



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 76

CA53/20

OPINION OF LORD CLARK

In the cause

GOLDEN LANE SECURITIES LIMITED and CHRISTOPHER MORAN & CO LIMITED

Pursuers

against

RODERICK SCARBOROUGH

Defender

**Pursuers: Thomson KC, Massaro; Brodies LLP
Defender: MacColl KC; rradar (Scotland) Limited**

7 October 2022

Introduction

[1] The pursuers are responsible for letting out land on the Cabrach Estate in the north of Scotland. For a number of years, the defender rented part of that land for grazing. Agreements were entered into for each year. The pursuers seek damages from the defender, claiming that he breached the terms of an agreement reached in 2015. The defender denies any breach and, in his counterclaim, seeks repayment of rent claimed to have been overpaid by him.

[2] Evidence was led over several days from 11 witnesses, with a large joint bundle of productions lodged, many of which were referred to in the evidence. However, the case

turns almost entirely on what was agreed orally by three people at a short meeting on 26 March 2015. The meeting took place in what is known as the gun room in Cabrach House on the Estate. The three people are Jamie Moran (a director of the pursuers), Douglas Ogilvie (who worked for Savills, land agents for the Estate) and Roderick Scarborough (the defender). Jamie Moran and Douglas Ogilvie also met with several other graziers on that day and reached agreements with them. For clarity, the meeting with the defender will hereafter be referred to as the key meeting. There are numerous important points of conflict in the evidence about what was agreed at the various meetings. The evidence will be assessed in due course and at this stage it suffices to give only a brief summary of the background.

Background

[3] Dr Christopher Moran is the ultimate owner of a group of companies, which includes the first and second pursuers and a company named Christopher Moran Holdings Limited ("CMHL"). The companies each have the same persons as their directors. CMHL is the heritable proprietor of Cabrach Estate. It has owned the Estate since 1983. Between 1994 and 2014, the defender entered into yearly grazing agreements, recorded in writing. Until 2001, the agreements were with CMHL. From 2002, the agreements were with the first pursuer, which now managed the property for CMHL. The second pursuer is the principal shareholder of the first pursuer. There were also yearly agreements reached with other individual graziers.

[4] In 2015, the Scottish Government introduced the Basic Payment Scheme ("BPS", giving grants to farmers and other agricultural businesses. This was formerly done as part of the European Union's Common Agricultural Policy. The BPS introduced in 2015 includes

what are described as “basic payments” and “greening payments”. It is not possible to claim one without claiming the other. Greening payments are an additional payment for each hectare, linked to keeping the land in good condition. Another element of the BPS is a payment under the Less Favoured Area Support Scheme (LFASS). In 2019, “convergence payments” were added as a further element to the BPS as a correction to underpayments made in previous years.

[5] To be eligible for payments under the BPS an applicant had to register for an "entitlement" to those payments in 2015 and establish that he or she was an active farmer in relation to a plot of land. The entitlements are per hectare and apply to three separate descriptions of land: Region 1 is better quality agricultural land; Region 2 is rough grazing of a particular category; Region 3 is rough grazing of a different category. The value of the entitlements depends upon whether the land is in Region 1, 2 or 3. To register for entitlements, the person required to exercise an agricultural activity. A claim for Region 1 land does not require livestock to be used and simply requires the land to be maintained. A claim for Regions 2 and 3 does require the involvement of livestock. Payments are then issued on an annual basis to the holders of the entitlements under the scheme, subject to certain further conditions. The amount to be paid can vary from year to year. The holder of the entitlements under the scheme is able to transfer his or her entitlements to another person, who will then receive the payments if certain conditions are met.

[6] As a result of the introduction of the new scheme, on 26 March 2015 separate meetings were held on behalf of the Estate with individual graziers. Certain matters were discussed and agreed orally, although precisely what was agreed is the nub of this dispute. No written agreement was entered into with any of the graziers. The defender occupied land on the Estate for each grazing season thereafter, until November 2019. Some months

after the meeting on 26 March 2015, Douglas Ogilvie prepared proposed written agreements for that year and claimed to have sent these to, among others, the defender. However, none was signed, either by the defender or by or on behalf of the pursuers. In early 2020 the pursuers became aware that the defender was seeking to sell the scheme entitlements on the open market. He refused to transfer them to the pursuers and sold them to another person.

[7] Two issues arise. The pursuers contend that the agreement reached with the defender on 26 March 2015 (and indeed with each grazier) was: (i) on rent, the grazier would pay 50% of the subsidies which he received under the BPS (other than the LFASS payment); and (ii) that as the grazier was permitted to register entitlements under the BPS in his own name, he would transfer the entitlements in question to the Estate in the event of him ceasing to graze the lands. The defender contends, on point (i), that the agreed rent was 50% of the basic payments under the scheme and did not include 50% of the greening or convergence payments, and that there was no agreement at all on point (ii). In his counterclaim, the defender contends that because he did in fact include in his rental payments 50% of the monies received by him for greening payments, he has overpaid his rent and the pursuers are due to repay him.

[8] The pursuers seek payment of firstly, the rent they say was due for the period between March and November 2019 (£104,433.44), secondly the costs of replacing the entitlements (£136,353.10), and thirdly sums said to be due as a result of underpayment by the defender between 2015 and 2018 (£26,434.43). The defender, in his counterclaim, seeks payment of £76,692.86, said to be his overpayment of rent.

Objections to evidence

[9] On the morning of the proof, the pursuers made an objection to certain passages of evidence in the defender's supplementary witness statement. The defender referred therein to having paid "quotas" under the previous subsidy schemes before the introduction of the BPS in 2015 and that these previous payments were relevant for the purposes of entitlements. He also referred to the convergence payment being related to periods of occupation on the land by him prior to 2015. Senior counsel for the pursuers submitted that there were no averments on these matters in the defender's pleadings. They had not been mentioned in his original witness statement, nor was there any evidence from any other source which supported the position. In addition, there was a lack of specification. On behalf of the defender, senior counsel submitted that the approach adopted for the pursuers did not fit with the requirements for a commercial action. The prejudice asserted by the pursuers did not arise as the supplementary statement had been lodged 6 weeks in advance of the proof. The evidence should be allowed, subject to competency and relevancy and those matters should be dealt with in final submissions.

[10] While pleadings in commercial actions are intended to be succinctly expressed, fair notice remains as a key requirement. There may be particular circumstances in which a lack of specification in pleadings is sufficiently developed in a witness statement and in some instances that can be allowed. Controversial evidence being led subject to competency and relevancy can of course also be permitted. But where the evidence objected to is on material points of real substance in a supplementary witness statement and these are not mentioned in the pleadings, and the points also lack specification and are not vouched, there is prejudice to the other party in seeking to deal with it at the proof. I therefore sustained the objection and excluded these passages from the evidence.

Evidence

[11] In assessing the evidence I have had regard to everything that was stated in the witness statements, supplementary witness statements and oral evidence, as well as the submissions by senior counsel. The evidence of each witness is now explained in brief terms, only on matters of particular relevance, and I give my conclusions on what is accepted. In relation to the three persons at the key meeting (Jamie Moran, Douglas Ogilvie and the defender Roderick Scarborough), their evidence is best dealt with in a little more detail and after that of the other witnesses called by each side.

