



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 26  
XA1/19

Lord Brodie

OPINION OF THE COURT

delivered by LORD BRODIE

in the Appeal from the Scottish Land Court

under

The Agricultural Holdings (Scotland) Act 2003

by

KEVIN MARTIN

Appellant

against

MERCEDES McMILLAN

Respondent

**Appellant: Party**

**Respondent: Logan; Campbell Smith LLP**

8 April 2019

**Introduction**

[1] This is an application by the respondent for an order ordaining the appellant to lodge caution in the sum of £10,000 for the expenses of the appeal. The appeal is from a decision of the Scottish Land Court dated 17 December 2018. The application for an order for caution

came before me on the Single Bills as an item of procedural business in terms of Rule of Court 37A.1(1) and (2)(ii) (appeals in Form 41.25). It is opposed. I heard submissions on 5 April 2019. Mr Logan appeared on behalf of the respondent. The appellant appeared on his own behalf. On the motion of the appellant I adjourned the hearing on the Single Bills until 8 April 2019 in order that he might obtain advice with a view to more fully responding to Mr Logan's submission and in particular to respond to the submission that the appellant's grounds of appeal were unstateable. I heard further submissions on 8 April. Having heard these submissions I made an order that the appellant find caution in the sum of £7500 within four weeks of 8 April 2019. I set out my reasons for making that order below.

[2] As at the date of the hearing on the Single Bills there had been no procedural hearing; in terms of the timetable that has been fixed for 14 May 2019. Notes of argument had not been lodged, these not being required until 30 April 2019. Having regard to my having made an order for caution, on Mr Logan's motion I prorogued the date for lodging notes of argument by a period of seven days.

### **The decision appealed against**

[3] Before going further, it is convenient to say something about the application to the Scottish Land Court which was determined, following proof, by an order of 17 December 2018, and in respect of which this appeal under section 88 of the Agricultural Holdings (Scotland) Act 2003 is lodged. The application was for declarator, first, that the now appellant is the tenant of subjects known as and forming 17.5 acres or thereby at Willow Rise, Whittinghame Estate, Haddington ("the subjects"), and second, that the appellant occupied the subjects in terms of a limited duration tenancy under the 2003 Act (otherwise an "SDLT"). There was a third crave for determination of the terms of the tenancy.

[4] The appellant gave evidence to the Land Court that he had agreed a tenancy of the subjects with the respondent's father, David McMillan, who controlled the family's financial and business affairs, at a meeting in January 2013. The subjects had previously been let to a company, Magic Farm Limited, in terms of a lease dated 9 and 18 June 2011 but Magic Farm had been dissolved on being struck off the Companies' Register (on 7 December 2012) by reason of failure to file returns and accounts. Mr McMillan also gave evidence. He confirmed the lease to Magic Farm but denied the appellant's account of a meeting at which he had agreed to let the subjects to the appellant. Rather, on 31 January 2014, Mr McMillan's wife, who then was the owner of the subjects, entered into a written lease (production 2) of the subjects to another company, formed on the initiative of the appellant (but of which he was neither a director or shareholder) on 16 December 2013. In its Note the Land Court abbreviates the name of that other company as "My Neighbours". The lease in favour of My Neighbours had the same date of entry and termination date (1 June 2011 and 31 May 2015) as the lease in favour of Magic Farm. Mr McMillan had been unaware of the dissolution of Magic Farm but had assumed the company had continued in business, albeit under a different name, until the expiry of the lease in 2015. For his part, the appellant claimed that production 2, the lease in favour of My Neighbours, was "bogus".

[5] The Land Court found the appellant to be neither credible nor reliable. It accepted that there had been an agreement in January 2013 but that it had related to a reduction of rent to £650 per month; it did not include acceptance of the appellant as tenant of the subjects. The Land Court further found that the lease in favour of My Neighbours was not a fraud or a forgery but a deed executed in an attempt to substitute My Neighbours for Magic Farm and that it was done with the applicant's knowledge and cooperation, if not at his instigation.

