to make an offer on behalf of him and his wife to purchase part of Cavelstone

Farm. Johnston & Herron also acted in the transaction for Mr Ferris and for Mr and Mrs Drysdale, to the extent that they had relevant interests. Missives were concluded and a disposition was in due course granted in favour of Mr Purvis and his wife. The issues which have arisen and which are now focussed in the present litigation are:

1. Whether the lost missives comprising the letters from Johnston & Herron dated 7 August 1995, and the two dated 24 August 1995, were of the tenor of the copy of those letters produced.
2. Whether the plan referred to in the missive letter dated 24 August 1995 was in all material ways the same as the plan annexed to the copy disposition in favour of Mr and Mrs Purvis dated 25 and 27 September 1995.
3. Whether decree should be granted in favour of Mr Drysdale declaring that he is the heritable proprietor of Cavelstone Farm, being the area of the farm other than the area disponed to Mr and Mrs Purvis in the 1995 disposition.
4. Whether the missives as concluded failed accurately to express the common intention as to the parts of the farm to be bought by and sold to Mr and Mrs Purvis.
5. Whether the disposition failed to give effect to the agreement entered into as to the parts of the farm to be bought by and sold to Mr and Mrs Purvis.
6. Whether Mr Drysdale subsequently entered into an agreement that he would sell the remaining part of the farm still owned by him to Mr and Mrs Purvis at the time of his retiring from farming.
7. How the price for any such sale was to be established.

[4] These are the issues focused in the three actions before the court and the evidence led at the single proof addressed each of them. For simplicity's sake the actions were referred to as "the declarator case", "the rectification case" and "the contract case".

[5] The parties to the declarator case were Mr Drysdale (the action being brought on his behalf by his daughters) with Mr Purvis and Cavelstone Farm Limited being the defenders. This was a company to which Mr and Mrs Purvis subsequently disponed the land they had acquired in the 1995 disposition. The parties to the rectification case were Mr and Mrs Purvis and Cavelstone Farm Limited with Mr Ferris and Mr Drysdale as the defenders. The parties to the contract case were Mr and Mrs Purvis with Mr Drysdale as the defender.

[6] Since the principal parties were both pursuers and defenders in the combined litigation it will be more straightforward to refer to them by name rather than designation throughout.

[7] It was agreed that the Purvis family should lead at the proof given their challenge to the accuracy of the missives and the disposition. Evidence in their case was given by Mr Purvis, Mrs Purvis, Mr Tom Johnston, the retired partner of Johnston & Herron, Mr Alexander Baxter, his former and now retired conveyancing assistant, Mr Ferris, Mr James Smith, Mr Andrew Baird and Mr Andrew Bailey, Mr Purvis's current solicitor. Evidence in the case for Mr Drysdale was given by his daughters Shona Drysdale and Fay Orr and Mr Paul Trodden, a retired solicitor who had previously acted for Mr and Mrs Drysdale. A joint minute setting out agreed facts was also available.

[8] A feature of the case is that some of those involved with the events of 1995 are now either incapable of giving evidence through age, or have little memory of those events. Others have incomplete memories. Mr Drysdale is now 87. He suffered a stroke in November 2018 and remained in hospital until January 2019, at which point he moved to

the nursing home where he now lives. A soul and conscience letter dated 4 May 2022 explained that he was incapable of providing evidence in any fashion. Mr Ferris is now aged 83. On 5 February 2021 he gave an affidavit concerning his involvement in the events of 1995 and he gave evidence through a video link at the proof. He had very little recollection of matters and, although he accepted that he gave an account to the best of his recollection in his affidavit, he was now unable to remember almost anything about the matters. Mr Baxter is now 78 and had only a very limited recollection of events.

[9] By way of contrast, Mr Johnston, who is now 67, plainly had a good recollection of some of the matters surrounding the 1995 transactions but had less memory of other parts. Mr Purvis is now aged 73. He appeared to have a good recollection of the general arrangements and of some but not all of the detail. Neither of Mr Drysdale's daughters had any involvement with the 1995 transactions, nor did Mr Trodden.

[10] The firm of Johnston & Herron is now dissolved and all of its files have been destroyed. The original items of correspondence which comprised the missives are not available but copy letters have been produced.

The sale of part of Cavelstone Farm

[11] Some of the evidence identified above was uncontroversial and some other parts could quite easily be assessed. I was therefore able to reach a number of conclusions with a sufficient degree of certainty and could use these to assist in the analysis of the more controversial matters. I shall set out the evidence relating to the sale of the farm and include at this stage the straightforward decisions which I was able to arrive at. I shall deal with my findings in relation to the more contentious aspects of the evidence later.

[12] In 1995 Mr Drysdale was sequestrated over a debt of around £10,000 which was owed to HM Customs and Revenue. In addition, the farming partnership owed in excess of £200,000 to its bank. The farm was offered for sale in four Lots. Lot 1 was the farmhouse where Mr and Mrs Drysdale lived. Lot 2 was described as "The Farm Steading" and Lots 3 and 4 were separately identified areas of farming land. The guide price for all four Lots was £520,000.

[13] At this time Mr Purvis was interested in purchasing something in the nature of a farm steading which he had in mind to use as storage and working facilities to assist in his then hobby of vintage vehicle restoration. Having become aware of the sale he was interested in purchasing the steading at Cavelstone Farm. The farm was located near to where he lived and whilst the buildings on the steading were in a very poor condition he had the knowledge and facilities through his construction company to carry out repairs or rebuild as necessary. Initially, he had no interest in obtaining any of the farmland.

[14] Whilst the farmhouse and the steading were described as separate Lots on the first page of the sales particulars prepared by McCrae and McCrae, on the second page there was a plan or drawing of what was described as "Cavelstone Farm Steading". This plan showed five individually numbered buildings, the first of which was the Farm House, despite the fact that it was described as Lot 1 earlier in the particulars. This plan also made it clear that there were two further buildings included in the steading, a general purpose shed and a grain silo, neither of which was shown.

[15] Having had a number of meetings with Mr Drysdale, Mr Purvis came to be told about the reason for the sale and learned from Mr Drysdale that he would prefer only to sell off enough of the farm to clear his debts and would ideally like to stay on living in the farmhouse. Mr Purvis knew that there were other interested purchasers and decided to

make an offer which might allow him to acquire enough of the steading and permit Mr and Mrs Drysdale to remain living at the farmhouse and farming part of the land. This required him to offer to purchase sufficient of the farmland to enable the offer to be competitive. A closing date for offers of 7 August 1995 was fixed.

[16] Whilst the precise steps in the process were unclear, I am satisfied that Mr Purvis instructed Mr Johnston to make an offer on behalf of him and his wife in the terms of the copy letter from Johnston & Herron dated 7 August 1995, production 6/1 in the rectification action. This letter bore Mr Johnston's name as the relevant contact. It was addressed to his own firm, since they were also acting as the seller's solicitors.

[17] The offer was to purchase, for the price of £285,000:

> "ALL and WHOLE that plot or area of ground extending in total to 132.455 acres or thereby of Cavelstone Farm, Kinross, being the subjects outlined in pink on the copy plan attached and signed as relative hereto, including those outbuildings and the parts of those outbuildings shown hatched in red on the second plan headed 'Cavelstone Farm Steading' attached and signed as relative hereto, but expressly excluding the cottage and land pertaining thereto outlined in pink on the plan in the middle of the subjects of sale, all as seen by our client and that on the following terms and conditions …"

[18] It is therefore plain that there were two plans attached to this letter, as there are attached to the copy letter produced. The second plan referred to is a copy of the plan or drawing of the "Cavelstone Farm Steading" which was part of the sales particulars. Consistent with the decision which Mr Purvis had arrived at, the hatching on this plan indicated that he was offering to purchase approximately two thirds of the steading area leaving out of the offer the farmhouse and the parts of the buildings identified as numbers two and three which were nearest to the farmhouse.

[19] The first plan referred to in the letter of offer appears to be part of an ordnance survey map prepared by McCrae and McCrae and shows the farm buildings and

surrounding land with the areas of land contained in the offer outlined. The offer to purchase, as identified in that plan, refers to part of Lot 3 and part of Lot 4. The effect of the offer of 7 August, if accepted, would have been to allow Mr Purvis to acquire most of the steading and a significant amount of surrounding land, leaving Mr and Mrs Drysdale with the farmhouse, part of the steading in front of it and some surrounding land.

[20] The evidence which Mr Purvis gave about why he wanted to buy the steading was given in an honest and reliable fashion and I have no difficulty in accepting it. Furthermore, Mr Johnston, who had acted for Mr Purvis for a number of years, recollected being told in the course of taking his instructions in the transaction that he wished to acquire the farm buildings because of his interest in renovating vintage vehicles. Mr Ferris had a recollection of being told the same by Mr Purvis.