Evidence from the pursuers' witnesses not at the key meeting

Christopher Moran

[12] Dr Christopher Moran explained that he is the shareholder and a director of the companies in the group, including the two companies who are the pursuers. He had no direct involvement in discussions with graziers about contract terms or the entitlements. His son, Jamie Moran, is also a director of the two pursuer companies and along with the companies' financial advisor, now Colin Reilly, dealt with day-to-day matters such as the letting of grazings. At some time prior to the meeting on 26 March 2015, Dr Moran had discussed the issue of entitlements with his son Jamie. Dr Moran was aware that it was vitally important that the entitlements would come back to the Estate. His son Jamie had made him aware of that matter. They decided to proceed with grazing lets, but with the clear agreement by the graziers that should any letting arrangement cease, the entitlements would pass to the Estate. Jamie was given clear instructions by Dr Moran to enter into a grazing let only if it was agreed that the entitlements would be returned. This

was to apply to the defender and to other graziers, including Mr Sheed, Mr Gordon and Mr Smith. After Mr Scarborough confirmed his intention to leave the let, on 7 October 2019 Dr Moran, Jamie and Colin Reilly met with Mr Scarborough. At the meeting, Dr Moran asked Mr Scarborough if he felt he was owed anything and the only point he raised was about payment for fencing. Dr Moran then met with Mr Scarborough in late January 2020, and at that meeting Mr Scarborough said, among other things, that there had been no signed written agreement which required return of the entitlements and “we all pay for our mistakes”. The performance of Savills on behalf of the pursuers was said by Mr Scarborough to have been “a joke” and they had been “all over the place”. Dr Moran was aghast and livid about this being said.

[13] Senior counsel for the pursuers submitted that while Dr Moran’s involvement in the matters in dispute was limited, his evidence about discussions with and instructions given to Jamie Moran was consistent with other evidence, including from Jamie. The same could be said about the meeting in January 2020 given that the defender did feel he was dealing with people who did not know what they were doing and that he could, accordingly, as he put it “chance his arm”. Senior counsel for the defender submitted that Dr Moran’s evidence should be treated with caution. He was not involved in any of the crucial events. His evidence was not given in a straightforward manner. He did not answer straightforward questions put to him but used them as a springboard to advance positions that he thought would be of assistance to the pursuers’ case.

[14] Dr Moran is businessman with knowledge and skill. In 2015, there was a major change in the whole issue about subsidies in farming. Quite clearly, he was in overall control of strategic commercial matters in the companies’ interests. It would make no sense to conclude that he would not have raised this issue with his son or Mr Reilly. I therefore

accept as credible and reliable the evidence that the discussions between the father and son, and indeed the direction from the father, took place. In terms of demeanour and behaviour, there was a degree of assertiveness about Dr Moran and the occasional repetition of points he perhaps wished to emphasise, but nothing of sufficient substance to cause me to doubt him. As to his discussions with the defender, I accept that there was a meeting in January 2020 between this witness and the defender and the defender mentioned there being no signed written agreement.

Stanley Gordon

[15] Mr Gordon, one of the graziers, said that he met with Douglas Ogilvie and Jamie Moran in the gun room at Cabrach House. While he could not recall the exact date of the meeting, it must have been in March or April 2015. During that meeting they discussed and agreed terms for his annual grazing. It was agreed at the meeting that the Estate would let him claim the payments under the entitlements for the land that he grazed and he would pay a standing rent of £12,000 together with 50% of the payments received under the BPS for Region 1 land in excess of this sum. As he would be claiming the subsidies (and as they would be registered to him) it was agreed that, if he no longer returned for a subsequent grazing season, he would transfer the entitlements to the Estate. Jamie Moran made it clear to him at the meeting that he had to agree to this. Jamie Moran said that if he did not agree to do so he would not be allowed to lease the land and would have to move off the land. He understood and agreed.

[16] Senior counsel for the pursuers relied upon the consistency of Mr Gordon's evidence about the meeting with the evidence of Jamie Moran, discussed below. For the defender, it was submitted that Mr Gordon's evidence was of little assistance to the court. No issue on

credibility or reliability of his evidence was raised and in any event I can see no basis for not accepting it.

Graeme Smith

[17] Mr Smith, another grazier, could not remember having a meeting with Jamie Moran and Douglas Ogilvie in the gun room on 26 March 2015, but he did remember meeting Douglas Ogilvie in the kitchen of Mr Smith's house, in, he thought, the spring of 2015. They discussed and agreed the terms for his grazings at the Cabrach Estate for the 2015 season. The terms agreed were also to apply each year thereafter. It was agreed that if he left the land and did not return for the next grazing season he would have to transfer the entitlements to the Estate to ensure that they stayed with the Estate's land. This meant the entitlements remained with the land for the benefit of the grazier succeeding him in taking over the holding. Mr Smith also explained that at this meeting with Mr Ogilvie he had agreed to pay 50% of the total annual subsidies received under the BPS, excluding the LFASS payments. He accepted that he would not have received the convergence payment without agreement from the Estate to occupy land at Cabrach, and was advised by his own advisor that the calculation of rent for 2019 should include 50% of the convergence payment.

[18] No material issue affecting the credibility or reliability of Mr Smith's evidence was identified by senior counsel for either party. His reference to not remembering a meeting involving Jamie Moran in the gun room at Cabrach House was not expressed by him as excluding that as having occurred.

Colin Reilly

[19] Mr Reilly is the Finance Director of the group, a post he took up in May 2016. Accordingly, he had no involvement in the meeting on 26 March 2015. On Saturday 26 October 2019 Mr Scarborough contacted Mr Reilly by telephone to discuss the possibility of retaining some of the land at Cabrach. Mr Scarborough also brought up the matter of entitlements during this call. He said that they would need to be discussed. Senior counsel for the defender submitted that Mr Reilly tended to give evidence that he wanted to advance, rather than answer the questions put, but that was not my conclusion. No issue arises in relation to his evidence.

Gordon McConachie

[20] Mr McConachie was formerly a Farm Management Consultant with Savills, who acted as client manager of the Estate for the pursuers in their dealings with the graziers from August 2016 to June 2019. He took over that position from Douglas Ogilvie, although Mr Ogilvie continued to have some involvement. Mr McConachie did the calculation of rent based upon the BPS subsidies. He commented on draft written agreements with the defender during his period of employment and explained the position on greening payments. His evidence was uncontroversial, albeit of limited assistance to the central issues.

Andrew Macdonald

[21] Mr Andrew Macdonald is the head of Food and Farming at Savills, having started in that post in 2019. He took over from Mr McConachie as client manager of the Estate. Among other things, he gave evidence about the BPS and greening payments. In his witness

statement, he referred to being told by Jamie Moran on 19 September 2019 that Jamie Moran had spoken to the defender who had accepted and agreed that the entitlements would be transferred to the Estate. In his oral evidence, he referred to an email being received from Jamie Moran at that time giving that information.

[22] Senior counsel for the pursuers relied upon that as providing important corroboration of the evidence of Jamie Moran (discussed below) concerning the telephone call to the defender. It would simply make no sense for Jamie Moran to have told Mr Macdonald, in effect immediately after speaking to the defender, that the defender had agreed he had to return the entitlements if no such discussion had taken place. Senior counsel for the defender submitted that Mr Macdonald was not involved at the material times and could not speak to events at the critical meeting. His evidence of events in September 2019 was also of little assistance as he did not participate in the call between Jamie Moran and the defender and his evidence as to the content of the unproduced email subsequently sent was also of little assistance.