[6] The Land Court considers the consequence of its conclusions as to the disputed matters of fact at paragraphs [64] to [67] of its Note, in light of the facts that as at 31 January 2014 Magic Farm had been dissolved and that by that date My Neighbours had been formed but that My Neighbours did not exist at 1 June 2011 which was the purported date of entry under the lease in its favour. The Land Court concluded, under reference to the decision in *Morrison-Low v Paterson* 1985 SC (HL) 49, that misapprehension as to the continuation of a previous lease was not fatal to the outcome that the appellant was tenant in his own right (from the date of the dissolution of Magic Farm on 7 December 2012). However, there was no evidence to point to the duration of any lease to the appellant; the impression being that it was from month to month indefinitely. That again was not fatal to the existence of a lease in favour of the appellant, as a lease for a year will be implied: *Gray v Edinburgh University* 1962 SC 157. That could be, as a lease for not more than five years, an SLDT in terms of section 4(1) of the 2003 Act, provided that it was a lease of "agricultural land" as that term is defined in section 93 of the Act, that is "land used for agriculture for the purposes of a trade or business". However, such a conclusion was not available in the present case as there had been no evidence of the conduct of a trade or business.

[7] At paragraph [67] of its Note the Land Court considers the consequences of it being wrong on the conduct of a trade or business point and there having therefore been an SLDT of which the appellant was the tenant after the dissolution of Magic Farm. Such a lease can be terminated without formality: 2003 Act section 6(2). Supposing there to have been an SLDT of which the appellant was tenant, it was the opinion of the Land Court that execution of the lease in favour of My Neighbours, something in which the appellant was an active participant, could only signify the entering into of a new arrangement, and that was so notwithstanding the impossibility of a lease in favour of a company commencing on a date

prior to the date of the company's incorporation. The appellant's application was accordingly dismissed.

### **The grounds of appeal**

[8] The appellant advances four grounds of appeal:

1. The Learned Chairman erred in law in deciding the appellant failed to establish the existence of an agreement whereby the appellant was the tenant of the subjects.
2. The Learned Chairman erred in law in deciding the appellant had failed to establish he had carried out a trade or a business from the subjects.
3. The Learned Chairman erred in law in holding that the purported lease dated 1 June 2011 was effective notwithstanding that the date of incorporation of the purported tenant under said purported lease was 31 December 2014 [that date looks to be clerical error, the Land Court refers to the lease to My Neighbours being executed on 31 January 2014, the date of incorporation of My Neighbours is 16 December 2013]
4. The Learned Chairman erred in law in repelling the motion by the appellant to cite the witness Gayle Wylie.

[9] At the hearing on 5 April 2019, Mr Logan argued that these grounds did not explain and therefore give notice of the nature of the alleged errors of law upon which the appellant proposed to found. The appellant acknowledged that the grounds were, perhaps, weak and he accordingly moved for an adjournment with a view to strengthening his presentation. At the continued hearing on 8 April he presented a page of "Supplementary Grounds of Appeal". I enquired of the appellant what was the purpose of this document; was it

intended, on the one hand, to introduce further grounds of appeal or, on the other, was it an expansion on or explanation of the existing four grounds. The appellant explained it was the latter. Accordingly, the document headed “Supplementary Grounds of Appeal” was not formally lodged but I had regard to its terms when listening to and evaluating the appellant’s submissions.

### **Submissions on the motion for caution**

#### ***The respondent***

[10] Mr Logan elaborated on the grounds set out in the respondent’s form of motion as follows. He accepted that “the test was a fairly high one” but, as illustrated by the decisions in *Rush v Fife Regional Council* 1985 SLT 451 and *Duff Petitioner* [2013] CSIH 112, where an appellant or reclaimer was unable to pay an award of expenses against him and had what was an obviously irrelevant or unstateable case, the interests of justice may require that a party in the position of the present respondent to be protected against incurring judicial expenses with no prospect of recovering them. Here what were put forward as the appellant’s grounds of appeal had no substance whatsoever; no sufficiently specific proposition was advanced which, if accepted, would entitle the appellant to succeed. The respondent had not been given notice of the argument which she had to answer. In so far as it was possible to discern what the appellant’s contentions were they had little or no prospects of success and were based in large part on a misunderstanding of what the Land Court had decided. Where facts are challenged no proper basis for an appellate court interfering with them is set out. Mr Logan developed his argument that each of the purported grounds of appeal was unstateable along the lines set out in the Answers for the Respondent. I shall have something more to say about Mr Logan’s submissions below.

[11] In relation to the appellant's likely ability to pay expenses, Mr Logan explained that the appellant does not appear to engage in economic activity. On the strength of the appeal the appellant occupies the subjects which belong to the respondent without payment or tender of rent. The appellant and his domestic partner occupied static caravans on adjacent land. This has given rise to various proceedings in respect of non-payment of rent and non-payment of electricity bills. None of the expenses awarded against the appellant's partner in these proceedings (proceedings in fact conducted by the appellant) have been paid. In July 2018 the appellant had made proposals to meet his partner's liabilities but nothing had come of that. A charge having expired without payment, proceedings had been commenced for the sequestration of the appellant's partner. The appellant had been granted emergency Legal Aid in order to bring proceedings for interdict in the Court of Session. Interim interdict had been granted but that order had been recalled on 27 April 2018. The appellant's Legal Aid application was dismissed for want of probable cause in May 2018.