[21] I reject the contention suggested in the pleadings, although not supported to any extent in the evidence, that Mr Purvis may have had an interest in developing any part of the farmland for residential or other purposes. I also accept Mr Purvis's evidence as to why he came to make the offer in the terms which he instructed. I accept that he took a liking to Mr Drysdale and felt sorry for him and his wife in the predicament in which they found themselves, that he came to decide that he could get on with Mr Drysdale and that operating part of the farm could be an attractive hobby for him. I accept that he discussed his proposal with Mr Drysdale and decided to make an offer which would allow him and his wife to remain living at the farmhouse and farming part of the land. However, I also accept that the essential part of the offer as far as Mr Purvis was concerned was the steading.

[22] Mr Johnston was also acting for Mr Ferris, whom he considered to be his client in relation to the sale of the property. He had acted for Mr Ferris in connection with a number of other matters. Mr Ferris was keen to allow the Drysdales to remain on the farm if that

was feasible. In the expectation that matters would proceed smoothly, Mr Johnston was also prepared to act for Mrs Drysdale who had an interest as the other partner in the firm of Robert Drysdale Farmers. Strictly speaking, Mr Drysdale had limited, if any, legal right to influence the sale but the discussions had been between him and Mr Purvis.

[23] On the closing date a number of offers were received. The next clear and undisputed step in the transaction occurred on 24 August 1995. On that date Johnston & Herron wrote a qualified letter of acceptance to Mr and Mrs Purvis but addressed to them at the firm address at Lochgelly, in other words addressed to themselves. The first qualification concerned what the subjects of sale were to be. They were specified as being 170 acres, as outlined in blue on the copy plan annexed and signed as relative thereto. The second qualification was that the price was to be £280,500. Various other qualifications were also listed which have no relevance for present purposes. I am satisfied that the qualified acceptance of this date was in the terms of the copy letter from Johnston & Herron dated 24 August 1995, production 6/2 in the rectification action.

[24] This letter bears Mr Baxter's name as the relevant contact. That same day a letter with Mr Johnston's name as the relevant contact, but bearing a reference which could be attributable to either him or Mr Baxter, was written to Mr Ferris, again at Johnston & Herron's Lochgelly address, intimating that, as instructed by Mr and Mrs Purvis, the terms of the offer of 24 August were accepted and the bargain was concluded. I am satisfied that the letter of acceptance of this date was in the terms of the copy letter from Johnston & Herron dated 24 August 1995, production 6/3 in the rectification action. What this comes to is that correspondence in the form of an offer, a qualified acceptance and a final acceptance was all passed from one file to another within the same office of Johnston & Herron.

[25] Unfortunately, no copy plan is attached to the copy qualified acceptance letter available. Parties proceeded upon the basis that the plan attached to the original letter identified the same areas of land as the plan attached to the disposition dated 25 and 27 September. I am satisfied that this is correct.

[26] There were significant differences between what was reflected in the plan attached to the qualified acceptance and the two plans attached to the offer of 7 August. The first difference was that instead of the land in part of Lot 4 which had been outlined in the first plan attached to the 7 August letter, running broadly to the north and north-west of the steading, the area of that Lot over the dismantled railway line to the north and east of the steading was specified. The second difference was that the area of land in Lot 3 specified in the 7 August letter was extended to include further land broadly to the south, south-east and south-west of the steading. The third difference was that the area outlined in blue on the plan delineating the subjects of sale in the qualified acceptance excluded the steading entirely. No reference at all was made to the second plan headed "Cavelstone Farm Steading" which had been attached to the 7 August offer.

[27] The disposition which was prepared and signed reflected only the land as identified in the qualified acceptance letter of 24 August. Accordingly, Mr and Mrs Purvis did not obtain title to any part of the steading.

[28] This is where the evidence enters its more controversial stage. It is notable that a period of nearly 3 weeks passed between the closing date and the issuing of the qualified acceptance. That of itself suggests that there were further developments. Mr Purvis's evidence might provide part of the explanation of what those developments were. His evidence was that on the closing day he received a telephone call from Mr Johnston telling him that his offer had been accepted. He said that he was also told that Mr and

Mrs Drysdale wished to meet with him at the solicitor's office to discuss a request which they had and that he did so. He explained that at the meeting Mr Drysdale asked if he would be willing to modify his offer by swapping some of the fields which had been included in his offer for other ones so that Mr Drysdale could retain the fields for which grants were received. Mr Purvis said he was content to do this as it did not matter to him which fields he had so long as they were adjacent to each other. At a later stage, once the relevant field numbers had been identified, Mr Johnston was informed of the change. Whilst Mr Johnston had no recollection of Mr Purvis meeting with the Drysdales in his office he did explain that he was informed that the land to be specified in the offer was to be changed and that he recollected discussing this with Mr Ferris. Although he did not claim to have a specific recollection of doing so, Mr Johnston's evidence was that an amended plan must have been produced identifying the modified agreement as to the land that was to be purchased and that he would have checked the accuracy of this with Mr Purvis. Mr Purvis and Mr Johnston both made clear that there was never any suggestion that Mr Purvis had abandoned his interest in obtaining the steading buildings.

[29] The relevant documents were passed by Mr Johnston to Mr Baxter who was given the task of drafting the qualified acceptance, although it was signed by Mr Johnston. Mr Baxter also drafted the disposition. The exclusion of the steading from these documents was described by Mr Johnston as a catastrophic error on the part of his firm. In deleting the entire preamble of the 7 August offer the qualified acceptance omitted to take note of the fact that there had been two plans referred to in that preamble, one identifying the farming land, or fields, to be purchased and the other identifying the buildings and the part of the steading to be purchased. The qualified acceptance ought to have specified the revised agreement as to which fields were to be purchased but should not have diluted the offer to purchase the

steading and buildings to any extent at all. Mr Johnston also signed the letter of 24 August concluding the bargain. The disposition as drafted by Mr Baxter reflected the terms of the qualified acceptance. Johnston & Herron's invariable practice was to send copies of offers to purchase to their clients. Mr Purvis broadly accepted that he did receive letters concerning the transaction from Johnston & Herron but his position was that he did not read them. He also acknowledged seeing the disposition and reading it to some extent but did not spot that the steading was excluded.

[30] On this evidence, neither the missives as concluded nor the disposition accurately reflected the agreement which Mr Purvis understood he had entered into. The matter does not end there though. Mr Purvis was only one party to the transaction. On 12 September 1995, Mr Johnston wrote to Mr Drysdale at Cavelstone Farm enclosing a copy of the disposition which was due to be granted and asking him to check over carefully what was narrated regarding boundaries and reserved rights. He asked Mr Drysdale to contact him immediately if he had any queries or corrections. No response appeared to have been received.

[31] The next stage in the progress of the transaction was the signing of the disposition. Mr Ferris signed both the deed and the plan attached to it at his office in Kirkcaldy on 25 September 1995 in the presence of Mr Baxter. On 29 September both the deed and the plan were signed at Johnston & Herron's office by Mr and Mrs Drysdale, as trustees for the firm or former firm of Robert Drysdale Farmers, and by Mrs Drysdale as an individual. On this occasion Mr Johnston acted as witness and, like Mr Baxter, signed the testing clause but not the plan.

[32] There was evidence from Shona Drysdale that both her mother and father were careful individuals who would have checked the details of any transaction which they were

asked to sign. Mr Trodden had acted for both Mr and Mrs Drysdale for over 10 years before the sequestration. He considered Mr Drysdale to be a man who was meticulous in relation to record-keeping and was not the kind of person to just sign what was put before him without checking the detail. In his opinion Mrs Drysdale was the same.

[33] The evidence concerning Mr and Mrs Drysdale's actions might suggest that they understood the agreement which had been entered into related only to the sale of some of the land. Mr Ferris's signature to the plan also lends support to the proposition that this was the extent of the final agreement. Mr Baxter did not seem to have had any discussions with anyone as to the extent of the agreement but Mr Johnston's signature adds a further feature which calls into question the precise extent of the agreement.

[34] There is a further dimension to take account of. Shortly after the disposition was signed Mr Purvis effectively took possession of the parts of the steading identified in the 7 August letter. He also took possession of the fields identified in the disposition. Over the next few years he engaged in substantial work on the buildings. He replaced the roofs on all of the buildings and the stone arches in the stables area. Various walls were rebuilt and new doors fitted. Concrete flooring was laid and electricity installed. One very large building, referred to as a shed, but of the size that one would see in an industrial complex, was built from new. Another of broadly similar size was renovated from the remains of an older building. Planning permission was applied for by Mr Purvis in relation to the first of these two buildings to be constructed. The buildings on the steading were used by Mr Purvis for purposes including the storage of grain. In effect, Mr Purvis treated the part of the steading which he had identified in his original offer to purchase as his own and completely transformed it. Mr Purvis came to spend much of his free time at the farm with members of his family and became good friends with Mr and Mrs Drysdale.

[35] He also gave authority to others to use the steading. Mr Smith was an investment manager based in Edinburgh whose hobby was farming Christmas trees. He grew these in a field he had rented from Mr Purvis since 2010. At harvest time he used the hard standing of the steading to store the trees on. Mr Baird was a farmer who undertook the management of Mr Purvis's fields and who kept his machinery from time to time in one of the sheds on the steading. The only tenable explanation for all of the work undertaken and expense incurred is that Mr Purvis genuinely thought that the disposition had conveyed to him the larger part of the steading in addition to the land.