[23] The email referred to was not produced but the court was advised, in final submissions, that it had been disclosed to the defender's solicitors prior to the proof. I was given no reason to doubt the evidence of Mr Macdonald.

Evidence from the defender's witnesses not at the key meeting

Laura Henderson

[24] Laura Henderson is an agricultural consultant employed by SAC Commercial Limited. She has worked in that position since 2019. Mr Scarborough has used the company's services since 2007. She had prepared calculations of sums due to be paid, to and by Mr Scarborough. Senior counsel for the pursuers argued that she had accepted that

the basic payment and greening payment are both elements of the BPS and that the same applied to convergence. Senior counsel for the defender said that her evidence should be accepted and that it reflected the defender's position that it would not have been understood by a tenant farmer in the defender's position that an agreement would encompass an obligation to pay 50% of greening or of convergence monies.

[25] Ms Henderson's evidence was in fact neutral so far as the key question of what was said at the meeting in concerned. In a sense, her evidence simply reflected the existence of potential ambiguity in what was meant by use of the expression "BPS".

Martin Sheed

[26] Mr Sheed is a grazier. His family had farmed in the area since the 1670's. Three parts of the Estate were now used by Mr Sheed, the relevant area for present purposes being Tornichelt Hill. He attended a meeting on 26 March 2015, with Jamie Moran and Douglas Ogilvie in the gun room at Cabrach House. There was no agreement reached that he would transfer his entitlement to the Estate without any consideration, should he leave the land. He was never informed that his lease depended upon such an agreement. The first time the issue was discussed was in 2020 when the clause was included in a new grazing lease. He was never asked to agree to this until 2020. The term "BPS payments" had never been used to include greening payments and the Estate's calculations of his rent never included greening payments.

[27] On 16 March 2022 Jamie Moran attended at Mr Sheed's property to complete the paperwork for the leases for 2022. Jamie Moran then stated that he was aware that Mr Sheed was going to give evidence in this case, called on behalf of the defender. Jamie Moran said he was disappointed and asked why that was to be done. Mr Sheed

explained to him that he had never been asked to agree to return the entitlements to the Estate should he leave and that he had never signed or been provided with a lease to that effect. Jamie Moran informed Mr Sheed that Christopher Moran would not be happy with him. Jamie Moran then asked Mr Sheed if he would sign a witness statement outlining his understanding of the lease. Mr Sheed agreed and did so, giving the witness statement to Jamie Moran. In his affidavit lodged for the proof, Mr Sheed states: "I felt obliged to give a statement to Jamie Moran. At the end of the day my family and I require to live and work alongside the Estate."

[28] Mr Sheed was taken to a WhatsApp message sent to him by Jamie Moran on 16 March 2022, stating:

"If you would be willing to give a statement which vaguely states the below that would be very much appreciated
I rent tornichelt [sic] hill off Cabrach and Glenfiddich Estate on an annual basis.
In 2015 it was agreed that i [sic] would register myself for the new entitlements and that the Estate and myself would split the proceeds of the entitlements 50:50 I do not believe it would be in the spirit of our agreement to sell the entitlements and keep the proceeds"

The next day Jamie Moran sent a message asking if he could pick up the witness statement. Mr Sheed agreed and said "I have written and signed a statement that is as true an account as I recall."

[29] In cross-examination, Mr Sheed accepted that there was never any agreement to exclude the greening payments from the rent calculation. He was taken to the statement he had given to Jamie Moran, in which the witness said that it would not have been appropriate for him to sell the entitlements. He accepted that this was "a necessary part of the agreement" and that it would not have worked otherwise. However, he also said that in 2020 "it was the first time that the return of the subsidies was ever mentioned". It had to be agreed, because otherwise it was "game over". The 2020 agreement did not reflect what

was earlier agreed; it added the clause about the entitlements. He was then taken to the supplementary witness statement of Jamie Moran which said that Mr Sheed had, when speaking to Jamie Moran, described the defender as dishonest. The witness reacted with clear disbelief to that suggestion and said that in fact it was Jamie Moran who called Mr Scarborough dishonest. He disputed what Jamie Moran claimed had been said, although he agreed with the sentiments expressed. He disagreed with the suggestion that it was possible that his memory was letting him down in relation to whether return of entitlements was agreed at the meeting on 26 March 2015.

[30] On behalf of the pursuers, it was submitted that the evidence of Mr Sheed should not be accepted as reliable insofar as it concerns the question of whether an obligation to transfer the entitlements was discussed and agreed in 2015. Mr Sheed provided the witness statement to Jamie Moran and then gave his affidavit which *prima facie* were inconsistent. He did not offer a convincing explanation reconciling them during his oral evidence. His evidence, that a requirement to transfer the entitlements was not mentioned in 2015, was said to not easily fit with his acceptance that the term was essential for the agreement to operate. Mr Sheed's position was clearly that he would wish to stay on the Estate in any event given his family history with the land and it may be that his recollection of agreement of this term in 2015 (which he willingly signed when the matter was put into writing in 2020) was unreliable. It concerned a situation which was never in his contemplation or was to his mind self-evident and uncontroversial in the context of, for him, the much more important question of what was to be the quantum of rent.

[31] Senior counsel for the defender submitted that Mr Sheed's evidence should be accepted as credible and reliable. It directly contradicted that of Jamie Moran as to the content of their discussions in March 2022, providing a clear indication that Jamie Moran

was untruthful. Mr Sheed's reaction to the suggestion that he (rather than Jamie Moran) had said the defender was dishonest was a genuine one of disbelief.

[32] The evidence of Mr Sheed came across as convincing. He gave his evidence on what was agreed at the meeting, to some extent unsupportive of the pursuers' case, notwithstanding the pressure that not supporting the pursuers might put upon him and his family. He impressed me as a straightforward witness, not in any way willing to try to act the part for the purposes of giving untrue evidence. Importantly, after their discussions Jamie Moran set out in the WhatsApp message what should be said by Mr Sheed in the witness statement, using the words: "I do not believe it would be in the spirit of our agreement to sell the entitlements and keep the proceeds". Where the furthest the witness is prepared to go is to refer to something not being appropriate or not being in the spirit of the agreement, that does not support the pursuers' position on what was agreed at the meeting in March 2015. This is not an example of documentation contemporaneous with the meeting, but I nonetheless view what is said in writing as consistent with Mr Sheed's affidavit. I accept his evidence.

Evidence from those who attended the key meeting

Jamie Moran

Central points in his evidence

[33] Jamie Moran explained that while his father was not heavily involved he had discussed things with his father and definitely consulted him. His father was very direct about the fact that the proposed course of action would not work unless graziers could not sell on the entitlements. On 19 March 2015, Jamie Moran emailed Douglas Ogilvie mentioning concerns about the graziers being able to sell their entitlements. He stated that

there could either be a contract farming agreement between the Estate and the main graziers, or if that was not viable “to agree several years of rent with the graziers and also to contract that the entitlements revert to the Estate should the grazing agreements come to an end.” In consultation with his father, the decision reached was to allow the graziers to register the entitlements in their own names, with the rent being a percentage of the total subsidy. Jamie Moran had several conversations with Douglas Ogilvie about protecting the Estate’s entitlements. They agreed that when they met the graziers an agreement would be put in place to ensure that the entitlements were transferred to the Estate if the grazier left and did not return for another season.

