

A Survey of Rural Law Developments in Scotland in August 2010

By Robert Sutherland, Terra Firma Chambers

This article is intended to be a survey of ongoing developments covering different topics affecting rural legal practice. It notes new cases, legislation, consultations and other matters which may be of interest under relevant subject headings.

Agricultural Holdings

The case of **Trustees of Niall Calthorpe's 1959 Discretionary Settlement v Hamilton, SLC/102/08, 13 August 2010** concerns an application by the landlord under Section 13 of the Agricultural Holdings (Scotland) Act 1991 for the Scottish Land Court to determine the rent of a holding. A preliminary proof was held to determine whether certain ground (used as a quarry after the start of the lease, but no longer in use) formed part of the tenancy. The title to this ground was held by a different person than the landlord. If that ground formed part of the lease subjects the tenant's contended that the application to the Court was incompetent and should be dismissed. The Court accepted that the disputed ground formed part of the tenancy at the outset and that it remained part of the tenancy, notwithstanding that it had not been taken into account when determining the rent in a series of past rent reviews. The Court agreed to the landlord's motion to sist the application to determine the rent pending separate proceedings to rectify the Land Register.

Agricultural Support

On 9 August 2010 the Scottish Government announced that it would implement new rules to help ensure that help ensure farmers receive subsidies based on the level of productive and environmental activity. The intention is to end payment of subsidies to farmers who are carrying out little or no farming activities. It is intended that the new rules are in place from 2011. The new rules will implement some of the short-term recommendations made by the **Pack Inquiry into Future Support for Agriculture in Scotland** (which were launched at the Royal Highland Show in June 2010).

The short-term recommendations made by the Pack Inquiry were that : (1) no change should be made to the current basis of allocating Single Farm Payment prior to 2013; (2) resourcing should be provided so that new computer systems can be developed as soon as possible to deal with changes to the support regime; (3) paragraph 10.3 of the Common Agricultural Policy Schemes (Cross Compliance) (Scotland) Regulations 2004 should be amended so that subsidies are only given to active farmers, and to include a stipulation that where undergrazing is identified the farmer has 60 days to rectify the situation; (4) guidance on undergrazing should be produced including minimum stocking rates for permanent pasture and rough grazing; (5) the Scottish Government should treat as a priority the introduction of regulations in the post-2013 Common Agricultural Policy that puts new entrants on an equal footing with businesses established before 2004; (6) the Scottish Government should extend its review of the Rural Priorities scoring system to investigate the possibility of changing it so that it favours those entering farming since 2004; (7) no use should be made of additional Article 68 measures before the post-2013 CAP regime is known; (8) in order to ensure that the Scottish Beef Calf Scheme continues in some form after 2012, the Scottish Government

and stakeholders should discuss the conversion of the Scheme from Article 69 to Article 68 measures for the 2012 scheme year i.e. agreement reached by August 2011, and that they should give special consideration to the possibility of creating a more targeted scheme. The Scottish Government's specific response to each of these recommendations can be viewed at <http://www.scotland.gov.uk/Resource/Doc/931/0103033.pdf>

Agricultural Wages

The **Scottish Agricultural Wages Board** has approved an increase to the minimum hourly rate of pay for agricultural apprentices and agricultural workers with effect from **1 October 2010**. this year. The dog allowance will also be increased. Copies of the Wages Order No 58, will be available from mid-September 2010 and can be obtained from the Secretary, Scottish Agricultural Wages Board, Saughton House, Broomhouse Drive, Edinburgh EH11 3XD, Tel No: 0300 244 9751.

Crofting

The **Crofting Reform (Scotland) Act 2010** received the Royal Assent on 6 August 2010. The Act reforms the Crofters Commission and renames it the Crofting Commission. There will be up to 9 members of the new Commission, the majority of whom will be crofters elected by crofters. There will also be representatives of landlords on the new Commission (either elected or appointed by the Scottish Ministers). The Act provides for a new map-based Crofting which is intended to give greater legal certainty over the land held in crofting tenure (including common grazing land) and the boundaries and interests held in that land. The new Crofting Register will be operated by the Keeper of The Registers of Scotland. The Act also contains measures to deal with absenteeism and neglect on croft land. Where obligations in respect of these matters are not being met by crofting tenants and owners, the new Commission is to take remedial action. The Commission also has greater powers over applications to decroft land, and the Scottish Land Court can consider resumption applications. Responsibility for crofting development will be transferred from the Crofters Commission to Highland and Islands Enterprise. Responsibility for the administration of crofting agricultural grants is to be transferred to the Scottish Government Rural Payments and Inspections Directorate.