[36] This evidence might also shine some light on what Mr and Mrs Drysdale's understanding was. Plainly, they were well aware of the transformation brought about by Mr Purvis and of his constant use of the steading. The evidence was to the effect that Mr Drysdale was a man of few words but who could be abrupt and was not slow to speak his mind. Mr Smith and Mr Baird both spoke of encounters which they had experienced with him to this effect. No one suggested that he was the kind of person who would put up with others interfering with his property. Quite the opposite. Despite this, no issue was ever raised about Mr Purvis's use of the steading until early 2018 at which point communications began between Mr Purvis and Mr Drysdale's daughters. The background to this was that there had been a fire in one of Mr Purvis's sheds in 2017. Mr Purvis was of the view that Mr Drysdale was not managing to look after himself as well as he had by then and there had been some discussions between himself and some of Mr Drysdales daughters during the course of which ownership of the steading was mentioned. Later in 2018 Mr Drysdale suffered a stroke from which he never recovered sufficiently to return to the farm. By this stage a degree of acrimony had arisen between Mr Drysdale's daughters and

Mr Purvis and there was a dispute about ownership of the steading during which the position as set out in the titles became clear.

[37] No proposition was put to Mr Purvis which might explain why he was allowed to intromit with the steading to the extent that he did. In the declarator action it is averred that Mr Drysdale allowed Mr Purvis to build two sheds on the steading and to carry out works to various other parts of it "in the spirit of neighbourly co-operation". Even this was not suggested to him in cross-examination. To the extent that there was any explanation it came from Shona Drysdale and Fay Orr. Each gave some rather limited evidence to the effect that they had been told by one or other, or both, of their parents that Mr Purvis was a wealthy man who had workmen and just wanted to help them, or that he had more money than sense.

The rectification case

[38] In the rectification case the Purvises seek a declarator that the missives entered into were of the tenor of the copy letters produced and that the plan referred to in the letter of 24 August was in all material respects the same as the plan annexed to the disposition. They seek various other decrees of declarator, all leading up to the conclusion for rectification of the missives and of the disposition so as to include the area of the steading specified in the letter of 7 August 1995.

[39] Lord Davidson invited me to accept the combined evidence of Mr Purvis, Mr Ferris and Mr Johnston as being credible and reliable. On that evidence he invited me to conclude that the common intention held by Mr Purvis, Mr Ferris and, to the extent relevant, by Mr and Mrs Drysdale, was that the part of the steading identified in the plan attached to the 7 August letter was to be purchased by the Purvises and conveyed to them. He invited me

to accept the evidence given by Mr Johnston, as further informed by the evidence of Mr Baxter, that there had been an error in the framing of the qualified acceptance and the disposition with the consequence that the steading area had been incorrectly excluded. He invited me to conclude that there had never been a change of mind by any of the parties about the steading and to accept Mr Johnston's evidence that those who had signed the disposition and plan must have done so without realising the error which it contained.

[40] I was reminded that Mr Drysdale's daughters had not been involved in any of the discussions around the 1995 transactions. To the extent that, in their view, their father would not have sold the steading, or would have told them if he had, I was invited to hold that they were simply speculating and to set their evidence aside.

[41] In these circumstances the provisions of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ("the 1985 Act") were met and the court should order rectification of the missives and the disposition as concluded for.

[42] Mr Moynihan invited me to conclude that, on the evidence, there had been no common intention of the sort relied upon. There had not been a failure to express a prior common intention. The error on the part of Johnston & Herron lay in the firm's failure to take instructions from Mr Ferris prior to issuing the qualified acceptance and perhaps also from Mr and Mrs Drysdale. On the evidence of Mr Purvis, the court should decide that the firm concluded missives without taking his instructions and without checking with him that the boundaries of the land in the missives corresponded to the land that he wished to buy. By the date of the qualified acceptance there was no common intention. The parties had diverged. The application for rectification was an attempt to rewrite the history of the transaction. Section 8 of the 1985 Act did not apply and the application for rectification could not be granted.

[43] Secondly, it was submitted that the action on behalf of Mr and Mrs Purvis sought to combine, by cherry picking, the steading from the offer of 7 August and the fields identified in the qualified acceptance of 24 August. Thus the action sought to construct a hybrid subjects of sale and there was no evidence that this hybrid reflected the common intention of the parties to the agreement. This was plain from the affidavit of Mr Ferris in which he stated categorically that he did not agree to any change in the farmlands and did not agree the terms of the qualified acceptance. Again, on this basis, the test in section 8 of the 1985 Act had not been met and the application for rectification could not be granted.

[44] A third submission in opposition to rectification was also advanced. I was invited to hold that the available evidence was inconsistent with the conclusion that Mr and Mrs Drysdale had any intention to sell the hybrid subjects. The inference to be drawn from the evidence was that they would have intended to implement the transaction as it was framed in the qualified acceptance and in the disposition, as this gave them the money required to secure Mr Drysdale's discharge from sequestration while leaving them with an operational farm for the future.

[45] This inference, it was submitted, should be drawn on an analysis of the evidence which did not focus simply or principally on Mr Purvis's intention. The Drysdale's intention was only to sell such part of the farm as was required to secure the discharge from sequestration. That was what Mr Purvis had been told and it is admitted in the answer to article 5 of condescendence. According to the evidence given by Shona Drysdale, the small area of the steading which was left out of the 7 August offer would have been insufficient to support an operating farm. The evidence given by Mr Johnston made it plain that Mr Ferris approached his duties in a sympathetic manner and would have been keen to discharge the debt while minimising the impact on the bankrupt if he could do so. There was no evidence

that the Drysdale's were willing to accept the 7 August letter. Their intention could be deduced from the terms of the qualified acceptance of 24 August which was issued with the consent of Mrs Drysdale. It was in reality a counter offer running in the name of Mr Ferris with the consent of Mrs Drysdale. The Drysdale's would have had no reason to apprehend that this qualified acceptance had not been instructed by Mr Ferris. Anyone reading the final acceptance issued on behalf of Mr and Mrs Purvis would assume that it had been issued in implement of instructions from them and would assume that the Purvises were content with the qualified acceptance. The Drysdales were provided with a set of missives by letter dated 25 August. The inference which should be drawn is that the Drysdales' intention was to enter into a contract in terms of the concluded missives. This was supported by the terms of the letter to Mr Drysdale on 12 September which enclosed a copy of the disposition and asked him to check over carefully what was narrated regarding boundaries and reserved rights.

[46] The signing of the disposition followed on seamlessly from what had preceded. The Drysdales would have had no reason to doubt that the Purvises were content to restrict the purchase to the land specified in the qualified acceptance. From their perspective there was no mistake to draw attention to. The disposition was signed because it achieved their intention. They were honest people who would have drawn attention to an error in the wording of any of the documents if they had been aware of one. They would have been entirely unaware that Johnston & Herron had made an error by failing to take the instructions of Mr Ferris and Mr and Mrs Purvis in concluding the missives. On this third basis it could therefore be seen that the Drysdales had no intention to sell the hybrid subjects and there was no common intention which could form the basis of rectification under the 1985 Act.

The application of section 8 of the 1985 Act

[47] So far as relevant, section 8 of the Act provides as follows:

> "8 Rectification of defectively expressed documents
> (1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that –
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made: or
> (b) a document intended to create, transfer, vary or announce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention.
> (2) For the purposes of subsection (1) above, the court shall be entitled to have regard to all relevant evidence, whether written or oral."

[48] In the present case the application for rectification founds on subparagraph (a) of subsection (1) and section 9 has no application. The essential requirements for the application of this power are that an antecedent agreement must have existed, that the parties to that agreement must have intended that it be expressed in a document and that the document fails accurately to express that common intention. The earlier agreement reached does not have to be legally binding but the court may require to take a different approach depending upon whether it is or is not.

[49] In the case of *Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* 2013 SLT 729 Lord Hodge set out a helpful analysis of section 8. He proceeded upon the view that whenever the court is asked to rectify a bilateral or multilateral document under this provision of the Act it has to assess the existence of the antecedent agreement and the common intention of the parties objectively. In so doing he drew upon the provisional view expressed by Lord Reed to the same effect in *Macdonald Estates Plc* v *Regenesis (2005)*

Dunfermline Ltd 2007 SLT 791. Since those decisions were issued there has been further analysis of the approach to be taken to rectification in the cases of *FSHC Group Holdings* v *GLAS Trust Corp Ltd* [2020] Ch 365 and *Briggs of Burton Plc* v *Doosan Babcock Ltd* [2020] CSOH 100.

[50] In the *FSHC* case, the Court of Appeal for England and Wales conducted a comprehensive analysis of the English law of rectification and concluded that the well-known obiter observations of Lord Hoffmann in the case of *Chartbrook Ltd* v *Persimmon Homes* [2009] 1AC 1101, to the effect that a common continuing intention had to be established objectively, regardless of whether or not the antecedent agreement had been a binding one, was to be departed from. In arriving at his decision in the *Patersons of Greenoakhill* case Lord Hodge had drawn on Lord Hoffman's analysis, which he explained he found persuasive.

