

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT STORNOWAY

[2019] SC STO 67

A10/12

JUDGMENT OF SHERIFF DAVID OMAN SUTHERLAND

in the cause

BERNARD and KATHLEEN ALLEN  
Residing at 18A Kirkibost, Bernera, Isle of Lewis

Pursuers

against

DAVID and JANINE HARGREAVES  
residing formerly at 17A Kirkibost, Bernera, Isle of Lewis  
and now c/o MacDonald Maciver & Co. Limited, Solicitors, 20 Francis Street, Stornoway

Defenders

**Pursuers: Mr McDougall Advocate; Gilliespie McAndrew**  
**Defenders: Mr Buchanan Advocate; MacDonald MacIver**

Stornoway, 28 June 2019

The Sheriff, having resumed consideration, refuses the pursuers' craves and repels the pursuers' pleas-in-law; Upholds the defenders' pleas-in-law and grants decree of absolvitor with expenses as taxed in favour of the defenders and allows an account to be prepared and remits same to the Auditor of court to tax and report thereon.

This action has had a considerable and lengthy procedural history with the pursuers having changed agents and debates being fixed with resultant minutes of amendment being lodged by the pursuers. When the present agents for the pursuers took over a proof before answer was fixed after amendment of pleadings. I am indebted to Mr MacDougall, Counsel for the

pursuers, and Mr Buchanan, Counsel for the defenders, for their careful presentation of the case.

I found the following facts admitted or proved:

- (1) The pursuers are Bernard and Kathleen Allen, spouses, residing at 18A Kirkibost, Bernera, Isle of Lewis. The defenders are David and Janine Hargreaves, spouses, residing formerly at 17A Kirkibost, Bernera, Isle of Lewis and now c/o MacDonald Maciver & Co. Limited, Solicitors, 20 Francis Street, Stornoway.
- (2) Mr Bernard Allen, the first named pursuer, was the tenant crofter of the crofts 18 and 19 Kirkibost, Bernera, Isle of Lewis.
- (3) Mr David Hargreaves, the first named defender was the tenant crofter of the croft 17 Kirkibost, Bernera, Isle of Lewis.
- (4) Mr Bernard Allen, the first named pursuer, was the owner of Highland cattle, which cattle were registered under the Premium Cattle Health Scheme and granted a certificate of accredited status in 2008.
- (5) Initially the first named pursuer only kept sheep on his croft but in 2005 this changed and he bought a cow and a heifer. When purchased the cow was in calf and once the cow calved in 2006 the first named pursuer started to participate in the Premium Cattle Health Scheme operated by Cattle Health Certification Standards (UK) and the first named pursuer becoming fully accredited in 2008.
- (6) The first named defender, in 2003, discussed with the first named pursuer that he might put Belted Galloway cattle on his croft, No. 17, for grazing. The first named pursuer said he had no interest in cattle but was quite happy for Mr Hargreaves to do so. Relations

between the parties were convivial and this continued with the first named defender carrying out drainage work at croft No 19 for the first named pursuer in 2005.

(7) Sometime between 2005 and 2007 the first named defender moved the Belted Galloway cattle to croft 9 where he grazed the cattle and their two horses. After some years the animals were brought back to croft 17 and the bull was placed onto the shore field and did not have access to the majority of croft 17.

(8) Relations between the pursuers and the defenders broke down over whose responsibility it was to maintain the fence between crofts 17 and 18. The first named pursuer, Mr Allen, applied to the Land Court for an order that the first named defender accept responsibility for the boundary fences between crofts 17 and 18. The court, on 16 February 2007, refused to make such an order and Mr Allen appealed the decision, which appeal was refused on 9 July 2007. The divisional court which heard evidence concluded that the majority of crofters in the south part of Kirkibost had an understanding whereby they would maintain their north fence where it abuts their neighbour to the north. The court considered that this was a sensible and fair arrangement and that it followed that it was incumbent on Mr Allen to maintain the fence between 17 and 18 and on Mr Hargreaves to maintain the fence between crofts 16 and 17.

While this was an informal arrangement and not legally enforceable, the arrangement was commented on favourably by the court.

(9) Notwithstanding this informal arrangement amongst the local crofters, Mr Allen refused to accept responsibility for maintenance of the fence between crofts 17 and 18 although that was his north fence. As a result of this failure, cattle from croft 17 strayed into croft 18 and cattle from the first named pursuer's crofts 18 and 19 strayed onto croft 17.