[12] The appellant has not been truthful in his dealings. For example, the position he adopted in the case *East Lothian Council v Martin* [2015] CSIH 13 was inconsistent with that adopted by him in the subsequent hearing before the Land Court. It is not reasonable that the respondent should have to incur the further costs of an appeal with no security for expenses.

[13] The sum of £10,000 is a reasonable estimate of the costs and Court fees that will be incurred by the respondent in addressing this appeal. In the event of a full day's hearing in the Inner House the cost to the respondent in court fees alone would amount to £4698.

*The appellant*

[14] Mr Martin began by explaining that it had been and remained his intention to meet his partner's liabilities in expenses when the present case was over. He had thought that he would have been successful before the Land Court and had not anticipated the need to appeal. He rejected the suggestion that he was a liar and just out to waste time. However he acknowledge that he had difficulty in processing information and in remembering; he had a particular problem with dates; he was not very well organised (these matters are discussed in paragraphs [5] to [8] of the Land Court's Note).

[15] Mr Martin went on to submit that the burden of having to find caution effectively barred a poor litigant from stating his case to the court. It was a matter of the court's discretion but in the case of an individual as opposed to a limited company, mere impecuniosity, short of having been made bankrupt, was an insufficient basis for making an order for caution: *Stevenson v Midlothian DC* 1983 SC (HL.) 50 at 58; *Walker v Kelty's Trs* (1839) 1 D 1066, Lord President Hope at 1170; *Monarch Energy Ltd v Powerglen Retail Ltd* 2006 SLT 743 at paragraphs 10 and 11; *Dean Warwick Ltd v Borthwick* 1981 SLT (Notes) 18; Macphail *Sheriff Court Practice* (3<sup>rd</sup> edit) paragraph 11.52 *et seq.* The court had to carry out a balancing exercise as between the parties while trying to ensure substantial justice but caution should not be ordered except in exceptional circumstances. There were no exceptional circumstances here; rather, the application for an order for caution was a blunt instrument which was being used by those acting for the respondent to prevent the appellant putting his case just because he had no money. To make an order would be contrary to what had been said by (the first) Lord President Hope in *Walker v Kelty's Trs* at 1070. Accordingly, the court should be slow to invoke its discretion in favour of the respondent. It would be according to accepted practice to refuse to order caution. That



being the case, the respondent having failed to show that she has an insurmountable case, the motion for caution should be refused with an award of the expenses of the hearing in favour of the appellant.

[16] When asked by me whether he accepted that he was not in a position to pay any award of expenses which might be made against him, the appellant initially demurred. It was the case, as was demonstrated by a completed Application for Exemption dated 14 January 2019, that the appellant was fee exempt on his declaration that he and his domestic partner were in receipt of benefits with an annual income not exceeding £18,000 (the appellant later explained that he did not claim benefits but lived off his partner's benefits). The appellant accepted that he had not tendered rent for the subjects; it had not occurred to him to do so pending the Land Court proceedings. He had accepted that he had undertaken to meet his partner's liabilities in respect of other litigation but, again that had been on the basis that this would be dealt with after the present proceedings had been brought to (successful) completion. At present everything was "at a standstill" as any move would prove disastrous if he lost the case. He had five children to consider. He had livestock but as matters stood he was not in a position to fence the land. He had however registered a Scottish Charity, the Earthy School Project. While he was "on his own at present", he had the support of two solicitors and an architect. The employee of a seed company had expressed interest. Once he succeeded in the present appeal he would be able to expand the board of trustees of the charity and to apply for grants. He might then "be stepping back" but would have the status of an employee. (A search in the Companies Register indicates that a private company limited by guarantee with exemption from the use of "limited" was incorporated as The Earthy School Project on 10 October 2017 with its registered office at the subjects. The appellant is a director. Raki Islam is another. They are

both shareholders. The Earthy School Project was also registered as a Scottish Charity from 12 December 2018 with its address at the subjects. Its only named trustee is the appellant).

[17] As I have already indicated, at the continued hearing on 8 April the appellant tendered "Supplementary Grounds of Appeal". That document is in the following terms:

1. The learned judge erred in law in holding that as a finding of fact the appellant was not engaged in agricultural use of the subjects at Willow Rise.