[51] In arriving at its decision the Court of Appeal in *FSHC* identified that two distinct forms of rectification were available under English law, the second of which applied to circumstances in which parties had not made any prior enforceable contract but had a common continuing intention in respect of a particular matter in the document sought to be rectified. As the court explained at paragraph 146, the justification for rectifying a contractual document to conform to a continuing common intention rested on the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) those terms to be when the document was executed. As the court explained, this basis for rectification is entirely concerned with the parties' subjective states of mind.

[52] At paragraph 58 of his decision in the *Briggs of Burton* case, Lord Tyre noted that there is no basis in the 1985 Act for adopting this approach of two distinct forms of

rectification but nevertheless considered that assistance could be obtained from the discussion in *FSHC* when it came to identifying the principles to be applied in interpreting the word "intention" in section 8(1)(a). Having conducted a careful and detailed analysis of the decision in *FSHC* and the relevant Scottish authorities, Lord Tyre set out his conclusion at paragraph 62 of his opinion as follows:

> "[62] I respectfully agree with the conclusion of the Court of Appeal in *FSHC* that there is no anomaly in applying an objective test where rectification is based on a prior concluded contract and a subjective test where it is based on a common continuing intention derived from an earlier non-binding agreement. Looked at in the context of interpretation of the word 'intention' in section 8(1)(a), which in my view clearly refers to intention at the time of execution of the document whose rectification is sought, in the former case the relevant principle is that parties should be required to adhere to their contractual obligations, and accordingly that they should be presumed to intend that the document will reflect the common intention expressed in that contract. In the latter case, however, where the parties have reserved the right to depart from the antecedent agreement, no such assumption should be made, and the starting point is rather that their respective rights should be determined by the contract into which they enter with the intention of being bound by it."

[53] *Briggs of Burton* was a case where non-binding heads of terms had been entered into concerning the terms of a sublease to be granted which were then departed from in the terms of the sublease itself. In an application for rectification of the sublease the point which arose for decision was whether the existence of a continuing common intention as at the date of the document felt to be assessed objectively or subjectively. The issue arose in the context of the missives which were drafted by the parties' solicitors following on from the agreement of the heads of terms and whether effect should be given to the content of a draft sublease circulated by the solicitor for the defender. For the purposes of the present case it is instructive to take note of the approach which Lord Tyre explained at paragraph 59 of his opinion where are he said:

> "[59] For my part, I share the concerns expressed in *FSHC* in particular about objectively attributing a common continuing intention to parties where one of

> them has, as a matter of undisputed fact, changed his intention during the period since entering into an expressly non-binding agreement. Mere change of intention is not, of course, of any significance unless it is communicated to the other party. But what is sufficient to constitute communication?"

[54] I shall consider the extent to which any of these observations apply to the facts of the present case in setting out my conclusions on the evidence led.

Conclusions on the evidence

[55] I shall now consider what to make of the evidence in this the more controversial chapter of the rectification case. I am perfectly satisfied that Mr Purvis's initial and principal interest was in acquiring the steading area at Cavelstone Farm. I accept his evidence that he had a number of discussions and meetings with Mr Drysdale about this interest. It is admitted that the Drysdales would have preferred not to have to sell all of the farm. I accept Mr Purvis's evidence that he discussed this with Mr Drysdale and that he told Mr Drysdale he had no interest in the house. I accept his evidence that he agreed with Mr Drysdale that he would put in an offer for part of the steading so that he would be left with the house. I accept his evidence that he appreciated he would need to offer to buy sufficient of the land to make his offer attractive. I accept that at no stage did he change his mind about wishing to purchase the steading. Accepting this evidence means that Mr Drysdale and, by inference Mrs Drysdale, knew what offer Mr Purvis was going to make. The inference which I draw is that they hoped it would be successful.

[56] I turn now to consider what happened at the offices of Johnston & Herron. Mr Baxter recollected a number of offers being received and this is consistent with the account given by Mr Ferris in his affidavit. Mr Ferris stated that he was present at the offices of Johnston & Herron on the closing date and had a discussion with Mr Johnston,

following which he agreed that the offer from Mr and Mrs Purvis should be accepted. It makes sense that he would be present. This was the only sequestration in which he had ever been appointed by HMRC. He plainly took his responsibilities seriously and had earlier visited the farm to discuss matters with Mr Drysdale. It is also obvious that he would require to give instructions to Mr Johnston as to which offer was to be accepted. This aspect of his affidavit is also consistent with another part of the evidence which I accept, namely that Mr Purvis received a telephone call from Mr Johnston on the closing date to tell him that his bid had been accepted. That chimes with the whole purpose of fixing a closing date.

[57] Furthermore, it makes sense that the Drysdales would also be present at the office of Johnston & Herron. Not only would they be interested in what was to happen but Mr Johnston plainly had it in mind that at least Mrs Drysdale's consent would be necessary. Although he could not remember them being present, Mr Ferris acknowledged that it would be logical that they would be there. I am therefore satisfied that it is correct to proceed upon the basis that Mr Ferris and both Mr and Mrs Drysdale were in attendance at Mr Johnston's office on the 7 August 1995 for the purpose of giving instructions on the offers received.

[58] The fact that Mr Purvis was told his offer had been accepted therefore demonstrates, contrary to Mr Moynihan's submission, that there was evidence that the Drysdales were willing to accept the offer of 7 August. Further evidence to this effect came from what Mr Purvis explained about the discussions he came to have with the Drysdales later that day. Accordingly, the combined evidence satisfies me that both Mr Ferris and the Drysdales were content to accept Mr and Mrs Purvis's offer of 7 August 1995.

[59] What then is to be made of the fact that a different package of land was subsequently referred to in the qualified acceptance and the disposition?

[60] I accept that Mr Purvis was told that the Drysdales had a request to make of him and that he did meet with them. Although Mr Johnston's evidence and Mr Purvis's evidence was not at one on this, I am satisfied that I can accept what Mr Purvis said. This was but one transaction for Mr Johnston; it was a matter of significance to Mr Purvis. Mr Johnston's recollection was poor or non-existent in relation to some of the details and he had even forgotten that he gave an affidavit as recently as September 2020 which was to be used in the case.

[61] It seemed to me to be obvious that Mr Purvis was giving truthful and reliable evidence when explaining that Mr Drysdale asked if he would be prepared to swap certain of the fields. There is no other sensible explanation for the fact that the land specified in the disposition came to be different from that specified in the 7 August offer. So far as can be told, that request was merely an effort on the part of the Drysdales to improve their situation. That fits with how Mr Purvis described their attitude at the meeting. Any suggestion that they might have sought to prevent the transaction from proceeding in terms of the original offer had Mr Purvis not been prepared to agree to a swap would just be speculation.

[62] Mr Purvis was of course prepared to agree to the swap for the reasons which he gave. Mr Johnston understood that there had been discussions between Mr Purvis and the Drysdales and that a changed agreement had been reached between them about the particular areas of land to be conveyed. That was his recollection and it is obvious that there must have been a communication of this sort made to him, given that a different package of land subsequently came to be specified in the letter of 24 August which came from his firm. Whatever communications there were must have been with Mr Johnston, since Mr Baxter had no dealings with either the Drysdales or Mr Purvis, at least until much later.

[63] I also accept, as Mr Johnston said, that there must have been a revised plan prepared to show the areas of the farming land to be disponed and that this must have been made available to Mr Purvis for him to ensure that it reflected what he wished to purchase. This whole process is consistent with the fact that there was no immediate written response to the offer of 7 August and that some time passed before a reply came to be formulated.

[64] It is also obvious that the farming land specified in the disposition was what Mr Purvis and the Drysdales had agreed to in their final discussions, since Mr Purvis took over the land specified and the Drysdales continued to farm the remaining area. This in turn makes it plain that the farming land specified in the disposition was the same as that identified in the qualified acceptance.

[65] The position of Mr Ferris remains to be considered. The evidence which he provided by way of affidavit acquires no different status from any other evidence. The extent to which the content of his affidavit should or should not be accepted as reliable evidence falls to be judged by weighing it against any other reliable evidence and against the extent to which Mr Ferris himself was able to vouch for the reliability of his recollection. By the time he gave evidence Mr Ferris had very little memory of any of the matters to do with the transaction and no reliable recollection of any detail. There was no reason to think that his memory was significantly better when he gave his affidavit a little over a year earlier.

[66] In these circumstances, and for the reasons given above, I accept that part of his affidavit in which he explained that he was present and agreed the acceptance of the Purvis offer. He went on to state that categorically he did not agree to nor was asked about a change in any of the farmlands which appears to have been implemented thereafter. I have difficulty in accepting this statement. Mr Johnston plainly knew that there was a change in the land package proposed. He was clear that Mr Ferris was his client in relation to the sale.