(10) As a result of Mr Allen's refusal to maintain and repair the fence between crofts 18 and 17, Mr Hargreaves eventually erected an electric fence one metre within his croft 17. The posts on the original fence were so badly damaged, the wind was blowing them towards the electric fence and Mr Hargreaves pushed the fence back so that it would not fall onto the electric fence causing it to short and deaden the whole length of the electric fence.

(11) The electric fence worked well with no intrusion of cattle from Mr Hargreaves' croft onto Mr Allen's croft or vice versa. Unfortunately Mr Hargreaves found that the electric fence was being cut. He had carried out 18 repairs and it became obvious that the fence was being cut. The times that the fence had been cut coincided with encroachment of cattle from crofts 18 and 19 onto croft 17.

(12) Crofts 19 and 18 were separated by a fence which was about 30 years old. When seen by Mrs Margaret Smith, Agricultural Officer with the Scottish Government, in late 2009 and 2010 she said they were in reasonable stock condition with no evidence of any damage.

(13) The fence between crofts 17 and 18 was a rylock fence, which is square fencing with a single line of barbed wire. It was not in particularly good condition and there was evidence of the strainers not being in good condition, the fence posts having been pushed down. The fence had been pushed over at one point to an angle of 45° and the fencing between crofts 17 and 18 was not sufficient to contain cattle.

(14) The first named pursuer achieved accreditation for his herd in the Premium Cattle Health Scheme operated by CHECS in 2008. These rules stated that farm boundaries must prevent cattle from straying off or onto a farm and must prevent nose-to-nose contact with cattle of a lower status over fences or walls. Installation of double fencing or use of an equivalent boundary to provide a gap of 3 metres between scheme cattle and any neighbouring cattle of a lower health status is essential. If cattle in the health scheme herds

come into contact with non-health scheme cattle, the accredited cattle will lose their status.

Owners of cattle participating in this scheme must inform the health scheme supervising vet of any changes that could affect herd biosecurity.

(15) Although the cattle were not registered in the scheme under the name of the second pursuer, she considered herself to be the owner of the cattle. Although she said that the defender's cattle had strayed onto crofts 18 and 19 on at least 30 occasions she did not consider that she had to report this to the Premium Cattle Health Scheme. Even although one of her cows had been impregnated by the defender's Belted Galloway bull she did not consider that she had to report this.

(16) Although both pursuers are described in the pleadings as the tenants of crofts 18 and 19, the tenant of the crofts is the first named pursuer who is also the owner of the pedigreed Highland cows and it was the first named pursuer who participated in the Premium Cattle Health Scheme operated by Cattle Health Certificate Standards (UK) (CHECS).

(17) The first named pursuer suffers from ill health and was unable to give evidence.

(18) The second named pursuer suffers from a chronic chest condition and angina and is restricted in her movements, having to stop for breath after walking 20 yards. She was unable to go out over the croft.

(19) The second pursuer did not see the defenders' bull or cattle cause any of the damage to the fences. The fence between croft 17 and 18 was in a bad state of repair and was the responsibility of the first named pursuer. Other than two invoices for a total of £80 in respect of repairs to the fence between crofts 18 and 19 in July and August 2009, no invoices were lodged for any other repairs.

(20) As a consequence of the first pursuer's refusal to maintain the fence between crofts 17 and 18, the first named pursuer's cattle crossed into croft 17 between five and ten times

and the defender's cattle also crossed into crofts 18 and 19 on several occasions. On each occasion the defenders brought their cattle back onto croft 17. The second pursuer contacted the police on each occasion that cattle strayed onto crofts 18 or 19. The police visited the crofts but did not take any further action.

(21) Between July and September 2010 a Highland bull, Calum Ruadh (007), used by the first pursuer to service his cattle, entered croft 17 and engaged in a scrap with the defenders' Belted Galloway bull, Ozzie, causing damage to the defenders' bull, drawing blood. The defenders' bull was much smaller than the Highland bull and, unlike the Highland bull, did not have any horns. The first defender managed to separate the bulls and he ran the Highland bull down through croft 18 onto croft 19. His daughter then reported the incident to Mr Matheson, owner of Calum Ruadh.