Reference is made to paragraph 66 of the learned judge's decision. The learned judge erred in law in not finding that the existence of certain farmyard animals and documentary evidence from bank records of the purchase of feedstock for said animals did not amount to a use of the subjects for agricultural purposes. Any judge reasonably seized of such evidence, who holds that such evidence is not reasonable proof of agricultural use, has produced an absurdity and in breach of natural justice.

2. The learned judge erred in law by conflating the existence of said animals with the social purpose mentioned by the appellant in evidence. Such social purpose does not detract from the core activity for which the appellant put the subjects to use namely agricultural use.

3. The learned judge erred in law by conflating the social purpose with the statutory protection of the appellant as afforded by the Act. Such protection exists and operates in favour of the appellant irrespective of any social purpose. Reference is made to 2 hereof.

4. The learned judge erred in law in holding that the purported lease in favour of My Neighbours represented the signing of a new lease. Such a finding is based on a legal fiction in that My Neighbours was not incorporated until several years had passed since the signing of said purported lease. (see 5 below)

5. The learned judge erred in law by holding (see paragraph 68 finding (c)) that any agreement between the appellant and Mr McMillan was automatically superseded by the purported lease in favour of My Neighbours. Such a finding has no legal basis given the purported tenant lacked the requisite legal capacity to enter into any lease far less the purported lease on the basis that the purported lease was executed on 1 June 2011 whereas the purported tenant company was not incorporated until 16 December 2013. This was 18 months later. The provisions of the Companies Act 2006, permitting as yet unincorporated entities to endorse transaction pre-incorporation, do not extend to such purported transactions as the purported lease.

[18] At the continued hearing the appellant took the opportunity to make further submissions. I took the appellant to adopt the Supplementary Grounds of Appeal as part of his argument in support of his existing grounds of appeal. He had reflected on the difficulties he had faced, as someone who is not a lawyer, in presenting his case before the Land Court and in preparing this appeal. He had had the benefit of some legal advice, albeit not from someone who combined knowledge of agricultural law with court experience. However, such help as he had received had been rushed and, as he now appreciated, “not good enough”. He had been unable to take notes in a professional way at the Land Court hearing. He had been stressed while giving evidence. There were things that he should have said but which he forgot to say. Nevertheless, that he was an agricultural operator was something which was obvious to everyone. He had animals. He had purchased poly-tunnels. At the relevant time the charitable project had been only an idea. If, in the context of previous proceedings, he had said that the pigs belonged to a company, that was because of the organised hostility of people in the area and the fact that he had been brought to the

verge of a breakdown. What had been done by these people was repugnant and immoral.

The appellant considered that he had a very strong case as he would be able to demonstrate from the transcript of evidence.

[19] The appellant stressed his commitment to a vision for the social project he planned for the subjects. It was intended to benefit disadvantaged young people who could be brought to work on the land in order to gain experience and skills but its benefits would not necessarily be limited to that. The appellant accepted that he had no money. That meant that making an order for caution would be an end to the appeal and therefore the end of his charitable project.

[20] I asked the appellant if he had any comment on the figure of £10,000 which had been proposed for caution. He said it was “way too high” but, as he explained, that was not because he challenged the likely level of expenses that the respondent would incur but, rather, because it was well beyond anything that he could afford.

### **Decision**

[21] It is competent to make an application for caution for expenses in any cause (including an appeal) by way of motion: RCS 33.2. The application may be made at any time. Where the cause is before the Inner House the motion is heard in the Single Bills: RCS 23.6(4). The object of such an application is to provide security for payment of any future award of judicial expenses which may be made against the party who is ordered to find caution. As is explained in the commentary to the Rules of Court at paragraph 33.1.1, “caution” is the Scots legal term for the obligation by which a person becomes surety for another; in more everyday language it is a guarantee of performance of an obligation to pay money. The court will determine a time period within which caution must be found.

Finding caution may be done by lodging a bond of caution in terms which comply with RCS 33.6: RCS 33.4 (1) (a) but it may also be done, and more usually is done, by consigning (lodging) a sum of money in the name of the Accountant of Court or providing some other form of security: RCS 33.4 (see discussion in *Centenary 6 Ltd v Caven* 2018 SLT 423). In the event that a party fails to find caution having been ordered to do so, the other party may apply to the court for an appropriate decree: RCS 33.10, *Centenary 6 Ltd* at paragraph [37]. Making an order that an individual impecunious litigant should find caution in appropriate circumstances does not contravene the litigant's rights as guaranteed by article 6 of the European Convention on Human Rights: *Ewing v Times Newspapers Ltd* 2010 SLT 1093 at paragraphs [10] and [11]. In this case the appellant had given notice in the form of opposition to motion of his intention to take the point that an order for caution would be a breach of his human rights under article 6. In the event he did not argue the point. I did not, however, consider that that relieved me of having regard to the importance of the rights guaranteed by article 6 and the other considerations mentioned by the Lord Justice-Clerk (Gill) at paragraphs [10] and [11] of *Ewing*.