[34] Formal meetings were then held on 26 March 2015 in the gun room at Cabrach House. Jamie Moran attended along with Douglas Ogilvie and they met the graziers on the Estate individually, one after the other. These were: James Angus, Graeme Smith, Stanley Gordon, Calum and Derek McBain, Martin Sheed and the defender. The purpose of the meetings was to negotiate and agree the value of the rent to be paid by the graziers now that the new subsidies were being introduced and to agree the terms on which the graziers would be allowed to continue leasing their holdings.

[35] In the meeting with Mr Scarborough, it was agreed that he would pay 50% of his subsidies to the Estate. Jamie Moran initially sought 90% of the subsidies received by Mr Scarborough as his rent. They negotiated and it was ultimately agreed that Mr Scarborough would pay 50% of the subsidies he received in return for him being allowed to register entitlements to land on the Estate and being allowed to graze his animals. What was being agreed in 2015 was to apply for the duration of the new subsidy regime. It was also made clear to Mr Scarborough that he had to transfer the entitlements to the Estate if he left and did not return for the following grazing season. He had discussed this with

Mr Scarborough on several occasions before the meeting when agreeing the principles on how the Estate would rent land to the graziers under the new regime. This was something Jamie Moran said to Mr Scarborough on these occasions and he agreed.

[36] It was also reiterated to Mr Scarborough in the gun room meeting at which Jamie Moran states he said something like "we really are trusting you with the entitlements". However, the main focus of that meeting was the commercial negotiation of rent as the mechanisms had been agreed prior to the meeting. But the return of entitlements was a take it or leave it point; it was not up for negotiation. Mr Scarborough did not resist this aspect of the deal. The grazier either agreed that they had to transfer the subsidies to the Estate, or they would not be granted a grazing let. None of the graziers on the Estate declined to agree to this. It was a term that was agreed with every grazier on the Estate, including Mr Scarborough. It would have lacked all commercial sense for the Estate us to have failed to insist on this clause. As the landowner the Estate had total control of who registered the entitlements. The meetings with all the other graziers were almost identical to that with Mr Scarborough. The agreement reached with Mr Scarborough and the other graziers was for the 2015 grazing season and for all subsequent grazing seasons that they returned.

[37] After the meeting Jamie Moran states that he instructed Douglas Ogilvie to prepare a written agreement for Mr Scarborough (as well as all the other graziers) to formally document what had been agreed. There were further communications with Mr Ogilvie seeking to have him prepare the agreement. A draft agreement was prepared several months later by Mr Ogilvie. It contains a clause requiring the entitlements to be returned (clause 8). The rent was wrongly described. No written agreements were executed by the parties for 2015 or the grazing seasons between then and 2019. In September 2019 Jamie Moran found out that Mr Scarborough was leaving the Estate at the end of the 2019

season and that he would not be returning for the 2020 grazing season. As soon as Jamie Moran became aware of this situation he contacted Mr Scarborough by telephone. Jamie Moran was in Heathrow Airport at the time of the call. Mr Scarborough confirmed that he accepted that he had to transfer the entitlements to the Estate as had been agreed in 2015. He said that he would not screw over the Estate and that he was loyal to it. The call felt very agreeable. Jamie Moran informed Mr Macdonald of this telephone call with Mr Scarborough shortly afterwards.

[38] Jamie Moran then referred to meeting with Colin Reilly, Mr Scarborough and Dr Moran, who asked Mr Scarborough if he would need money for anything (such as fencing) before he left the Estate. Mr Scarborough said there was only a small amount of fencing costs he would like to be refunded and nothing else. He did not mention anything about the entitlements.

[39] In his supplementary witness statement, Jamie Moran states that on the day after the call from Heathrow Airport he was walking his dogs in part of the Cabrach Estate and bumped into Mr Scarborough. Jamie Moran apologised for the language and tone that he had used during the telephone call the previous day. There was a brief conversation, and Mr Scarborough did not mention or suggest that he would not transfer the entitlements to the Estate. In relation to Mr Sheed, he was incorrect in saying that the greening payments were not part of the subsidies of which 50% was due in rent and he was also incorrect about the entitlements matter, as that had been agreed with him at the meeting on 26 March 2015. Jamie Moran referred to his discussions with Mr Sheed about giving a witness statement. Mr Sheed commented upon how dishonest Mr Scarborough was and the ridiculousness of the agreement if he was to sell the entitlements. As he had said this, Jamie Moran asked him

if he would be willing to give a statement to assist with the court case if he disagreed with Mr Scarborough. Mr Sheed readily, and even enthusiastically, agreed to do this.

Submissions about this witness

[40] Senior counsel for the pursuers submitted that Jamie Moran's evidence about his involvement in events was detailed and clear. He made appropriate concessions. His evidence, on the essentials, was supported by other witnesses. His frustration with the position adopted by the defender was not hard to understand. He was, like certain other witnesses, subjected to aggressive cross examination, but gave his evidence clearly and without obfuscation.

[41] Senior counsel for the defender submitted that Jamie Moran should not be accepted as credible or reliable. His evidence was plainly untruthful as regards events at his meeting with Mr Sheed in March 2022. He took deliberate steps to guide a witness (Mr Sheed) as to the evidence that he should give to the court. In cross-examination, he repeatedly failed to answer straightforward questions put to him. Instead, he used the questions merely as an excuse to advance positions that he thought would be of assistance to the pursuers' case and which appeared to be "pre-prepared" in terms of their content. He claimed that his position was vouched by documents that had not been produced. His evidence was tinged with self-interest and, in particular, a concern not to be seen to have made a mistake in relation to his father's interests.

Assessment

[42] I accept the evidence of Jamie Moran that he discussed with his father before 26 March 2015 that return of entitlements was as a matter to be agreed at those meetings.

There is also the important contemporaneous document, the email to Douglas Ogilvie dated 19 March 2015, six days before the meeting, in which Jamie Moran specifically mentions agreeing several years of rent and that the entitlements should revert to the Estate if the grazing agreement comes to an end. In relation to the actual meetings on 26 March 2015, Jamie Moran's evidence is that Mr Gordon, Mr Smith and Mr Sheed all agreed on the two key issues of rental amount and return of entitlements on leaving. I have accepted the evidence of Mr Gordon. Jamie Moran's evidence, at least about the meeting with Mr Gordon, is consistent with it. Mr Smith's recollection is that the agreement he reached was not at a meeting in the gun room at which Jamie Moran was present but at a meeting in the kitchen of Mr Smith's house, with only Douglas Ogilvie present. This differs from the evidence of Jamie Moran and Douglas Ogilvie. But Mr Smith's evidence does support the fact that agreement on return of entitlements was reached. Mr Smith's recollection about the meeting could well be mistaken, given the other evidence. I do not regard it as providing a serious inconsistency that could undermine the evidence of Jamie Moran.