(22) In or about October 2009 the defenders' bull impregnated one of the first pursuer's Highland cows, resulting in the birth of a cross Belted Galloway calf. Given that the defenders' cattle had strayed onto croft 18 and the first pursuer's cattle had strayed onto croft 17, it cannot be said where the impregnation occurred with this quite possibly having occurred in croft 17 following an incursion by the first pursuer's cattle.

(23) Any loss or damage claimed by the pursuers is as a result of the first pursuer's failure to erect and maintain a fence between crofts 17 and 18 and not as a result of any fault or negligence of the defenders.

#### **NOTE**

[1] I first heard evidence from Kathleen Allen, the second named pursuer, who is 71 years of age and designated as a crofter. She explained that they first used the croft for

sheep but in 2005 changed this. She explained that she was the crofter and she had bought a cow and a heifer.

[2] She explained how the Hargreaves became her neighbours at 17 Kirkibost as herself and her husband had the crofts at 18 and 19.

[3] Although she maintained that she was the crofter and the cattle belonged to her, she explained how her husband was actually the tenant of the croft and any losses, she said, would therefore be for her husband although the losses would also be hers because the animals belonged to her. She went on to say that her husband was the accredited owner of the cattle for the scheme in which they were involved but this was because he was named as the crofter. Although there were no business accounts, she used the croft and said that the business was simply a marriage and there was no formal arrangement. She explained how she had registered the animals with the Premium Cattle Health Scheme in her husband's name simply because he was the crofter, although she accepted that this was probably not accurate in law. She had discussed the whole matter of accreditation with a lady at the health scheme but she had never told them that her husband didn't actually own the cattle.

[4] She explained how, on the defenders' croft, there was a bull and three cows together with some calves.

[5] She explained that she had first seen the defenders' bull on their croft in 2006 at 6.00am on 6 July, when she had seen the bull chasing her cow around the field. She had contacted Mr Hargreaves and he came and moved the cow and heifer to the top of the field. He had found a calf and had carried the calf back to the mother before he took the bull away. Later, she said he had moved his cows to croft 9 about a mile away but had been aware in May 2009 that he had moved his cattle back to croft 17. She explained how she had achieved accredited status in 2008 but the defenders' herd did not have such accredited

status. The rules of accreditation stated that her animals should not have any nose-to-nose contact with other cattle who were not accredited. As a result, she moved all her cattle to croft 19.

[6] She explained how in July 2009 she had the first of about nine visits from his cattle and this had gone on till October 2009. When any of his cattle came down onto croft 18 she would phone the defenders' house. She met them and they asked her to repair the fence between crofts 17 and 18.

[7] Each time the cattle from the defenders came onto their ground, she would contact them and she spoke of her husband having to get out of his sick bed when the bull came back down one day in October and how the defenders had come and taken the bull away. Her husband had told the first named defender to fix the fence between crofts 17 and 18.

[8] She explained how the first named defender had taken steps to electrify his croft and she could see the batteries on the electric fence flashing from the road but she had no idea what other arrangements he had made.

[9] After the electric fence was put up by the first named defender, there was no further incident for 8 or 9 months and she assumed that the electric fence was holding the cattle back. This stopped on 21 July 2010 when she saw the bull again on croft 18 and also croft 19. She again penned her animals and told the first named defender.

[10] These incursions came to an end at the end of 2010 when she had a high stock fence put up. This decision had been taken by herself, having met a representative from the Department of Agriculture. She accepted it was a risk to her herd to have nose-to-nose contact with other cattle.

[11] As a result of this she had to change the feeding habits every time the bull came onto her croft and her animals had to be penned. She had 13 cattle and 5 calves and had to move



them constantly because the Belted Galloway cattle were coming onto their croft. She moved them off the croft but returned them after 2010 when the high fence had been put up. She explained how she produced pedigreed calves using a hired bull from Kenneth Matheson of Highland Bulls. She said that the defenders were aware that they had Highland cows and were aware of her accreditation because she had put signs up on her gates saying "accredited herd".

[12] The defenders caused chaos to her breeding programme and she had to watch for invasions every day. Her animals were not safe because of the invasion of the Galloway herd.

[13] She was aware in 2009 that the Highland bull had left in September 2009 before he finished his job because the owner, Mr Matheson, had been concerned regarding his accreditation. As a result of all that had happened, one of her cows was impregnated by the Belted Galloway bull leaving her with a Belted Galloway cross calf.