[22] As the appellant reminded me, whether an order for caution for expenses should be made is a matter of discretion: *Thom v Andrew* (1888) 15 R 780, *Matheson v Marsh* 1996 SC 25. However, there are certain recognised principles by reference to which that discretion should be exercised. The general rule is that where a person bringing proceedings is or becomes bankrupt he will be required to find caution for expenses, but mere impecuniosity, while of obvious relevance, is not enough. Were it otherwise persons of modest means would be unable to vindicate their rights. As encapsulating that principle, Mr Martin put particular stress on what was said by the Lord President in *Walker v Kelty's Trs* at 1070:

“As to caution for future expenses, this party is now in the same position with any other on the poor’s roll; and it would be nothing short of shutting the doors of the Court upon them, if parties on the poor’s roll were compelled to find caution for expenses.”

Lord Fraser put the matter this way in *Stevenson v Midlothian DC* 1983 SC (HL) 50 at 58 in a speech with which the other members of the House agreed:

“... the effect of an order to find caution of a substantial amount might be to make it impossible for the appellant to continue with the action. In a case where an action has serious merits, this would be a matter of great importance. It would clearly be wrong that a litigant with a stateable case should in effect be excluded from the court by an order for caution with which he could not comply, unless in exceptional circumstances.”

[23] Thus, the need for there to be exceptional circumstances is where the action “has serious merits” or the case is “stateable”. Lord President Hope was not saying anything different in *Walker v Kelty’s Trs*. In that case the pursuer, Walker, was of limited means; he had been sequestrated but had been discharged. He assigned his claim against the defender to Rutherford, “a solvent merchant in Kirkcaldy” who was a creditor of Walker, and who then made payments to Walker’s law agents by way of financing the litigation. Walker was then “on the poor’s roll” (an early form of Legal Aid). On learning of this the defender moved that either Rutherford should be sisted (made a party to the action) or that Walker should be ordered to find caution. The Lord Ordinary made such an order. Walker reclaimed (appealed). At that point Walker produced a retrocession by Rutherford (a deed renouncing the assignation of the claim). The matter was remitted to the Lord Ordinary to make inquiry. The Lord Ordinary is recorded as having expressed “much reluctance in abridging the right of litigants in poor and destitute circumstances from pursuing any relevant action which they may be advised to raise to vindicate their just and lawful rights” (*supra* at 1068). On the case returning to the Inner House, Lord Gillies was not very impressed by the dealings between Walker and Rutherford which, “whether a true

transaction or not, [were] meant to enable Rutherford, the assignee, to reap all the benefit if the action was won, and to keep free of all expenses if it was lost." As for past expenses (prior to the retrocession) the Court imposed the requirement that had been sought by the defender as a condition of the action being allowed to proceed, but as for future expenses Walker, who was "now in the same position with any other on the poor's roll", would not be required to find caution.

[24] One sees therefore in the report in *Walker*, a case which was decided nearly 180 years ago, conflicting concerns which remain pertinent to this day. On the one hand, a concern not to prevent litigants from vindicating their just and lawful rights simply because they are in "poor and destitute circumstances" and, on the other, a concern at least to be alive to the apparent unfairness of a litigant reaping "all the benefit if the action was won", while being kept "free of all expenses if it was lost".

[25] However, to return to the reliance placed by the present appellant on what was said by the Lord President in *Walker*, it is necessary to understand what, in 1839, was "the same position with any other on the poor's roll". That position is set out in Mackay *Manual of Practice in the Court of Session* (1893) p161. Critically, as is required for a modern grant of Legal Aid, admission to the poor's roll required the pauper to demonstrate not only poverty but also that his case had probable cause. The procedure was rigorous. It involved an application to the Court and a remit to reporters for an assessment of the pauper's prospects of success. At the time Mackay was writing the procedures were governed by the Act of Sederunt of 21 December 1842 but that Act of Sederunt substantially replicated the provisions of the earlier Act of Sederunt of 10 August 1784 (reproduced in Erskine *Principles of the Law of Scotland* (10<sup>th</sup> edit, 1816) at p591). In particular an applicant for admission to the poors' roll had to demonstrate probable cause (see eg *Currie* (1829) 7 S 302). Thus, when the

Lord President in *Walker v Kelty's Trs* speaks of “shutting the doors of the court” he has in mind shutting the doors against a litigant who has, on the face of it, a reasonably good case.