[43] There is an inconsistency with the clear evidence of Mr Sheed, which I have accepted. That evidence is, however, about Mr Sheed's meeting and not the key meeting with the defender. Jamie Moran's evidence is also consistent with that of Mr Macdonald, which I have accepted, about an email mentioning discussions with the defender, albeit the email is not produced.

[44] In relation to inherent probability, it was made clear to Jamie Moran by his father that agreement with the graziers on return of entitlements was required. It is likely that he would take that seriously, especially when there are also strong commercial reasons for the Estate to take this approach. In addition, since he raised the matter with Douglas Ogilvie by

email on 19 March 2015 and at these meetings there were said to be only two key points on the agenda, it can be viewed as likely that Jamie Moran would seek to address each of them.

[45] There is an obvious ground for concern when one key witness, closely involved in the parties pursuing the action, requests a written statement from another witness (Mr Sheed) setting out what that witness should say (using terms such as “I would” and “I do not believe”). Taking steps to guide a witness in this manner is strongly deprecated and raises concerns for the court. However, the message refers to Mr Sheed “vaguely stating” what is then set out and it also mentions the spirit (rather than terms) of the agreement. It accords with Mr Sheed’s evidence, that the statement given to Jamie Moran was a true account. I therefore do not regard this behaviour, though unacceptable, as creating any material issues about credibility or reliability.

[46] Senior counsel for the defender is at least to some extent correct that Jamie Moran used his answers to advance positions that he thought would be of assistance to the pursuers’ case. He did repeatedly seek to emphasise the commercial reasons for the pursuers requiring return of the entitlements if the defender left. I also see no real force in the point made at the meeting in January 2020, that his father asked the defender whether he needed money for anything and the defender did not mention the entitlements. As I understood Jamie Moran’s evidence, this was suggested as some kind of pointer to the return of entitlements having been agreed. If it is the defender’s position that the entitlements remained with him, then I see no basis upon which he ought to have said that he needed money from the Estate. As to whether Jamie Moran’s evidence was tinged with a concern not to be seen to have made a mistake in relation to his father’s interests, while I accept that Jamie Moran would not wish to do such a thing, I find no clear basis upon which that inference can be drawn as affecting the truth of what was said.

[47] Overall, I am not persuaded that there is a credibility issue, based on deliberate dishonesty, in the evidence of Jamie Moran. There are some potential concerns about reliability, particularly about whether at each of the meetings (including with Mr Sheed) the point about return of entitlements was discussed and agreed. However, when viewed in the context of overall consistency and inherent probability, the key elements of Jamie Moran's evidence about the meeting with the defender fall to be accepted.

Douglas Ogilvie

Central points in his evidence

[48] Douglas Ogilvie formerly worked as a director of Savills. He first became involved in assisting Cabrach Estate in 2015 when he became the client manager. He advised on farming matters generally and provided advice on the new BPS. In late 2016, Gordon MacConachie took over this role, followed in due course by Andrew Macdonald, although Mr Ogilvie helped out from time to time with them.

[49] With the new BPS being introduced, it was necessary to meet with each of the graziers and meetings were arranged in the gun room at Cabrach House on 26 March 2015. There were separate meetings arranged with Mr Scarborough, Stanley Gordon, Graeme Smith, Martin Sheed and James Angus. Mr Ogilvie attended each of these with Jamie Moran.

[50] The purpose of the meeting on 26 March 2015 was to agree the split of the BPS payments received under the entitlements between the Estate and Mr Scarborough. This was discussed and it was agreed that Mr Scarborough would pay 50% of the payments he received under the BPS to the Estate as his rent for the land. There was no discussion about the two separate components that made up the BPS. Mr Scarborough did not make any

distinction between different parts of the BPS when he agreed to pay 50% of the payments he received under it to the Estate.

[51] The witness and Jamie Moran had also discussed the transfer of the entitlements in advance of the meeting in the gun room. Jamie Moran was clear in his instructions that this was something on which that the graziers had to agree. Mr Ogilvie agreed that this was a solution and it was decided that this was going to be a term that applied to all the graziers on the Estate who registered entitlements in their own names over its land. It was a key term of the agreement reached with Mr Scarborough. This was raised with Mr Scarborough during the gun room meeting. He was told that if he did not return for the subsequent grazing season, he would have to transfer the entitlements he held over the Estate's land in his name to the Estate. That way the entitlements would stay registered over the Estate's land and in the control of the Estate. Mr Scarborough agreed to this. The same agreement was reached with all the other graziers met with on 26 March 2015 apart from one grazier, who walked out of the meeting.

[52] After some delay caused by work pressures, in September 2015 Mr Ogilvie prepared a draft agreement for the grazing let to Mr Scarborough for 2015. Clause 8 stated:

“Should the grazier not enter in a grazing agreement on this land in 2016 then the grazier will transfer the entitlements established on this land to the Landlord subject to any siphon”.

Mr Ogilvie understood that this recorded what had been agreed at the meeting on 26 March 2015. The draft was sent to Jamie Moran, who raised issues about the rental figure in the draft agreement being wrong. Mr Ogilvie's account was that the rent terms reached at the meeting on 26 March 2015 were changed on the instructions of Jamie Moran. The draft was revised in December 2015. Clause 8 remained in place. Mr Ogilvie's recollection is that this was sent to the defender. Mr Ogilvie also prepared draft agreements with the graziers

for 2016 and 2017. These did not make any reference to return of the entitlements.

Mr Ogilvie did not recall receiving instructions to include a clause for the transfer of entitlements in these later drafts. He said that the return of entitlements matter was agreed only in respect of 2015.

[53] In his supplementary witness statement Mr Ogilvie states that he does not remember if they met with Graeme Smith in the gun room. In relation to Mr Sheed, Mr Ogilvie's evidence was that the transfer of entitlements was discussed with him and it was agreed that if he did not return as a tenant in 2016 then the entitlements would be transferred to the Estate.

Submissions about this witness

[54] On behalf of the pursuers, it was submitted that the evidence of Mr Ogilvie was not credible other than insofar as it is supported by other witnesses. In the passages in his evidence which involved his own personal interests, it was apparent that Mr Ogilvie's evidence was self-serving and sought to avoid blame for errors he had made. It was said to be apparent that Mr Ogilvie, and therefore Savills, did not do as he and they were instructed to do by the pursuers. It took him 6 months to prepare the first draft of the 2015 written agreements and then a further 3 months to prepare the corrected version. The first draft was incorrect as to rent.

[55] The December 2015 draft was also not in accordance with either Jamie Moran's instructions or the agreement reached by the parties. Mr Ogilvie's evidence, that this draft was prepared in accordance with an instruction from Mr Moran to depart from what was agreed, was simply wrong. Mr Ogilvie's evidence that draft leases were issued to the

defender in 2015, signed by him and returned to him was also incorrect and nor did it happen in 2016 or 2017.

[56] His evidence that the return of entitlements was agreed for 2015 only was not credible. He accepted in his oral evidence that in fact the reasons to include such a clause remained in 2016 and each year thereafter just as they had in 2015. There was no basis for concluding that the pursuers would no longer wish such a clause to be included. His suggestion that Jamie Moran only raised the matter after the 2016 drafts were prepared was not true. The defender does not say that what was agreed in 2015 was limited to 2015. It was also not the position Mr Gordon or Mr Smith.