It would be quite inconsistent with the duty and conduct of an experienced and reputable solicitor to deliberately give effect to this proposal without the authority of his other client, the seller. Mr Johnston was asked who would have instructed the change in the land and he replied that he had a recollection of further discussions with Mr Ferris. I infer that he must have discussed this proposal with Mr Ferris. It would be a matter of no consequence to Mr Ferris that the parcels of land were to change with the price remaining almost the same and, crucially, still sufficient to satisfy the original purpose. The fact that the change in the land was identified in the qualified acceptance goes by inference to support the conclusion that Mr Ferris gave his agreement to this in the discussions with Mr Johnston.

[67] The next question to consider is what became of the part of the offer to purchase the steading? The steading was what underpinned Mr Purvis's whole interest in making an offer. This was known to Mr Johnston, Mr Ferris and Mr Drysdale. There was no evidence that anyone proposed or discussed removing the steading from the transaction. I cannot accept the proposition that the qualified acceptance should be seen as a counter offer from Mr Ferris which deliberately excluded the steading. There would be no reason for Mr Ferris to suggest such a thing, given that he was content with the original offer and that he knew of the reason for Mr Purvis's interest in the steading. Even if he had, Mr Johnston would have been bound to raise that with Mr Purvis directly given his knowledge of his long-term client's reason for making any offer at all. Had this been suggested to him I am confident that Mr Johnston would have remembered it. The basis of Mr Moynihan's third submission was a little more subtle however. The argument was that the Drysdales would have assumed that Mr Ferris must have intervened in this fashion to protect their interests and that they would have no reason to question this. They would then understand that the original deal had been modified twice, first by changing the precise land to be disponed and

second by removing the steading from the sale. On this basis it could be said that there was no common intention which extended to sale of the steading.

[68] I do not accept this analysis. Apart from there being no evidence to support it, the entire proposition is undermined by what occurred later. Mr Purvis took possession of the larger part of the steading and proceeded to transform it. He did so with the knowledge and, at times, active participation of Mr Drysdale. He treated it as if it was his own, to the obvious knowledge of Mr and Mrs Drysdale. I do not accept that Mr Drysdale would simply have stood by and allowed Mr Purvis to occupy and build upon land and allow him to renovate buildings, which he believed to be his, over many years, without raising the matter with him. The evidence demonstrates that Mr Drysdale was the kind of man who would state his mind and was not slow to enter into disagreement with others. I am satisfied that if either Mr or Mrs Drysdale had any reason to think that the original agreement to include part of the steading in the sale had been departed from they would have voiced this understanding and raised it with Mr Purvis or with others, such as Mr Ferris or Mr Johnston or, for that matter, with their own lawyer Mr Trodden.

[69] There remains the fact that Mr Purvis would have been given a copy of the qualified acceptance yet raised no query and the fact that the Drysdales received the letter of 12 September, and signed the disposition, again without any query being raised.

[70] As to the first of these points, I accept the evidence of Mr Purvis who explained that he did not pay any real attention to the correspondence he received from Johnston & Herron. As he explained, with a certain sense of logic, he thought nothing could possibly go wrong if the same solicitor was acting for everyone.

[71] I am satisfied that nothing should be taken from Mr Ferris's signature on the disposition. He appears to have put his faith and trust in the solicitors whom he used on a

number of occasions. There is no reason to think he would have had any doubt but that the disposition accurately reflected the agreements which he had been party to.

[72] The signatures of Mr and Mrs Drysdale are more concerning. However, I reject any suggestion that they might or must have changed their minds. I cannot accept that they would have allowed Mr Purvis to act as they did over all of the years that followed if they had changed their minds about selling the steading, or if they thought that he had backed out of buying it. They became good friends with Mr Purvis and, it would seem, were grateful to him for the approach which he had taken in making an attractive offer which allowed them to remain living in their farmhouse.

[73] Mr Purvis wanted to buy the steading and the Drysdales knew this. He made an offer which included the steading and the Drysdales knew this also. There is no basis in the evidence to conclude that he changed his mind or that the Drysdales thought he had. After the disposition was signed Mr Purvis acted as if the larger part of the steading was his and the Drysdales knew this as well. Furthermore, the evidence which I shall come to outline in connection with the contract case demonstrates that Mr Purvis showed many kindnesses to the Drysdales and helped them in a variety of significant ways over the years which followed. The combined evidence does not support the view that the Drysdales would have been prepared to allow Mr Purvis to think the steading was his whilst all along knowing that it had been excluded in the disposition. There was evidence from a number of witnesses concerning the character of both Mr and Mrs Drysdale. They were spoken of with much affection. All of that evidence contradicts any suggestion that they would have possessed anything like the duplicitous character necessary to have conducted themselves in such a fashion.

[74] The only sensible conclusion to draw from what transpired over the many years which followed is that both Mr and Mrs Drysdale thought that the disposition had transferred ownership of the large part of the steading to Mr Purvis, just as it had transferred the parcels of land which had been agreed to.

[75] In the end of the day there is perhaps no one who would have a better understanding of what the parties to the transaction had in mind to agree than the solicitor who acted for all of them. It is clear from Mr Johnston's evidence that an error was made which had the result of excluding the steading. It seems likely that the error was contributed to by the passage of time between 7 and 24 August and that in the transfer of the papers from Mr Johnston to Mr Baxter sight was lost of the importance of the plan headed "Cavelstone Steading" and the part which it had in the transaction.

[76] I am not deterred from these conclusions by the evidence of Mr Drysdale's daughters. I have some reservations about the reliability of the evidence of Shona Drysdale and Fay Orr concerning the explanations given to them by their parents. There are two issues to consider, first, whether their evidence about what was said to them should be accepted as credible and reliable and, second, if it is, should the explanations which they were given be treated as truthful and accurate accounts on the part of their parents.

[77] The extent to which Mr Purvis occupied and used the steading would have been obvious if members of the Drysdale family were regular visitors. If either daughter was concerned enough to ask about what was going on, I find it difficult to accept that the explanations which they spoke of receiving could have carried any weight with an intelligent person of an interested disposition. As matters continued and the transformation increased over the years, one would expect that they would wish to further enquire with Mr and Mrs Drysdale quite what was happening. One might also imagine they would have

raised it with Mr Purvis. However, the evidence as given by each daughter suggested little more than a one off, or casual enquiry, which went no further in the conversation. Nor was there any form of detail in their evidence as to what in particular provoked any such enquiry, when it was made or with what level of concern or interest. Their evidence took no account of the fact that Mr Purvis's original interest had been in the steading and that it had been part of his original offer. It seems as though their parents never mentioned this part of the transaction to either daughter.

[78] I found this evidence unconvincing and felt bound to question in my own mind whether such statements were ever made by Mr and Mrs Drysdale. In any event, proceeding on the basis that explanations of the sort described were given, it seemed to me that they carried the tenor of an effort to dismiss the subject. It also appears that this is the effect which was achieved. The evidence of an occasional enquiry which was accepted without further discussion suggests to me a reluctance or inability to enquire into their parents affairs, perhaps in the knowledge that such would not be welcomed.

[79] Before determining what effect to give to these findings on the evidence it is helpful to return briefly to some of Lord Hodge's observations in the case of *Patersons of Greenoakhill*. He approached the matter on the basis that the court had to assess the existence of the antecedent agreement and the common intention of the parties objectively and, at paras [41] to [43] of his opinion, he explained what evidence he considered would be relevant for this purpose. Evidence of statements which one contracting party made to the other during negotiations about his intentions would be relevant because it would show that one was aware of the other's subjective view. As he explained, the court has to assess those statements and other manifestations of the party's intention to ascertain whether there was an agreement and also a continued shared intention at the time the document sought to be

rectified was executed. He also took note of the fact that the court might hear evidence from parties of their uncommunicated subjective intention as part of the way in which a witness gave his recollection of events but was clear that one party's uncommunicated intention would not be relevant in assessing the existence of the antecedent agreement or the common intention of the parties. What mattered was each party's intention manifested to the other by statement or conduct. He also accepted that it may be relevant to consider the conduct of the parties after they signed the impugned contractual document as that may cast light on their intention when they entered into the contract.

[80] Following this approach, and assessing the import of the evidence which I have accepted on an objective basis, a number of conclusions are arrived at. First, an agreement was reached on 7 August 1995 between Mr and Mrs Purvis, Mr Ferris and the Drysdales that there should be a sale of the part of the steading identified in the plan headed "Cavelstone Steading" and of some of the farmland surrounding it. Second, prior to 24 August 1995 all parties had agreed that the farming land to be disponed to Mr and Mrs Purvis was to be as specified in the plan attached to the qualified acceptance of that date. Third, there had been no change in the agreement that the part of the steading specified was to be included in the sale. Viewed objectively, the agreement which all parties entered into was for the sale of the larger part of the steading along with the land identified in the plan attached to the 24 August letter. As it happens, the evidence which I have accepted permits the same conclusion to be drawn on a subjective basis, in other words this is actually what all of the parties had in mind.