[14] As a result of this she had to renew part of the fence and there were quotations for replacement from Mr Beaumont but she found it difficult to say what this related to.

[15] As a result of the impregnation the Belted Galloway cross calf was raised and then sold to her family for meat. Cheques were paid for Belted Galloway totalling £500 but for a pedigreed calf she would have received between £1,100 and £1,200.

[16] In cross-examination she accepted that her husband was the tenant as you can only have one named tenant of a croft. Any losses, she said, therefore would be for him although she would also have losses because the animals belonged to her.

[17] She went on to say that there had been a Land Court case at which she had given evidence. Her husband had taken proceedings because he was the named crofter and the crofting business was in his name because he was the registered crofter. Similarly the bank

account was in his name with Santander and all money for the fencing would have come out of that account because the crofter had to maintain his fences.

[18] She was looking to the defenders to put the fences back into the state they were in 2009. She said that the damage was in 2009 and 2010 and they were not claiming for damages before that. The bull had not come over until June to August 2010.

[19] She must have called the police on 30 separate occasions and one day the police might appear on three occasions but told me it was a civil matter.

[20] So far as the accredited herd scheme was concerned, she did not consider that she had to report any invasion to the scheme. Her duty was simply to show that they weren't contaminated by nose-to-nose contact. She was satisfied that she could do everything herself and when the Belted Galloway calf was born the cow was isolated from the rest of the herd. She did not discuss anything with CHECS. She did what she considered was necessary. Her cattle had never left crofts 18 or 19 and had not been on the defenders' ground. She accepted there was an occasion when the two bulls clashed and Mr Matheson was aware of the situation. There had not been any discussion with the defenders when the pursuers intended to bring the bull onto their croft and, in any event, she was using croft 18 as a buffer zone to meet CHECS requirements. Eventually they put up a high fence in 2010 to create the 3 metre buffer zone between crofts 17 and 18. Before 2009 she had spoken to the Premium Cattle Health Scheme and they had said that she could use croft 18 as a buffer rather than having to build a high fence.

[21] She explained that the first named defender had put up an electric fence but she had no knowledge of the circumstances when the electric fence was cut on 16 occasions. She explained that it was the defenders' cattle that had damaged the fence – not just the bull but also the cows and the calves.

[22] With regard to the Land Court, she said that the Land Court had literally sat on the fence but had said that her husband had a duty to keep the fence between crofts 17 and 18.

[23] The court then heard from Mark Beanland, Fencing Contractor, who said that he had carried out fencing work for Mr and Mrs Allen. He thought that it was in 2010 but he was shown quotations dated 16 February 2011 and said that he wasn't sure of the exact dates, it having been a long time ago.

[24] He explained that the fence between crofts 17 and 18 had a number of places where there was damage. He said that he had seen damage which was indicative of stock pushing its way through and flattening the fence, either pushing it over or jumping over it. He said that a cow or a large animal could put its neck over trying to graze and their strength would collapse the fence over time. When he saw the fence he said that it would appear that they had been pushed over from croft 17 towards croft 18 in that the lean on the posts were forced away in the direction of croft 18.

[25] He explained that he had lots of invoices but all he had in court today were quotations. He had done some repair work but he wasn't sure if it related to this and he could not tell for certain given the length of time. He explained that most of the fences were quite good and were suitable to keep sheep back but not a standard stock fence for a cow or a bull. It was he who recommended that the Allens build an 8' high fence to stop cattle.

[26] The court then heard from Mrs Margaret Smith, Agricultural Officer with the Scottish Government. She explained how she inspected cows and sheep and made sure that the owners adhered to all the regulations.

[27] She was aware of the dispute between the Allens and the Hargreaves. She covered the west side of Lewis and had several phone calls from Mrs Allen regarding the wandering of her neighbour's cows. She explained that there was nothing legally she could do but

advised her to contact the police or the Crofting Commission. She had been to the croft on several occasions to deal with grant applications and she spoke to the boundary fence between crofts 18 and 19 being in reasonably good condition. She said that there had been no evidence of any damage to the fence.

[28] With regard to the fence between crofts 17 and 18, this was not in particularly good condition and there was evidence of the strainers not being in good condition, the fence posts having been pushed down by livestock, sometimes to an angle of 45°.