[57] Senior counsel for the defender submitted that Douglas Ogilvie should not be accepted as credible and reliable. His evidence was generally confused and unpersuasive. It would not be appropriate for parties to attempt to cherry pick elements of his evidence, simply with a view to supporting their own positions. The better approach would simply be to disregard his evidence as a whole. In any event, Mr Ogilvie had no true and clear recollection of the events at the meeting on 26 March 2015. He was only really concerned at that meeting with issues of rent. He did not have any real recollection of the issue of entitlements being specifically discussed with the defender. He also had no involvement in events in 2019.

Assessment

[58] Mr Ogilvie gave evidence on a number of factual matters. As happens in any criminal or civil case, there may be parts of the witness's evidence which are accepted and others that are not. In my view it is appropriate to test the key elements in his evidence based on consistency with the evidence of others and inherent probability. Doing so, I

accept his evidence that discussions with Jamie Moran prior to the meetings on 26 March 2015 dealt with the need for return of entitlements to be agreed, and that the matter was raised and agreed in the meetings with the defender and other graziers on that day. There is the inconsistency with the evidence of Mr Sheed, but as noted above that does not materially affect the evidence about what occurred at the meeting with the defender. I can see no rational basis of any kind for Jamie Moran limiting the duration of the agreement to 2015. Other graziers stated that it applied to all lets thereafter. Whether Mr Ogilvie gave this view to avoid criticism of him not including the point (which was clause 8 in the 2015 draft) in future drafts I cannot say. It is at least possible that in his mind he was approaching matters on the basis of agreements being, as had been the historical position, only for the coming year and he may have transferred that thought into his recollection of what was discussed. I reject his evidence that it was restricted to 2015 as that is not consistent with the evidence of any other witness that I have accepted. There is a fair degree of unreliability in parts of his evidence about rent calculations and what was done in respect of draft agreements and I shall give no weight to that evidence.

Roderick Scarborough (the defender)

Central points in his evidence

[59] The defender had rented land at Cabrach for many years and up to 2014 there had been formal written grazing agreements for each year, signed by the parties. He attended the key meeting on 26 March 2015, with Douglas Ogilvie and Jamie Moran. They discussed the percentage of the BPS to be paid as rent, with Jamie Moran proposing 75% and the defender proposing 40%, and then agreeing that it would be 50%. The defender asked for 140 hectares of Region 1 land from the Estate. As he put it in his witness statement,

“I didn’t really need this but I decided to chance my arm”. Jamie Moran agreed to lease this land to the defender, who got “the distinct impression that Jamie Moran didn’t really know what he was talking about”. Douglas Ogilvie was present at the meeting but contributed nothing and just sat there. Greening payments were never mentioned and as the defender did not know if he would meet the requirements for greening he certainly could not have agreed for greening to be included. There was no doubt in his mind that all that was agreed was that his rent payment would be “50% of the BPS received in any year”. Nothing was agreed about return of entitlements.

[60] After the meeting, the defender was expecting to receive lease documentation. Given the different areas he had leased, in previous years he had received three separate leases which all required to be signed individually. Douglas Ogilvie later told him that he had underpaid in 2015 and that half of the greening payment had to be paid. The defender “bowed to...Douglas Ogilvie’s superior knowledge”. He later received advice from Ms Stewart at the Scottish Agricultural College (SAC) that she did not think 50% of his greening payment should be included as part of the rent. Nonetheless the defender continued to make those payments as a result of what Douglas Ogilvie had said. The defender did not receive lease documentation that he could sign at any time between 2015 and 2019. Douglas Ogilvie sent a draft lease for 2018 which specifically referred to rent being 50% of the BPS and made no mention of a requirement to hand back entitlements if the defender left the land. A similar draft lease was sent to him in 2019.

[61] On 20 September 2019 Jamie Moran phoned him at around 5.00pm. The conversation was a rant, with Jamie Moran cursing and swearing at him. The defender stopped the conversation. He did not know what Jamie Moran had phoned about and could only describe it as very garbled. He met Jamie Moran the following day at Cabrach and

Jamie Moran apologised. The defender “deduced that he was speaking about the entitlements” and that Jamie Moran said that his father wanted them back. He says that he told Jamie Moran that “they were not bullying me and I wasn’t prepared to hand them back”. He then referred to Dr Christopher Moran coming up from London and meeting in the dining room at Cabrach House. Dr Moran said there would be litigation about the entitlements. The defender declined to agree to hand back the entitlements. As he put it in his witness statement:

“This was something which had never been discussed. It was not part of any lease agreement. As I have indicated, from 2015 I never signed any lease from them. It made no sense for me to agree to this.”

The defender received a convergence payment of £55,000 in 2018. It was not a subsidy that existed in 2015 and could not have been part of the rent due. Because he had followed what Douglas Ogilvie had said about the greening payments, he has overpaid the rent for 2015-2018.

[62] At the meeting in January 2020, Christopher Moran told the defender that he was to hand back the entitlements. The defender states: “What has been narrated in terms of what happened at that meeting simply did not happen”. The defender says that he had no discussions with either Douglas Ogilvie or Jamie Moran in the lead-up to the meeting of 26 March 2015. Jamie Moran’s evidence about the meeting was not accurate. In particular, the whole issue of entitlements was quite simply not discussed. Jamie Moran did not refer to “subsidies” but to “BPS”. If the defender had been told that he had to hand back his entitlements if he ever left the Estate he would “quite simply have walked out there and then”. It made no commercial sense for him to hand back the entitlements. Everything that Jamie Moran said about the telephone call on 20 September 2019 was incorrect. The issue of entitlements was not discussed. Colin Reilly was incorrect in saying that Savills provided

the calculations upon which the rent payments were based. The telephone conversation that Colin Reilly said he had with the defender on 26 October 2019 did not in fact happen.

Submissions about this witness

[63] On behalf of the pursuers, it was submitted that the evidence of the defender should not be accepted as credible and reliable insofar as contradicted by other witnesses. The defender's evidence regarding why, between 2015 and 2018, he paid the greening component of his BPS payments as part of his rent was not credible. There was an internal inconsistency in his evidence about discussions with Jamie Moran on selling entitlements. The defender had demonstrated himself to be someone who would provide an incredible account when it suits him to do so. His evidence regarding the Heathrow Airport telephone call, and his encounter with Jamie Moran the following day, fell into this camp.

[64] Senior counsel for the defender submitted that the defender gave his evidence in a straightforward manner. He was subjected to a sustained cross-examination, but was consistent throughout on the central parts of his evidence (particularly the events at the meeting on 26 March 2015 and the telephone call and subsequent meeting with Jamie Moran in September 2019). Unlike a number of the pursuers' witnesses, the defender was not sticking to a script, with a view to giving the evidence that he wished to give. Rather, he was doing his best to answer the questions put to him. This extended to being prepared to acknowledge where there might be minor mistakes in his position. It may be that Jamie Moran had intended to raise the issue of the transfer of entitlements with all of the graziers who attended the meetings, but he failed to do so with the defender. This may simply be down to an omission on his part, with their meeting taking place at the end of a long day of intensive negotiation.