[81] In the present case there is no evidence of an uncommunicated subjective intention. To that extent the circumstances are quite different from those which existed in each of the cases of *FSHC* and *Briggs of Burton*. The analysis of the evidence which I have set out

however does permit me to conclude that the actual common intention of all three interested parties, the Purvises, the Drysdales and Mr Ferris, remained the same throughout, namely that the larger part of the steading was to be included in the sale. This is consistent with what was in the minds of all at the beginning of the process, it is consistent with what happened on 7 August, it is consistent with the fact that there was no evidence of any change of mind on this point and it is consistent with what happened over the many years which followed the grant of the disposition. So whether viewed objectively or subjectively, the evidence demonstrates that there was an antecedent agreement to include the larger part of the steading in the sale to Mr Purvis and both the missives and the disposition failed to express accurately that common intention which remained in place throughout. The weight of this evidence is sufficient to allow me to put aside any doubts which I harboured as a consequence of the signatures of Mr and Mrs Drysdale to the disposition.

[82] I accept that a high quality of evidence is required to persuade the court to grant rectification of written documents such as feature in this case and that the party bearing the burden of proof faces a stiff hurdle to overcome. In my opinion, the evidence led before me provides a cogent and compelling case for rectification and it would be an injustice to decline to give effect to it. I shall therefore order rectification of both the missives and the disposition. The consequence of this decision is that the action for declarator brought by Mr Drysdale must fail.

The contract case

[83] The basis of the contract case brought by Mr and Mrs Purvis is a claim that they entered into an agreement with Mr Drysdale that he would sell the remaining part of the farm which he still owned to them at a point in time which remained to be determined.

The first conclusion in the action is for declarator that an agreement was entered into to sell that part of the farm, at market value, but that the value of goods and services provided by Mr Purvis to Mr Drysdale would be deducted and that the sale would take place when Mr Drysdale retired from farming. The second conclusion is for declarator that Mr Drysdale retired from farming in 2018 and that he is accordingly under an obligation to sell the remaining part of the farm to Mr and Mrs Purvis. The third conclusion is for declarator that the Purvises have to date paid the sum of £352,868 towards the purchase price of the remaining part of the farm.

[84] The direct evidence in relation to this agreement came solely from Mr Purvis but there was a body of circumstantial evidence which lent support to his account. His evidence was that the prospect of purchasing the remainder of the farm was first raised with him by Mr Drysdale on 7 August 1995 during the course of the meeting which they had at the offices of Johnston & Herron. According to him, during the course of their conversation Mr Drysdale said to him "would I be right in thinking you'd be happy to buy the rest of the farm", to which he replied that he would and that this was something which could be discussed at a later date. The context in which the further discussions took place was that Mr and Mrs Purvis became good friends with both Mr and Mrs Drysdale through spending time at the farm and working on the various developments. They were frequently invited into the Drysdale's house for tea and scones when they were at the steading and their grandson also spent time at the farm house. On one such evening, around 2 to 3 years after taking possession of the steading, the subject was raised when all four were present. Mr Drysdale asked if the Purvises would be interested in buying the rest of the farm to which they replied that they would be delighted to do so. On Mr Purvis's understanding, it was settled from that point on that this is what would take place. It was agreed that a

valuation would take place and a price would be agreed upon. Although no timescale was fixed for this, Mr Purvis understood that within around five to ten years' time Mr Drysdale would want to give up farming and move out of the house. That would be the point at which the sale would take place.

[85] Matters developed differently however. A few years later Mr Drysdale required to replace the car which he used as it was no longer roadworthy. Mr Purvis agreed to sell him a car which his wife had been using for the sum of £9000. A few months after taking the car Mr Drysdale confided to Mr Purvis that he could not pay for it. There was a discussion which, according to Mr Purvis, made it plain that Mr Drysdale had very little income from the farm. Mr Purvis's evidence was that he offered to buy one field at a time in order to provide Mr Drysdale with money to keep going but that he was reluctant to accept that suggestion and proposed to Mr Purvis that if he did work for him then when it came time to value the farm there could be a deduction of what had been supplied to him and Mr Purvis would pay the balance. The pair settled on that agreement. Nothing was put in writing and the agreement proceeded on trust.

[86] After that, according to Mr Purvis, various pieces of work were undertaken on the land which it was understood Mr Drysdale had retained. The farm track which gave entry from the main road was entirely renovated to provide an attractive roadway, or long driveway into the premises. Over the years another three cars and finally a van were given to Mr Drysdale by Mr Purvis without payment. He also paid for the vehicles to be insured and MOT tested. There was no challenge to the broad claim that Mr Purvis did undertake significant work around the steading and at least some on the property and land retained by Mr Drysdale. There was no challenge to the evidence concerning the motor vehicles.

Mr Purvis allowed Mr Drysdale to use one of what he understood to be his sheds over many years so that he could store hay in it.

[87] A further piece of evidence of some significance concerned Mr Drysdale's use of some of the fields which had been purchased from him by Mr Purvis. It was accepted that Mr Drysdale had a keen interest in horses and kept a number of them, at times a large number. However, as Mr Purvis explained, he did not have sufficient land to accommodate them. He could not grow crops and allow the horses to graze in the same field and so he rented some fields from Mr Purvis in which the horses could graze, allowing him to continue to grow crops in his own fields. Mr Purvis's evidence was that the fields were rented throughout something in the region of 20 years. No payment of rent for the fields was ever made to Mr Purvis and the use of these fields was something which it was understood would be taken into account in the final process of reckoning.

[88] A further piece of evidence relied upon in support of the existence of an agreement was the purchase of a derelict cottage and plot of land which was owned by Mr Drysdale's sister, Elizabeth Shorthouse. This plot of land sat at the north end of the steading and was excluded from the original offer of 7 August 1995 as it was known not to belong to Mr and Mrs Drysdale. There is no doubt that this plot came to be purchased by Mr Purvis. He built a very attractive looking house for his grandson on it which can be seen in the photographs lodged with the joint bundle. In his evidence, Mr Purvis explained that Elizabeth Shorthouse approached him at some point around about 1998 and said to him that she understood he was buying the rest of the farm and did he want to buy this plot as well. If accepted, this evidence would suggest that she had been told by her brother of the arrangement.

[89] The most compelling evidence in support of Mr Purvis's account of an agreement came in the chapter of evidence about the building by him of a cottage near to the original

farmhouse on the part of the steading which Mr Purvis correctly understood to be owned by Mr Drysdale. This project began in around 2000 when Mr Purvis decided to change one of the buildings on the part of the steading which he understood he owned into what he called a day cottage, by which he meant somewhere that would have electricity, water and toilets and could be used to cook and to eat in whilst he and his wife were at the steading or working in their fields. As he explained it, when he told Mr Drysdale of this intention he suggested converting an old rundown bothy on his part of the steading as it would be nearer to the farmhouse for water and electrical connections. In the course of this discussion Mr Drysdale had said to him "well you are going to own it all one day anyway, what's the difference". Since they both understood that he would be acquiring all the land in due course it did not matter that the build would take place on what was then Mr Drysdale's land. The bothy at that time was in a state of ruin with no roof and only one gable end.

[90] Mr Purvis explained he took Mr Drysdale's offer up and began the renovation work. Before it was completed it became obvious that Mrs Drysdale's health was deteriorating and he was approached by three of her daughters who enquired whether he would be able to build a house on the farm for their mother and father if they were in a position to fund it. He acknowledged that this could be done but that it would take around 2 years by the time permissions were obtained and work was completed. It was obvious that Mrs Drysdale needed a new home quickly. By this time the farmhouse in which she and Mr Drysdale were living was dilapidated and had no heating or hot water. He suggested that they move into the cottage that he was building as an interim solution to give the family time to make longer term plans.

[91] The work on the former bothy was then accelerated so as to provide a two bedroomed cottage for Mr and Mrs Drysdale. A "Dutch Barn" roof kit was installed so as

to provide an upper floor, a kitchen was installed, central heating installed, electricity connected and it was furnished by Mr and Mrs Purvis. The building was completed at a cost to Mr Purvis of around £100,000. Once it was finished Mr and Mrs Drysdale moved in and the daughters never mentioned the situation to Mr Purvis again. Mrs Drysdale stayed there until she died in 2007 and Mr Drysdale remained living there until being hospitalised in 2018. Throughout, no rent was asked for or paid. In addition, Mr Purvis paid for the central heating oil supplies and the electricity.

[92] Nothing about their agreement was put into writing by Mr Purvis and Mr Drysdale and no accurate or detailed running total of the sums outlaid or costs involved was ever kept, although Mr Purvis indicated he had kept a rough file of some of the costs involved. It was matter of trust between the two of them and the arrangement was that a mutual agreement about the costs to be deducted would be reached in discussion between them when the time came to implement the sale.

[93] At the proof two documents were spoken to by Mr Purvis in connection with the total sums outlaid by him over the years and which were relevant to his assessment of the sum to be deducted from the farm valuation. These were found commencing at pages 62 and 68 of the joint bundle of productions. The valuation of the remaining parts of the farm still owned by Mr Drysdale, as Mr Purvis understood it, was given in the first of these documents as £543,000. The sums set out as being due to be deducted were different in each. In the first the total was £352,868 and in the second it was some £190,000. The larger sum was said to represent a more accurate note of the sums involved.