[26] The balance must inevitably shift when, on the face of it, the “poor and destitute” litigant does not have probable cause. Hence what was said by Lord Justice-Clerk Wheatley in *Rush v Fife Regional Council* 1985 SLT 451 at 453:

“Ordering caution on a man who is manifestly not in a financial position to provide any sum of substance may appear to be a draconian order, but justice has to be even handed, and on the other side of the coin it would be grossly unfair to oblige the defenders to carry on defending an obviously irrelevant action without any hope of recovering any expenses if successful ...”

[27] It follows that in looking at the interests of justice in the round, having regard to all the circumstances, as I was encouraged to do by Mr Logan, I must take into account the apparent merits of the parties’ respective cases: *Ewing v Times Newspapers Ltd* at paragraph [10]. If on doing so, I consider that the appellant does not have probable cause or a stateable case (I take these expressions to be more or less equivalent), it does not appear to me that the exceptional circumstances referred to by Lord Fraser in *Stevenson* (a case in which Legal Aid had been granted but nevertheless caution had been ordered) need be demonstrated.

[28] In the present case I am satisfied that the appellant is not in a financial position to meet an award of expenses against him. I understood the appellant to say as much in terms: “I have no money.” He is fee exempt on the basis of his declaration that he and his partner are in receipt of benefits and has an income of less than £18,000 per annum. The appellant clarified that position during submissions on 8 April when he said that he “did not sign on” and lived on his partner’s benefits. He has five children to support. He has not tendered rent for property of which he claims to be the tenant. He accepts that he has undertaken to make some sort of payment against his partner’s liability in expenses in respect of other



litigation but he explains that he is not presently in a position to make such payments. On questioning he premised his ability to meet his obligations on attracting grant funding for the Earthy School Project. It is difficult to understand how funds belonging to a charity could properly be applied to meet the appellant's personal obligations but a more direct difficulty is that the appellant's hope of obtaining funds in the future, whatever the nature of these funds may be, is dependent upon him being successful in this appeal. An order for caution is intended to address the reverse situation: where the appellant has not succeeded in his appeal and accordingly he has been found liable in expenses.

[29] There is therefore a basis for the respondent's application. Litigation is a costly business; costly in time, trouble, anxiety and money. The respondent has already expended the costs of a five day hearing before the Land Court. If the appeal is to go forward she wishes to be protected against the eventuality of expending further costs which she will be unable to recover even if successful. What then are the circumstances which bear on the question as to whether the interests of justice require the respondent's application to be granted?

[30] The appellant reminded me of an important circumstance and that is that the fact that the appellant does not have the means to pay the respondent's expenses also means that he will be unable to find caution and therefore he, in all probability, will suffer the sanction which is available for that, which in this case would be dismissal of the appeal. I accept that as a matter of fact and I accept the importance of that as a relevant circumstance.

[31] In the reasons put forward in the support of the motion for an order for caution the respondent suggests that the appellant has been "dishonest in his dealings". The appellant recognised in this a repetition of the suggestion that he is a liar and a time-waster; something he rejected. It may be that the appellant has said different things at different

times about whether it was he or a company which owned the pigs on the subjects but for present purposes I propose to leave that aside and to proceed upon the basis that the appellant is sincere and acting in good faith. I accept that he believes that he has a good case based on an agreement with Mr McMillan. That is not however to exculpate him from adverse comment on his conduct of the appeal. He has understood the need for a certain amount of professional legal assistance. The Appeal (ie the form 41.25) has the appearance of having been prepared by a solicitor, as the appellant acknowledged was the case. The appellant was able to provide a typed list of relevant authorities for the hearing on 5 April. The Supplementary Grounds of Appeal again have the look of having been prepared by a legal professional. However, the appellant explained that such professional help that he had received had been "rushed". That would be seem to be the case. The grounds of appeal show little sign of any analysis of the errors of law which are attributed to the Land Court and they and the Supplementary Grounds appear to proceed on misapprehensions as to what are the facts and what was decided by the Land Court. What I would see as meriting adverse comment is the appellant's willingness to embark on what he would seem to recognise is a legal process, dependent on the application of legal rules, without having taken any steps to equip himself to do so. My strong impression, reinforced after a weekend's adjournment to allow the appellant to prepare an explanation of what his case was about, was that the appellant does not yet know what it is he might be able to argue were the appeal to go ahead. The appellant was frank about how difficult he had found these proceedings to be. He acknowledged that he had been ill-prepared for the hearing on 5 April. He volunteered "I need to learn this back to front". He saw a need to obtain a transcript of the hearing before the Land Court with a view to identifying passages of

evidence which would support his contention that he was engaged in agriculture on the subjects.