[29] With regard to the options for the owner of a bull, the obvious one was correct fencing of a suitable standard. They could also be ringed or haltered.

[30] The next witness was Mrs Janine Hargreaves, second named defender and wife of the first named defender. She explained how they had moved to Kirkibost in 2007 from Rishworth, near Halifax, where her husband had run a business. She explained how her daughter Ruth had cattle and they helped her with keeping them and moving them.

[31] She explained how relations between themselves and the Allen's were fine when they moved in in 2007 and her husband had dug ditches and she had done some cleaning for Mrs Allen. All this, however, had changed when the conversation of a fence arose. This would have been about 2005 and her husband was dealing with it with Mr Allen. She spoke to having seen beasts from Mr and Mrs Allen's croft on her croft at 17. She couldn't say how often this occurred but was certainly aware of it. She was not aware of her daughter Ruth's animals being on crofts 18 or 19.

[32] She explained how the Belted Galloway bull was actually owned by Ruth, her daughter. She went on to explain how they put up an electric fence to ensure he did not move out of croft 17, this electric fence ran the width across croft 17 and she explained how it worked well until they started finding cuts in the wires which they had to constantly

repair. The electric fence, when working, was effective in keeping in the bull and she confirmed that she had never seen the Belted Galloway bull jump over a fence or force a fence down. She explained that on many occasions she had been contacted by the police and recalled on one particular occasion saying that she had received a phone call from the police and when she looked out of her house she saw the Belted Galloway bull standing in his own croft and she explained this to the police.

[33] She spoke of the Highland bull, Calum Ruadh, coming onto croft 18 and roaring at the smaller Belted Galloway bull. There was one occasion when the bulls met and there was a fight in which Ozzie was covered in blood because he did not have any horns.

[34] She explained how they had bought the bull for her daughter Ruth which she wanted to have as a hobby. However, her daughter had gone off to university in 2008 or 2009 and they were looking after the bull for her.

[35] The court finally heard from David Hargreaves, first named defender, who explained how, although his occupation was an engineer and he had had a business in Yorkshire, he had been brought up on a dairy farm and first became involved in crofting in 2002 when he bought the croft before moving up in 2004 and then moving into their house in 2007.

[36] He had discussed grazing cattle with Mr Allen in 2003 and Mr Allen had explained that he kept sheep on his two crofts but he didn't have any issue with Mr Hargreaves grazing cattle. At that time relations were convivial and Mr Allen asked him to undertake some drainage on his croft at No. 19 as it hadn't been done for a good number of years.

[37] Relations became frosty with the issue of the fence between crofts 17 and 18. There was a Land Court dispute in relation to boundaries and fences and the outcome of the dispute was that it was the responsibility of the tenant of croft 18 to maintain the boundary

between 18 and 17. The matter had been raised with the Land Court by Mr Allen and there was considerable interest in the community because if the boundary had been altered it would have set up some sort of precedent and people wanted to maintain the status quo as they had done for generations, namely that the northernmost boundary is maintained by the southernmost croft so it would be croft 18's responsibility to maintain the boundaries with croft 17. Mr and Mrs Allen had refused to do any repairs to the fence or maintain it in any way and he had on several occasions tried to get Mr Allen to carry out maintenance but he refused saying it was Mr Hargreaves' responsibility.

[38] Mr Hargreaves explained that while he had never seen Mr Allen's cattle crossing the boundary onto croft 17, he had seen his cattle on croft 17. He couldn't be certain but it would be between five and ten occasions and he had also seen their sheep on his croft. He explained that the fence was not tensioned and it was very old.

[39] He also explained how he had earlier seen his own beasts on crofts 18 and 19 and had moved them back. When he brought his bull back onto croft 17, he decided to put up an electric fence because he wanted to be able to use the back of the croft for the cattle. This electric fence worked very well and there were no problems for a couple of years. However, after the Land Court hearing they had 18 months of problems with the electric fence stopping working. He found that the fence had been damaged at the back of the new house on croft 18. He explained that he had done about 18 repairs to the electric fence and it became obvious that the fence was being cut. It wasn't just cattle pushing against the electric fence. It had not been frayed but had had a neat cut and the times that the fence had been cut coincided with the encroachment of cattle from the pursuers' herd onto their land at No 17.