Assessment

[65] It is true, as was submitted for the pursuers, that in his supplementary statement the defender said that he had no idea why Dr Moran thought he was going to sell the entitlements as he had not made up his mind what to do, and that in his affidavit he states that he had told Jamie Moran three months earlier that he would not return the entitlements. But there is of course a difference between selling and not returning and I see no internal inconsistency on that point.

[66] However, if all of the defender's evidence is correct then on specific points the evidence of many other witnesses is wrong and indeed untruthful. I have already accepted the evidence of a number of those witnesses and I can find no reason to think that they are incorrect on the conflicting points. In addition to inconsistency with the evidence of Jamie Moran and Douglas Ogilvie, there is nothing in any of the productions which provides support for the defender's position that the issue of returning the entitlements was not discussed, let alone agreed upon, at the meeting. Further, reference to previous written agreements featured several times in the defender's account of events, appearing to be his understanding of how agreement could be reached. This fits with the evidence of Christopher Moran and Jamie Moran about comments made by the defender that there was no written agreement. Jamie Moran's evidence about discussing matters with the defender in September 2019 and communicating that to Mr Macdonald is corroborated by the evidence of Mr Macdonald. It deals with the important point of whether the defender, in the discussion, accepted that the entitlements would be transferred to the Estate. There is no good reason to consider that Jamie Moran would make up in an email to Mr Macdonald a

completely untrue account of something that, according to the defender, never arose at all in their discussions.

Decision and reasons

[67] I raised with senior counsel the question of whether, at the key meeting, it was possible for parties to reach an overarching agreement on terms which would apply over each coming year of grazing, when the grazing agreements themselves covered only a 364-day duration. Both parties submitted that reaching such an overarching agreement was lawful. There was no suggestion at any stage to the contrary.

[68] In relation to the key meeting between Jamie Moran, Douglas Ogilvie and the defender, each of them gives a different account of what was agreed. Their evidence was presented in what might be described as an “overview” manner, in effect just stating what was and what was not agreed. There was very little evidence from any of these three witnesses about precisely in what words specific proposals were made or reacted to, or how agreement or disagreement was articulated. In short, there were assertions about the outcome, looking back at the meeting in general. In light of the absence of clear evidence about who said what at the key meeting and the stark and multiple conflicts in the evidence given at the proof, I have found it necessary to explain above my views on the credibility and reliability of the individual witnesses and the evidence I have accepted. When I draw all of the accepted evidence together, a reasonably clear picture emerges.

Issue 1: calculation of rent

[69] On this first issue it is common ground that an agreement was reached at the meeting on 26 March 2015 about the rent to be paid for the 2015 grazing season and that the

same calculation would apply to any future grazing lets between the parties. Further, the fact that the rent was to be 50% of a particular amount received by the grazier is undisputed. There is, no doubt, some room for potential ambiguity in the use of terms such as “Basic Payment Scheme” or “BPS” or “subsidies” when describing the particular starting point or denominator from which 50% is to be paid.

[70] Senior counsel for the pursuers argued that the terms used were comprehensive and included all payments under the BPS. Senior counsel for the defender argued that the defender’s alleged understanding, that it was only the basic payment element of the scheme that was subject to the 50% rent tariff, was correct and it would not have been understood by a tenant farmer in his position that such an agreement would encompass an obligation to pay 50% of greening. Greening is a payment to be “paid on top of the Basic Payment Scheme from 2015” according to the contemporaneous Scottish Government Guidance. It was argued that the same must apply to the convergence payments.

[71] The evidence of Jamie Moran is that 50% of the “subsidies” under the new scheme, minus LFASS, was the agreed position. He emailed Douglas Ogilvie in May 2015 and in summarising the rental agreement stated that to be the position. Plainly a subsequent email by the person who says that a particular point was agreed does not provide material support for his evidence, but on the other hand it is a contemporaneous document that at least reflects, two months or so after the meeting, his recollection.

[72] In contrast, Douglas Ogilvie’s recollection was 50% of “payments under the BPS”. While no one suggests that “greening” payments were specifically expressed as being included, equally there was no suggestion of any discussion leading to these not being included. They are component parts of the subsidies the defender would receive under the BPS and the issue at the heart of this aspect of the dispute is whether the expressions used

covered the whole of the subsidies (except LFASS) or only part of them. The evidence of Douglas Ogilvie was in effect independent on this issue. I conclude that the whole of what were then the BPS subsidies (except LFASS) was the agreed denominator.

[73] The defender's evidence, in cross-examination, was that Jamie Moran asked for a percentage "of the BPS". There was, he said, no discussion about what BPS meant. However, the defender did agree that when he himself used the expression "BPS" he was referring to the Basic Payment Scheme. He also accepted the obvious point that the Basic Payment Scheme included greening payments. The defender did not provide any proper basis in his evidence for the 50% sum to be in respect of only the basic payment component of the Basic Payment Scheme. Where an aspect (LFASS) is specifically excluded in the agreement, but there is no such exclusion of greening payments, that points clearly towards the pursuers' account being correct.

[74] It is also notable that in 2015 to 2018 the defender made calculations and then made payment of what he understood to be 50% of the basic payment and the greening component. In other words, he paid 50% of his subsidies under BPS except LFASS. Post-contractual conduct is not generally relevant to interpretation of the language used in the agreement, but that is not the point here. Rather, the issue is what was agreed. This conduct by the defender did not fit with how on other occasions he had raised challenges about financial issues with the Estate, such as refusing to pay rent that he felt was wrongly charged. He made no suggestion at the time that the payments he calculated and made were wrong. He claimed that he had been given advice in 2015 that the greening payments were not included in the denominator but in his evidence stated that he nonetheless "did nothing" about the advice and "just left it". That is a troublesome account. He did say in evidence that he told Douglas Ogilvie in a brief phone call that the greening component of

the BPS ought not to be part of the rent in 2016. Douglas Ogilvie did not accept that and the defender again “just paid it”.

[75] I conclude that the defender calculated and paid the rent on the basis that it included the greening component of the BPS simply because that is indeed what was agreed at the meeting on 26 March 2015. There is however an issue about a “convergence” payment. At the date of the meeting, this was not a component of the BPS. It is correct that a convergence payment was only made to someone who was in receipt of payments under the BPS in 2019. Another witness (Mr Smith) was given advice to the effect that as the convergence payment formed part of the BPS payment it also formed part of the rent. This point boils down to whether the agreement at the meeting about 50% of the BPS was intended to include any additional elements (as well as basic payments and greening payments) that might come to be added to the BPS in the future. There is some force in the view that the expressions “BPS” or “subsidies” cover any payment that comes in or might come in under the scheme. But, on balance, and based on the relatively limited evidence about the agreement, I am unable to conclude that the parties intended that any additional form of payment added to scheme in the future formed part of the denominator. The convergence payments made available in 2019 are not therefore covered by the 2015 agreement, although they are of course open to future agreement.

[76] The defender argued that, in relation to underpayment in respect of 2015, the pursuer’s claim had been extinguished by the operation of prescription. The pursuers’ reliance on section 6(4) of the Prescription and Limitation (Scotland) Act 1973 was said to be unfounded in the evidence. On behalf of the pursuers, it was argued that they were entirely reliant on Savills to tell them how much to bill each year. The information given by the defender to Savills was said to induce an error on the part of the pursuers under section 6(4)

that they had been paid the correct amounts under their agreement. Reference was made to *Heather Capital Ltd (In Liquidation) v Levy & McRae* 2017 SLT 376, at para [63].