[32] This brings me to my assessment of the appellant's case as presented in the grounds of appeal, as expanded up by the Supplementary Grounds of Appeal and considered in the light of the submissions of the appellant and Mr Logan. In my opinion the appellant was right when he said that he could not ask the court to make a judgement on the basis of what his case could be; I had to consider what his case was. That means that I can leave aside consideration of whether the appellant would be able to acquire the transcript of the evidence led before the Land Court (assuming the evidence was recorded) without paying for it and what he might then do with it. (I was advised that while usually Land Court proceedings are not recorded, they may be if a request for that is made at the outset.

According to Mr Logan in the present case no request was made).

[33] I turn then to the appellant's grounds of appeal.

[34] RCS 41.25(e) requires that an Appeal under statute must state in brief numbered propositions the grounds of appeal. "Brief" means brief; prolixity is to be strongly discouraged (cf *Centenary 6 Ltd*, the Lord Justice Clerk at paragraphs [10] and [11]) but they nevertheless must provide a basis for development of an argument and give notice of the point which is to be taken. In this case the grounds of appeal are so brief as to be devoid of substance; they give no indication whatsoever of the nature of the errors of law which are founded on or why it is said that a specified error was material to the Land Court's decision. In *Ferguson v Whitbread & Co plc* 1996 SLT 659 (the second) Lord President Hope explained that:

"... the preparation of the grounds of appeal, which require to be lodged as a step in process, should never be regarded as a mere formality. The purpose of the rule, which is a simple example of case management, is to give notice to the parties and to

the court of the points which are to be argued. Specification of the grounds enables the parties to direct their argument, and their preparation for it, to the points which are truly at issue.”

Whereas in the case before him:

“It is plain that these are not grounds of appeal in accordance with rule 40.14 (2). No attempt has been made to specify the grounds on which the sheriff and the sheriff principal were in error in pronouncing the interlocutors against which the pursuer seeks to appeal. In *McAdam v Shell UK Ltd* 1991 SC 360 the ground of appeal was that the Lord Ordinary ‘erred in law’ in finding that the pursuer was liable to the defenders in expenses on the sheriff court ordinary scale and refusing to find him liable in expenses on the Court of Session scale. The Lord President said at ... p 364 ... that this ground was meaningless without an explanation of the error of law which was said to have occurred.”

The same can be said about the grounds of appeal in the present case.

[35] A consideration which applies to the appellant’s grounds 1 and 2 is that, although they assert errors of law on the part of the Land Court (appeal under section 88 of the 2003 Act is only on question of law), they complain about failures to make findings in fact: that there was an agreement whereby the appellant was the tenant of the subjects; and that the appellant carried out a trade or a business from the subjects. The grounds do not provide any basis for the proposition that failure to make these findings involved a question of law. The Supplementary Grounds attempt to address this deficiency. Ground 1 of the Supplementary Grounds asserts that for a judge to accept evidence of the existence of certain farmyard animals and the purchase of feed for these animals and yet not hold it to be “reasonable proof” of an agricultural use of the subjects produces an absurdity and a breach of natural justice. That is to fail to understand the Land Court’s decision and also to depart from ground of appeal 2. As appears from paragraph [66] the Land Court accepted the presence of livestock on the subjects and, unsurprisingly, that their feed was paid for. That might (although not necessarily) point to the subjects being “land used for agriculture”.

What it did not establish was that such agriculture as was carried on was “for the purpose of

a trade or business”, as required for the subjects to be “agricultural land” as the term is defined in section 93 of the 2003 Act. It was the appellant’s failure to prove that any agriculture as there may have been was for the purpose of a trade or business that was fatal to his claim to be the tenant under a SLDT. Grounds 2 and 3 of the Supplementary Grounds which might be summarised as a contention that the existence of a social purpose was not necessarily inconsistent with agricultural use similarly misses the point, which is that at the relevant point in its reasoning the decision of the Land Court turned on the failure of the appellant to establish use for the purpose of a trade or business.