[40] He went on to describe Ozzie the bull as being a Belted Galloway bull with a white belt round his middle. He had no horns and was quite a short animal and certainly not as high as an ordinary farm gate. He had never seen him jump any height.

[41] He explained how he had seen the Highland bull, Calum Ruadh (007), come onto the crofts at 18 and 19. He had not been told by Mr Allen that this was happening and there had been no communication whatsoever. He spoke of an occasion between July and September 2010 when Calum Ruadh and Ozzie came face-to-face. His daughter went out to investigate what was happening and had seen the two bulls having a scrap on the top of croft 17. His girls were frightened and couldn't get them apart so he managed to get a big piece of wood and went out to separate the two bulls. By the time he got them separated they were now back on croft 18, the electric fence had been flattened and the posts smashed. He had run the Highland bull back down to croft 18 and onto 19 while his daughter started to repair the fence. His daughter was very upset because her bull had been gouged and was bleeding and he was pretty much defenceless because he had no horns and was only two-thirds of the size of the Highlander.

[42] He explained this should never have happened because two bulls should never be allowed to be that close together, but he had not been told by Mr Allen that they were bringing the bull onto the croft.

[43] He went on to explain how the animals were Ruth's and that they had bought them for her because she had hoped to go into agriculture as she got older. Although everything went through his wife's account, the animals belonged to Ruth and she was the registered breeder of the cattle and was registered with the Beltie Society.

[44] Mr Hargreaves said he was unaware of how the impregnation of one of the heifers had taken place. He didn't know where it had taken place, whether it was on croft 17, 18 or

19, but it could quite possibly have taken place on 17 when the heifers were coming over on to his croft from 18 and 19.

[45] He explained how he had put the bull in to the shore field at No. 17 and had not put his bull on to the back of the croft where the faulty fencing was. The bull was therefore not on the part of his croft which had the faulty fencing between 17 and 18. He only placed the bull on to that part of the croft when they had erected the electric fence.

[46] Mr Hargreaves explained how he had moved his beasts down to No 9 in 2005 because the fence at the back of the croft was not very good and also because the woman who owned No 9 had no stock and had asked him if he would be interested in grazing his stock on her croft. They also had two horses which they put into No 9 but he moved the bull back to No 17 in 2007. The lady who owned the croft at No 9 had interest from a purchaser and that was the reason why he moved his beasts back. His bull had not gone onto No 18.

[47] Mr Hargreaves explained that he had only recovered his bull from the Allen's croft on one occasion and it was certainly not the number of times as described by Mrs Allen.

[48] Mr Hargreaves went on to explain that he had only heard about the Allen's accredited status with their cows at the Land Court hearing. Because the fence was not being repaired by Mr Allen, the only thing he could do was to erect an electric fence. He repaired the electric fence every time it was damaged, the only other thing he could do was to ask the Allens to erect a proper fence and he had asked them to do that in 2004. He didn't accept that his animals had damaged the pursuers' fence. The fence had already been badly damaged. It couldn't even keep Mr Allen's sheep in and it certainly wasn't going to keep in larger stock.

[49] He felt that Mr Beanland had been mistaken. The electric fence was on white posts and they were stuck into the ground. This was about a metre inside his croft. What was



happening at the top of the croft was that the posts in the fence were so badly damaged that the wind was blowing them towards the electric fence and he had to push the fencing back over to make sure that it didn't fall on the electric fence. He didn't want it shorting the electricity again and deadening the whole length of the electric fence. He therefore actually pushed the weak posts back onto No 18.

[50] He explained that the fight between the two bulls had taken place in 2010, just before the Highland bull had gone back onto the other farm.

[51] He explained that Mrs Allen could have informed them about her health scheme. If she had informed them about the ins and outs of the scheme, they too could have introduced their cattle into such a scheme which would have made the fact that one of the fences required would have been grantable. He explained that you would only need two fences if the stock on the other side are ordinarily low health. If she had given them that information they could have applied for status and Mr Allen would have been able to get a 50% grant.

[52] However, there was no communication and they then went and put up a fence 3 metres inside their property to try to force him into putting up a boundary fence which was not his liability and that had come out at the Land Court and had been well known in the area before all this had happened.