[94] However, Mr Purvis insisted in his evidence that these were not to be treated as invoices. They were not prepared for the purpose of the litigation. They were rough indications of the sort of sums involved and had been prepared in 2019 in order to give

Mr Drysdale's daughters some indication of the value of the work and facilities which he had provided to their mother and father over the years. For example, a figure of rent for the furnished cottage over 15 years had been included giving a total of £72,000 but, as Mr Purvis explained, he had no intention of ever charging Mr and Mrs Drysdale rent, this was just to give an indication of the value of the facility. As he put it, he had no intention of ever putting either of them out of the cottage. In the end it was left too long, Mr Drysdale become frail and quickly deteriorated both physically and mentally before any final arrangement could be discussed.

[95] As set against this testimony, the evidence of Shona Drysdale was that her parents had never mentioned to her any arrangement to sell the farm and she thought that they would have mentioned something of such importance. So far as she was aware, they had not mentioned it to any of her sisters either. She did not think that her parents would have wanted to sell the farm it as it had been in their family for so long. She stated that her father had been asked about an agreement to sell the farm at a point when he was in the nursing home but had said that there was no agreement. Fay Orr's evidence did not advance the matter one way or the other. Reliance was also placed on the evidence of Paul Trodden who testified that he had seen Mr Drysdale at the farm on a few occasions between 1995 and 2017. There were no discussion about ownership of the land. He had prepared Mr Drysdale's will a year or two after Mrs Drysdale's death. His whole estate was to be left to his daughters.

Submissions

[96] Lord Davidson invited me to hold that Mr and Mrs Purvis and Mr and Mrs Drysdale agreed that the Purvises would buy out the balance of the farm not owned by him when

Mr Drysdale gave up farming at Cavelstone and that the purchase price would be the market value as at that time. He invited me to hold that subsequently an agreement was entered into that at the date of purchase a contra item to the price would be attributable to value transferred by Mr Purvis to the Drysdales since the time of the transfer of the car at an unpaid price of £9000 to the date of Mr Drysdale's retirement. He invited me to conclude that Mr Drysdale gave up farming in November 2018 on his departure from Cavelstone Farm. I was invited to conclude that on the balance of probabilities the figure of £352,868 given in the schedule to be found at page 62 of the joint bundle represented the appropriate figure which fell to be deducted from the valuation figure. Alternatively, I was invited to approach assessment of this relevant figure along the lines suggested in the schedule to be found at page 68. Failing which, Lord Davidson invited me to fix a further, or continued proof at which evidence could be led to establish the correct figure to be deducted. He submitted that there had been no real challenge to the figures produced by Mr Purvis and he drew my attention to the terms of article 16 of condescendence in the contract action and the answer thereto. The schedule produced at page 62 of the joint bundle was referred to in that article and the sum due specified as the figure of £352,868. It was incorporated into the pleadings. The answer on behalf of Mr Drysdale included the proposition that: "The defender's position in relation to the content of the schedule will, for convenience and clarity, be marked-up on the schedule".

[97] No such markings had ever been provided. Nor was any different sum suggested in evidence or submissions.

[98] Mr Moynihan set out a series of submissions which were designed to demonstrate how the contract action could not succeed if the rectification action failed. These fall away in light of my earlier conclusions.

[99] His principal submission was that the evidence in support of this action did not disclose the creation of an enforceable contract. There was no reliable evidence as to the event which would trigger any sale. It was averred in the pleadings that this was to take place when Mr Drysdale retired. In evidence Mr Purvis had explained that it would take place at the point when Mr and Mrs Drysdale left the farm. It was plain that they did this by moving to the cottage around 2000. Mr Purvis had given evidence that his own interest had waned and his health deteriorated so he never pushed the issue of the agreement with Mr Drysdale. The fact that he did not keep a running account of the value of the works to be credited against the price and never discussed this with Mr Drysdale was consistent with his interest in any purchase having waned.

[100] The essential ingredients of any contract for sale included the price and the date of transfer. The evidence did not meet the prescriptive averments to be found in article 14 of condescendence concerning either of these issues. The figure for deduction specified in the pleadings was departed from in evidence when Mr Purvis repeatedly said that neither of the schedules produced was to be seen as a demand for payment, both were just guides for negotiation. He had not intended to negotiate the price with Mr Drysdale's daughters, the negotiation was meant to be with their father. His evidence was that there would be a discussion between himself and Mr Drysdale in which there would be some horse trading and they would agree some figures.

[101] The evidence failed to establish an agreement with sufficient certainty to constitute a binding contract. There was no clarity as to the scope of the goods and services to be valued and no clarity as to the basis for valuation. Even when explaining how the schedules had been prepared Mr Purvis had made it plain that there was a question over whether the figures reflected cost. Some were based on his estimate as to what would have been paid

in the years between 1995 to 2000 on a commercial basis but the reality was that he used one of his own companies and some of those who had carried out the work for him were personal friends who did it free and out of friendship. Mr Drysdale had also assisted with some of the work. At times in his evidence Mr Purvis had suggested that giving the cars to Mr Drysdale was really an act of friendship rather than anything else and he had made it plain that he was never going to charge for rental of the cottage. He accepted that he would do various other things simply to help Mr Drysdale out because he was a friend. It was plain therefore that whatever had taken place at the farm proceeded on the basis of personal friendship and not a business relationship.

[102] The legal principles to be applied included that market value was to be payable for goods if no price had been agreed and where services are provided in the course of business there is an implied term that a reasonable rate is payable - *Avintair Ltd* v *Ryder Airline Services* 1994 SC 270. The present case was quite distinct in that a business background was absent. There was an important personal element to the negotiations which Mr Purvis had anticipated, as it was he and Mr Drysdale who would know what had been done and in what circumstances. The negotiations would take place on the background of many years of friendship. The mechanism for determining price which Mr Purvis claimed had been agreed upon was no longer available. The law would allow a reasonable price to be fixed for services but would not do so where this was contrary to the terms agreed between the parties. The cardinal rule was that no term could be implied into a contract if it contradicted an express term - *Marks & Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] AC 742 per Lord Neuberger at paragraph 28.

[103] In these circumstances Mr Moynihan submitted that the terms of the alleged agreement were too vague to be enforceable. It would be incompetent to continue the proof

to a further hearing in order to lead evidence and establish quantification of credit as suggested by Lord Davidson. The case of *Duncan* v *Gumleys* 1987 SLT 729 supported the submission that the court had to assess the case on the material led before it.

Discussion

[104] The legal principles to be applied were not in dispute between the parties. There need not be agreement on all the terms of a contract for it to be binding. Whether there is a binding contract between the parties depends upon consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires, as essential to the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement - *RTS Flexible Systems Ltd* v *Molkeri Alois Muller Gmbh & Co KG* [2010] 1 WLR 753. Regard could be had to the subsequent actions of the parties insofar as they assisted in identifying whether a reasonable person would have understood a bargain to have been completed - *Baillie Estates Ltd* v *Du Pont* (UK) Ltd [2009] CSOH 95 per Lord Hodge at para [26].

[105] The question of how to determine whether a verbal agreement constituted a contract could be answered by following the helpful summary of the relevant principles set out by Lord Hodge in *Morgan Utilities Ltd* v *Scottish Water Solutions Ltd* [2011] CSOH 112 at para [52]:

> "First, the court has to decide whether the parties had manifested an intention to be immediately bound, 'there and then': *Aisling Developments Ltd* v *Persimmon Homes Ltd* 2009 SLT 494, Lord Glennie at paragraph 56; *Fletcher Challenge Energy Ltd* v *Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 , paragraphs 51–53. Secondly, the court adopts an objective approach, having regard to what the parties did and said. It asks what would reasonable and honest men in the position of the parties and having their shared knowledge of the surrounding circumstances have understood by the discussion which they had or the communications which passed between them: *Fletcher Challenge Energy Ltd* (above) at paragraphs 54–55. In the context of a commercial transaction the court asks what would have been the reasonable expectations of sensible businessmen: *G Percy Trentham Ltd* v *Archital Luxfer Ltd* [1993] 1 Lloyd's Law Reports 25, Steyn LJ at p.27. Thirdly, while it is important to consider events as they unfolded in order to take an objective view of what reasonable people would have understood the position to be at the time the deal was allegedly concluded, it is also relevant to look at parties' behaviour after that time to the extent that that may cast light on what reasonable persons would have understood at that earlier time: *Fletcher Challenge Energy Ltd* at paragraph 56. Communications between the parties after an alleged agreement may help the court evaluate evidence about what occurred at the time of such an agreement: *Australian Broadcasting Corporation* v *XIV th Commonwealth Games Ltd* (1988) 18 NSWLR 540, Gleeson CJ at p.550. Fourthly, when the court is considering whether or not the parties intended to enter into a contract at a particular time, it adopts an entirely neutral approach: *Fletcher Challenge Energy Ltd* at paragraph 58. It is only once the court has decided that the parties did intend to contract that it will seek to give effect to that intention and uphold the contract if it can: *G Scammell and Nephew Ltd* v *Ouston* [1941] AC 251, at p. 268. See generally, *Baillie Estates Ltd* v *Du Pont (UK) Ltd* [2009] CSOH 95, at paragraphs 25 and 26."