[36] Grounds 4 and 5 of the Supplementary Grounds would appear to proceed on the misapprehension that the lease, production 2, was executed on 1 June 2011 as opposed to 31 January 2014.

[37] Mr Logan had additional criticisms to make of the appellant’s purported grounds of appeal when he addressed me on 5 April. These criticisms appear in the Answers to the Grounds of Appeal. As far as ground 1 is concerned it is said to be misconceived in that the Land Court had been prepared to contemplate there having been a lease of the subjects in which the appellant was tenant from the date of dissolution of Magic Farm. However, the Land Court held that lease must have been superseded by the subsequent lease (Note paragraph [68](c)). I would agree with this criticism. That is how the Land Court decided. Ground 1 of the grounds of appeal is simply not to the point.

[38] As far as ground 2 is concerned the respondent again contends that it is misconceived. According to Mr Logan, the question that the Land Court considered was whether such trade or business as was carried out fell within the definition of “agriculture”. I cannot say that that is my reading of the Land Court’s decision. As I have set out at paragraph [35] above, the question was whether a supposed lease would have been a lease

of “agricultural land” (see 2003 Act sections 4(1) and 93). That depended on it being “land used for agriculture for the purposes of a trade or business”. It was the absence of evidence of conduct of a trade or business which was fatal to the contention that any lease was an SLDT in terms of section 4(1) of the Act (Note paragraph [66]). I therefore do not accept the respondent’s criticism of ground 2. However, the point made at paragraph [35] above remains: on what basis is it to be argued that the Land Court erred in law in deciding the appellant had failed to establish he had carried out a trade or a business from the subjects?

[39] As far as ground 3 is concerned the respondent contends that it is misconceived in that the Land Court did not hold that the lease in favour of My Neighbours was “effective notwithstanding that the date of incorporation of the purported tenant”. Rather, what the Court held was that the impossibility of the lease commencing on a date before the incorporation of the company was not fatal to the lease becoming operative as from the date of incorporation (Note paragraph [67]). The respondent elaborates on its criticism of the ground of appeal by reference to the possibility of adoption of pre-incorporation contracts and section 51 of the Companies Act 2006. Again I found myself in disagreement with Mr Logan. It does not appear to me that the Land Court had in mind the adoption of pre-incorporation contracts (as to which there was in any event no recorded evidence). The Land Court’s understanding was that My Neighbours was incorporated on 16 December 2013. The lease in favour of My Neighbours was entered into on 31 January 2014. My Neighbours therefore existed as at the date of execution of the lease, production 2, albeit it did not exist on the date of entry which was specified in that deed. In these circumstances the Land Court, as appears from its Note paragraph [67], posited the possibility of the lease becoming effective from its date of execution. That would seem to be an arguable proposition. However, whether or not that is a good argument is not critical for present

purposes. The significance of the execution of the deed was not that it necessarily created a lease in favour of My Neighbours but rather that it indicated the entering into of a new arrangement, to which the appellant was party, which was inconsistent with the appellant being the tenant, and therefore the coming to an end of any previous lease in his favour (Note paragraph [67]). Ground of appeal 3 is not directed to that and therefore the basis of the decision set out in the Land Court's Note paragraph [67] stands unchallenged.

[40] As far as ground 4 is concerned the respondent states that the decision of the Land Court to refuse an adjournment in order for the appellant to secure the attendance of another witness, Ms Gayle Wylie (Note paragraph [4]), was a matter for the Court's discretion and that there is nothing in the ground of appeal that would justify an appellate court in interfering. I can only agree.

[41] For these various reasons I consider this appeal to be unstateable. The appellant did not really argue the contrary despite having been allowed an adjournment in order to prepare any such argument that he might have. That, in my opinion, is a very powerful consideration in favour of making an order for caution. Justice is not well served where a party is compelled to incur expense in answering a claim which is entirely lacking in merit with no prospect of recovery of that expense even if she is completely successful. I recognise that in all probability a result of an order for caution will be that the appellant will be unable to continue with his appeal. That is clearly an important consideration but it is not an appeal which, in my opinion, has any prospect of success. I will therefore order caution. Mr Logan estimated the likely expense of the appeal going to a full day's hearing at £10,000. That estimate includes court fees of a little less than £5000 for each party (the appellant is exempt but the respondent is not). Fees are calculated on a time in court basis. I cannot see this appeal, were it to go ahead, requiring more than half a day's hearing. The court fees

might therefore be in order of £2500 rather than £5000. Taking a broad view I will fix caution at £7500. Caution should be lodged within four weeks of 8 April 2019.