### **Decision**

[53] While this action has been raised on the basis of damage inflicted by a bull of the defenders with resultant losses, it became clear during the course of the case that it was a neighbour dispute as opposed to anything else. I cannot but make comment of how unfortunate this case has been given the fact that the first named pursuer suffers serious health problems which prevented him from ever giving evidence at the court. The second

named pursuer also suffers disability, explaining that she could not walk more than 20 yards without becoming breathless and having to rest. The first named defender suffered severe illness resulting in the court having to be adjourned on occasions.

[54] Notwithstanding the difficulties that the parties faced health wise, the pursuer has insisted on pursuing this case which took place at Stornoway Sheriff Court over a prolonged period.

[55] Both Counsel for the pursuers and Counsel for the defenders lodged written submissions. They also addressed me orally and Mr MacDougall for the pursuers intimated that he was no longer maintaining a claim for the cost of the fence between crofts 17 and 18. He also made a motion to reduce crave 4 to £5,966.10. He further sought expenses of the action to include sanction for junior Counsel.

[56] Mr Buchanan, Counsel for the defenders, moved for absolvitor and for the expenses of the action with sanction for junior Counsel.

[57] This case has had a long and chequered history with the action being raised in 2012 and going through sundry procedure, including debates, minutes of amendment and the pursuers changing agents requiring a further minute of amendment and thereafter proof.

[58] Mr Hargreaves advised Mr Allen that he was going to have Belted Galloway cattle on his croft No. 17 and Mr Allen's position was that he was quite happy with that and he was only keeping sheep. Matters were convivial and indeed Mr Allen used the services of Mr Hargreaves to dig ditches with his digger.

[59] Matters deteriorated over the question of who was responsible for the upkeep of the fence between crofts 17 and 18. Mr Allen decided to go to the Land Court for them to make an order saying that Mr Hargreaves was responsible but instead the Land Court refused to

make such an order on 16 February 2007, which ruling Mr Allen appealed and the appeal was refused on 9 July 2007. The Divisional Court had concluded:

“That the majority of crofters in the south part of Kirkibost have an understanding whereby they will maintain their north fence where it abuts their neighbour to the north. We consider that a sensible and fair arrangement. It follows therefore that it is incumbent on Mr Allen to maintain the fence between 17 and 18 and on Mr Hargreaves to maintain the fence between 16 and 17.”

While this was an informal arrangement and not legally enforceable, the arrangement was commented on favourably by the Court.

[60] Therefore we have a fence which is the responsibility of Mr Allen but he refused to do anything regarding the upkeep even although it was clear that the fence was in need of serious repair.

[61] Having heard the evidence, I do not consider that the defenders are liable to the pursuers. While it was extremely unfortunate that Mr Allen, given his ill health, was not able to give evidence it became clear that Mrs Allen was not the crofter neither was she the owner of the cattle. At best she might have had a common business with her husband but unfortunately there was nothing placed before me to substantiate that or indeed such items as firm accounts. I was a little unhappy to hear that while she maintained that the cattle belonged to her, she did not tell the accreditation authority that, who therefore put her husband down as the accredited owner. I fully understand that a croft can only be in the name of a single person but I think Mrs Allen could have been more forthright with the authorities when she was endeavouring to obtain accredited status for the herd.

[62] Similarly I was less than impressed to learn that she did not consider that she had to tell the authority of the invasion of unaccredited cattle or even of the cross Belted Galloway calf born to one of her heifers. A cursory examination of the rules of the CHECS would

show her to be in serious breach of their regulations which would have negated her accredited status.

[63] I felt her evidence was not as credible or reliable as I would have wished and while I have no doubt that she was extremely distressed by the whole situation, this does not excuse coming to court and presenting a case which is, at the best, exaggerated and unreliable.

[64] I have every sympathy for her with her severe disability, having to deal with not only this case but her crofting work on her own because of her husband's severe illness. Nonetheless, I have to deal with the case as it is presented before me and, as became obvious, much of the information which she was relying on was not available to the court. There were no bank accounts, business accounts or receipts. I was being shown estimates but no receipts for the work carried out and claimed for.

[65] In the end of the day, it is up to the pursuer to prove their case. I do not feel that what has been laid before the court substantiates the claim of the pursuers.