[106] The context which applies at this stage is set by my conclusions concerning the rectification action. The remaining part of Cavelstone Farm still owned by Mr Drysdale, to which the conclusions for declarator are addressed, comprises the remaining farmland which he retained and the small part of the steading, amounting to approximately one third, which remains in his ownership after the 1995 missives and disposition are rectified. It follows that any discussion between Mr Purvis and Mr Drysdale would proceed upon the basis of a shared understanding of the extent of Mr Drysdale's remaining ownership.

Did Mr Purvis and Mr Drysdale enter into an agreement about the sale of the remaining part of Cavelstone Farm?

[107] Mr Purvis presented as an honest witness throughout and his account of fondness for, and friendship with, Mr and Mrs Drysdale was plainly truthful. At paragraph 68 of the written submissions for Mr Drysdale it is contended that it is inconceivable that Mr and Mrs Drysdale would have concealed the sale of the northern two thirds of the steading and any agreement to sell the remainder of the farm to Mr Purvis from their daughters. Despite this I was not invited to disbelieve the evidence of Mr Purvis, nor was his honesty challenged to any extent in the course of his evidence.

[108] In assessing the import of the evidence in relation to this chapter of the case I proceed upon the basis that Mr Purvis gave a truthful account. I shall begin by considering the evidence that he and Mr Drysdale entered into what I will call, for the purpose of this stage of the discussion, an agreement. His evidence is supported by an objective assessment of the surrounding circumstances. It is not disputed that he supplied a variety of services to Mr Drysdale. Mr Drysdale knew that his horses were grazing in Mr Purvis's fields for many years. He knew that Mr Purvis had supplied him with a number of different motor vehicles for his own use. He knew that Mr Purvis had done work on various parts of the steading and land which he retained. He knew that Mr Purvis had built a home for him and his wife and had supplied them with heating and electricity over many years. None of these services were paid for and Mr Drysdale had no apparent means of doing so. All that he had of value was the remaining land and his part of the steading.

[109] Mr Purvis made use of the land which he had purchased in a business fashion. The bulk of it was farmed and managed for him by Mr Baird and another field was rented by

Mr Smith. Two comments which he made in the course of giving evidence struck a powerful chord. The first was in relation to the fields rented to Mr Drysdale. He stated:

> "… he rented the fields for 20 years and he couldn't expect me to buy the fields and pay for them and then give him them back free of charge, that just wasn't going to happen".

The second was in relation to the cottage. He stated:

> "I am a business man … I would never have spent £100,000 building a house on somebody else's land unless I had some form of agreement".

[110] These comments reflect how a reasonable observer would understand the situation. The question which is under discussion at this stage is the straightforward one of whether the evidence has established that Mr Drysdale agreed to sell the remainder of his land to Mr Purvis. Looked at objectively, there is no other view which could sensibly explain the conduct of each of them. Furthermore, no other explanation for what took place was suggested in the evidence or in submissions. Whilst Shona Drysdale would not countenance the suggestion that her parents had agreed to sell the remainder of the farm, she was unable to offer any explanation for the fact that a house was built for and provided to her parents by Mr Purvis in which her father had lived for many years. When asked about this issue she simply failed to engage with the questions posed. It is also noteworthy that at answer 3 in the declarator action brought in Mr Drysdale's name by his daughters, to be found at pages 24 and 25 of the closed record, there is a call made upon the pursuer to aver why he contends that the cottage was built on the farm for him and his wife to live in if they did not have a binding agreement in the terms set out. That call remains unanswered.

[111] I am therefore satisfied that there were discussions about the sale of the remaining part of the farm to Mr and Mrs Purvis and that the two men agreed between themselves

that the purchase price would be market value minus the cost of the work to be done for Mr Drysdale and of the facilities provided to him.

Did each intend to be immediately bound by the agreement?

[112] Viewed objectively, the answer to this is that they did. Mr Purvis fulfilled his side of the arrangement. There is no other sensible explanation for his conduct than that he had entered into what he considered to be a binding contract. Mr Drysdale should be viewed as an honest lifelong farmer. I am satisfied that he would wish to be seen as a man of his word. He would not have allowed Mr Purvis to provide him with so many valuable services if he had not intended to be bound by the arrangement. Again, no other sensible suggestion was offered in evidence or submissions which would explain either the provision of the many benefits to Mr Drysdale or the willing receipt of them by him.

[113] I do not consider that any of these conclusions are in conflict with the evidence given by Mr Trodden about the terms of Mr Drysdale's will. When he gave him his instructions no reference was made to any heritable property or to what was to happen to any part of the farm. He simply instructed that the balance of his estate was to be left to his daughters.

[114] Ordinarily of course a contract for the sale of heritage has to be in writing, as required by section 1(2)(a)(i) of the Requirements of Writing (Scotland) Act 1995. Section 1(3) and (4) qualify this statement. They provide:

> "(3) Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a written document complying with section 2 of this Act, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust ('the first person') has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster ('the second person') -
>
> (a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and
>
> (b) the contract, obligation or trust shall not be regarded as invalid,

on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied.

(4) The condition referred to in subsection (3) above is that the position of the first person -

(a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and

(b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent".

[115] If the agreement entered into between Mr Purvis and Mr Drysdale satisfies the requirements of an otherwise binding contract then the provisions of section 1(3) are clearly met.

When was the sale to take place?

[116] Although this was described in different ways in the evidence, I am satisfied that the trigger point for the sale was to be Mr Drysdale's retirement from farming. Although he moved out of the farmhouse in around 2007 he appears to have continued to work to some extent or another on the farm until being hospitalised in 2018.

A binding contract?

[117] The next question to consider is whether these findings about an agreement establish the existence of a binding contract. There remains the question of the price. The parties to a contract are entitled to decide for themselves what the essential elements of that contract are to be. They are entitled to decide that the price should be mutually settled at a later date - *Avintiar Ltd* v *Ryder Airline Services Ltd*. In the present case it is the nature of the arrangement arrived at that the price to be paid could not be determined until there was a reckoning of the costs of all that had been provided. That total would continue to change until the date at which the sale was to take place. Accordingly, an arrangement of this sort

does not prevent the court from holding that a valid contract had been entered into. The problem which arises is that the mechanism which the parties to this agreement had decided upon for determining the price is no longer available.

[118] The import of the third conclusion was explained above. The third plea-in-law is that the pursuers being deemed to have paid £352,868 towards the purchase price, decree of declarator should be granted as third concluded for. Neither the third conclusion nor the third plea-in-law is supported by the evidence. The suggestion that the sum of £352,868 represented the figure to be deducted was expressly rejected by Mr Purvis. The schedule which sets out this figure includes the sum of £76,500 for rental and insurance of the cottage. A further sum of £29,378 is included in respect of electricity and heating oil. Mr Purvis made it plain that he had no intention of charging the Drysdale's for rent. He did not mention electricity and heating oil but by implication the same might apply. A sum of £21,500 is included in respect of motor vehicles supplied. Mr Purvis's position was ambivalent on whether any or all of this would have been charged to Mr Drysdale. A further sum of £10,400 is included in respect of vehicle insurance, road tax and MOT inspections. The total cost for work carried out for Mr Drysdale as specified in the schedule comes to more than £80,000. It is far from clear as to how the various figures for costs in relation to this work were arrived at.

[119] Even if it were possible for the court to impose an implied term that in the absence of agreement a reasonable price for the services rendered would be paid, there was no evidence which might illuminate what such a price would be. Nor is this the basis of the case which is pled and no suggestion was made of approaching matters in this fashion. The reality of the situation is that matters have drifted on for so long, without any reliable record of the works undertaken or services supplied being kept, and without any attempt being

made to enforce the agreement entered into, that it is now impossible to ascertain the price to be paid in terms of the agreement.

[120] The court could not grant declarator as third concluded for as this would be in direct conflict with the evidence. To grant decree as first concluded for would be to grant declarator that a contract for sale was entered into in which the price could not be determined. That would be no contract at all. I cannot give effect to Lord Davidson's suggestion that a further hearing should be fixed to determine the extent of the sums to be deducted. The case which has been brought to court, and which commenced in February 2021, has not been established.

[121] The consequence is that the contract action must fail. That is not to say that Mr Purvis should be treated as having gifted all of the various benefits which were made available to Mr and Mrs Drysdale. There may well be other routes available through which he can receive recompense.

Disposal

[122] For the reasons explained above I shall sustain the first, second and third pleas-in-law for the pursuers in the rectification case and grant decree in terms of the first, second and third conclusions in that action. I shall repel the first to fifth pleas-in-law for the second defender.

[123] In the declarator case brought by Mr Drysdale I shall uphold the second plea-in-law for the defenders and grant decree of absolvitor.

[124] In the contract case I shall repel the pleas-in-law for the pursuer, and uphold the third plea-in-law for the defender.

[125] The question of expenses shall be reserved for further submission.