[77] On the evidence, it was Savills who had responsibility for the calculation of the rent and they were plainly able to check the information given by the defender and the sums actually due. Mr Ogilvie explained that, based on the known information, “there was no need to consult with Mr Scarborough before calculating his rent” and that Savills would calculate “the expected level of BPS payments”. Accordingly, I am unable to accept that the defender induced an error in that regard. The claim for the sum due in respect of 2015 has been extinguished.

[78] As noted above, the pursuers also seek payment of rent for the period between March and November 2019. There is no doubt that the defender occupied the land for that period. It is argued for the defender that this part of the case, as pleaded, is founded upon the pursuers establishing that there was an agreement entered into between the defender and Savills (acting for the pursuers) in 2019 as to the occupation of land and that this had not been established by evidence. Reading the summons as a whole, I take the pursuers’ position to be that the agreement in 2015 covered the coming years, which would include 2019. The averments in article 4 of the summons, founded upon by the defender, do not revoke that broad contention. Moreover, agreements can of course flow from the conduct of parties and, in the context of years of grazing on the basis agreed at the meeting on 26 March 2015, continuing to graze in 2019 must in my view be seen as on the same contractual basis.

[79] Senior counsel for the defender also emphasised that the evidence was that the defender offered to make payment of rent to the pursuers in respect of his occupation of the land in 2019 and that payment was rejected by the pursuers. He remained willing to

pay a sum by way of rent for 2019. However, the rejected sum was based on the defender's calculation, which I have concluded is wrong. The fact that he offered and was willing to pay the wrong sum is of no relevance.

[80] As a consequence of my decision on Issue 1, and for the reasons I have given, the defender has not overpaid rent for the years 2015 to 2018 and his counterclaim must fail.

Issue 2: return of entitlements

[81] The central point on this issue, which relies on unchallengeable facts, is that in preparing the draft written agreement for 2015, Mr Ogilvie included in it (in clause 8) a requirement to return the entitlements if the grazier left. Mr Ogilvie described this as a non-standard term, which is of course fairly obvious given that an entirely new scheme had just been brought into existence. It plainly had not appeared in any of the numerous previous written agreements.

[82] Having reviewed the productions and the evidence, there is no reference to any kind of communications between Jamie Moran (or anyone else) and Douglas Ogilvie prior to Mr Ogilvie preparing the draft agreement in September 2015 which could have given rise to the insertion of clause 8. In light of Douglas Ogilvie's evidence about what was said and agreed at the meeting, the only reason for including clause 8 in the written agreement must be that Douglas Ogilvie did so because that was agreed at the key meeting.

[83] He is an independent witness, in the sense that he has no direct interest in the outcome of the dispute (other than perhaps potential criticisms of his involvement). There is simply no basis, other than that it was agreed, for him putting clause 8 in the draft written agreement. It is of course also correct that later versions prepared by Mr Ogilvie, for years after 2015, did not include what was in clause 8. This can be viewed as fitting with his own

evidence that the agreement at the key meeting was only about 2015, but I regard that as highly implausible. There is no other evidence supporting the idea that the key meeting, and the meetings with the other graziers, concerning how things would change arising from a completely new payment scheme, would be restricted to the current year. The rent to be paid was plainly a broad point, intended to last over the years, and the same goes for the return of entitlements. The defender accepted that the rent agreement was for that purpose and it makes no sense to think that any agreement about return of entitlements would only apply to the current year.

[84] The evidence of other graziers about the meetings they had in 2015 is of course of some circumstantial relevance. Mr Sheed says the matter was not raised or agreed in his meeting and while that could point to the possibility of it also not being raised with the defender that inference is outweighed by the other evidence. Mr Smith says that it was agreed on a different occasion, meeting only with Douglas Ogilvie. That may well be a mistaken recollection, but even if it were to be accepted it emphasises that Douglas Ogilvie was alert to, and sought agreement upon, the return of entitlements point. The defender stated that if he had been asked to return his entitlements if he left as a grazier he would have walked out of the meeting. I view that as merely another example of the defender seeking to add force to his account of events.

[85] The inherent probabilities also point towards the matter having been agreed at the key meeting. Even if for some reason the point was not raised with Mr Sheed, it certainly was raised with Mr Gordon and Mr Smith (albeit, he says, by Mr Ogilvie). It is difficult to see why Jamie Moran, with two fundamental points on the agenda in his mind, instructed by his father who was the major player in the Estate's business affairs, would not raise both of them. Return of entitlements was discussed between Jamie Moran and Douglas Ogilvie

beforehand and Mr Ogilvie was plainly aware of its significance. I take into account that Jamie Moran stated that the defender also later agreed to return the entitlements, which may seem slightly odd if he had already committed himself to such an agreement. But I view it as a reiteration of the agreed position.

[86] In my opinion, the defender paid great heed to the fact that all previous grazing lets had been dealt with in formal written documents and he gave no real weight to what was discussed and agreed orally at the key meeting. Indeed, the approach of having a written agreement was carried forward by Mr Ogilvie and the draft was prepared, but that does not of course suggest that there was no oral agreement. On the contrary, it supports that position as it sought to reflect what was agreed. I accept the evidence of Christopher Moran that the defender stated, when they met in January 2020, that he intended to take advantage of the absence of written documentation.

[87] As noted above, I have accepted the evidence of Jamie Moran and Mr Macdonald about Jamie Moran communicating that the defender had accepted and agreed to return the entitlements in September 2019. There is no doubt that there was a heated telephone conversation between Jamie Moran and the defender and this contemporaneous communication spoken to in the evidence strongly fits with Jamie Moran's account of their discussion the next day. It also contradicts the defender's position. No sound basis exists for thinking that Mr Macdonald simply made up the existence of this communication. Moreover, if the defender had not, in the discussions the day after the heated call, accepted that he should return the entitlements I have no doubt that Jamie Moran, who had already been extremely angry in the telephone call, would have returned to that state of mind. The defender made no suggestion of that occurring.

[88] For these reasons, I conclude that the agreement to return the entitlements if the defender ceased to be a grazier on the Estate was reached at the key meeting. I note that while the second conclusion in the summons refers to the entitlement sums being paid to the second pursuer, the evidence was that the first named pursuer should receive them. No issue was raised on behalf of the defenders in that regard, whether in evidence or submissions.

Conclusions

[89] On Issue 1, the agreement reached on rent calculation covered the whole of the then existing BPS income (apart from LFASS). As a consequence, the pursuers' claims in respect of amounts not paid in 2015-2018 succeeds, subject to deduction of the sum claimed for 2015 (£8,133.77). However, the convergence payments, not part of the BPS at the time the agreement was reached, are not to be included. The pursuers also succeed in respect of the amount due in rent for March to November 2019. On Issue 2, there was agreement that the entitlements would be returned if the grazier left the land let to him. The pursuers' claim on that matter also succeeds.

Disposal

[90] Decree will be granted in respect of the sums concluded for in the summons, subject to deductions in relation to 2015 and convergence payments. The arithmetical consequences of my decision will be addressed at a by order hearing, along with questions of expenses.