[66] Referring to the defenders' submissions, Mr MacDougall said that line 153:

*"Ozzie strayed only because he was not faced with boundaries"*

seemed to go to the heart of the issue. While I can understand what Mr MacDougall was saying in that regard, nonetheless it is clear that the responsibility for the fence between 17 and 18 was that of Mr Allen. In any event Mr Hargreaves, because he was aware of Mr Allen refusing to fulfil his obligation, erected an electric fence which, on the evidence of Mrs Allen, seemed to work and there were no incursions into their crofts for a considerable period. The incursions only occurred once the electric fence had been broken by cutting on, according to Mr Hargreaves, 18 occasions. The defenders therefore had taken steps to ensure that none of their cattle went on to the neighbouring crofts, notwithstanding the fact that it was Mr Allen's responsibility to ensure fencing between 17 and 18. The Hargreaves

therefore took appropriate steps to ensure that their cattle did not transgress and I do not consider that they can be criticised in any way for what they did.

[67] Further, I accept the evidence of Mr and Mrs Hargreaves that while their cattle did go onto the crofts belonging to the pursuers, nonetheless that was only because of the state of repair of the fence which Mr Allen was responsible for. In addition I accept their evidence that the pursuers' cattle transgressed and went onto croft 17 on numerous occasions and it is therefore difficult to say which animals caused the damage to the fence. I accept from the evidence that the damage had been occasioned over several years and therefore it might not have been the animals of the pursuers or the defenders but the state of the fence was such that we heard that the pursuers' sheep were also going onto croft 17.

[68] All this is of particular importance with regard to the impregnation of one of the pursuers' cows. It is quite apparent that the impregnation was caused by Ozzie, the Belted Galloway bull, but where this took place has certainly not been proven by the pursuers. It may well have taken place in croft 17 following on the pursuers' cattle moving on to that croft as they had on several occasions.

[69] The pursuers' Counsel spoke of the common law claim arising from the defenders' breach of a duty of care. On the basis of the evidence before me, I consider that the defenders have fulfilled their duty of care. The fence between 17 and 18 was the responsibility of the pursuer but he wilfully refused to deal with that. Notwithstanding that the defenders took reasonable steps. Firstly they removed the cattle to No 9 and only brought them back when they had put up an electric fence a yard within their ground to deal with the possible movement of their cattle onto 18 and the pursuers' cattle and sheep onto 17. This, on the evidence of the pursuers, worked effectively and it was only when

someone started cutting the electric fence (18 occasions) that they ran into difficulties again.

I consider what the defenders did was fair and reasonable.

[70] As far as strict liability is concerned, I do not consider that the pursuers have proved their case. The defenders maintained that their daughter owned the bull but notwithstanding that it was quite clear that she was at university and they were looking after the cattle in her absence. I do not consider that the evidence points conclusively that the bull caused the damage to the fences because it seemed to come both ways with the bull and the cattle from 17 going into 18 and cattle from 18 and 19 coming into 17. That the bull impregnated one of the pursuers' cows is generally accepted, but it is certainly not proven that that occurred out with croft 17 when I accepted the defenders' evidence that the pursuers cattle were, on several occasions, found in croft 17.

[71] The evidence all points to the only pursuer being the 1st Pursuer with there being no evidence of partnership accounts or joint bank statements. I accept the difficulty of her husband's serious illness but none the less I do not consider that her evidence has helped her husband's case. She spoke of additional costs arising from her protection of her herd's accredited status yet she never reported anything not even the impregnation of their accredited heifer. The rules of CHECS state "Cattle from health scheme herds must not come into contact with non-health scheme cattle of a lower status; Otherwise they will lose their status within the scheme". Any of the losses claimed by the 1<sup>st</sup> Pursuer arose out of his failure to maintain the fence between crofts 17 & 18. Very properly I was advised by counsel for the pursuer that they were no longer claiming for the damage to the fence between 17 and 18. I simply could not accept the second pursuer's evidence where it conflicted with the defenders' evidence

[72] For these reasons I do not consider that the pursuers have proved their case. As I said at the beginning, this is more of a neighbour dispute rather than anything else and it is unfortunate that we have reached this stage. It is strange that the court did not hear from any of the neighbouring crofters or indeed the police. As I said, I have the utmost sympathy for the 2nd pursuer who was placed in a very difficult position given her husband's illness. Nonetheless her evidence was not such that I could hold the case proved. I found the defenders totally credible and therefore will grant decree of absolvitor with expenses as taxed.