Flooding

A consultation on implementation of the **Flood Risk Management (Scotland) Act 2009** was launched on 20 August 2010. The 2009 Act transposes Directive 2007/60/EC on the assessment and management of flood risk ('the Floods Directive') into Scots law, and aims to reduce the negative effects of all sources of flooding on human health, economic activity, the environment and cultural heritage. The consultation deals with technical implementation issues and is aimed at local authorities, Scottish Water and other key stakeholders with some level of technical knowledge and an understanding of both the Act and general flooding issues. However, comments from any respondent will be taken into consideration. The consultation closes on **15 October 2010**. and can be viewed at http://www.sepa.org.uk/about_us/consultations.aspx

Health and Food Safety

Various news media have reported the story of **Steven Innes** and **Callum Innes**, the Nairn farmers who bought two bulls born from a **cloned cow** in the US, and who used the bulls to sire 96 cows. Both bulls have been slaughtered. Two other UK farmers have also bought animals produced from cloned livestock and there have been conflicting reports on the extent to which meat and milk from these animals might have entered into the UK food chain. The Food Standards Agency (FSA) stated that Mr. Innes should have applied for a licence under rules regarding 'novel foods'. The Innes's have indicated that their 96 calves might be sold to farmers in other European countries which don't have the same restrictions. EU sources were reported as saying that rules on novel foods do not apply to the offspring of cloned animals, only to the cloned animals themselves. The European Commission Standing Committee on the Food Chain and Animal Health (SCoFCAH) has been asked to put the issue on its agenda.

On 20 August 2010 the Scottish Government announced a consultation on the proposed **Animal By-Products (Enforcement) (Scotland) Regulations 2011** which would have effect from 4 March 2011. The new Regulations will implement EU Regulation 1069/2009 which comes into effect on that date and will replace the Animal By-Products (Scotland) Regulations 2003. The consultation closes on **15 October 2010**. It is available at <http://www.scotland.gov.uk/Resource/Doc/322090/0103494.pdf>

Inheritance Tax Business Property Relief

Qualifying business property may be exempt from inheritance tax at the rate of 100% or 50%, depending on the type of property. Investments are not qualifying business property. Where business property has been transferred it has to be owned by the transferor for two years before the transfer to qualify. Lord Balfour inherited a life interest in Whittinghame Estate in 1968. In November 2002 his life interest in the estate was brought to an end and his title to the Estate was recorded in January 2003. In November 2002 he also entered into a partnership with his nephew to manage and farm the Estate. He died in June 2003. Some of the Estate was farmed in hand, whilst other parts of the estate were leased out. HM Revenue & Customs refused to apply BPR to the let assets of the Estate business. That decision was overturned on appeal. In a further appeal to the Upper Tribunal Tax and Chancery Chamber the issues were whether the property had been held long enough to qualify for BPR and whether the business was properly characterised as mainly holding investments. In **HMRC v Brander, [2010] UKUT 300 (TCC), 16 August 2010** the Upper Tribunal agreed with the first instance judge that under the terms of the original Will of the first Lord Balfour, the late Lord Balfour had been the life tenant of the whole Estate. The evidence was that Lord Balfour actively managed the Estate and that the Estate trustees carried out his wishes. Although different book-keeping records were kept for different aspects of the business, the Estate was managed by Lord Balfour as a single business, and he did this with a view to the overall benefit of the Estate. The estate business consisted of composite of in-hand farming, forestry/woodland, sporting activities, farm letting and letting of surplus-dwelling houses. This mix of business, the profits from trading and letting, the relative time spent on trading and letting activities all supported the view that the business of the Estate was mainly a trading activity. The decision of the Upper Tribunal will be

welcomed by many rural estates, which traditionally carry out a mixture of farming/sporting activities and farm and property letting.

Planning

On 27 August 2010 the Scottish Government published **Planning Circular 1/2009: Development Planning Appendix 1: The Habitats Regulations**. The appendix gives guidance on the application of The Conservation (Natural Habitats, &c.) Regulations 1994, as amended, ('the Habitats Regulations') to the development planning system in Scotland. The guidance can be found at <http://www.scotland.gov.uk/Resource/Doc/322693/0103825.pdf>

On 31 August 2010 the Scottish Government published two new Planning Advice Notes. **Planning Advice Note 2/2010: Affordable Housing and Housing Land Audits** is in two sections. Section 1 covers affordable housing and replaces *PAN 74: Affordable Housing* which was published in 2005 and is now revoked. It provides advice and information on how the planning system can support the Government's commitment to increase the supply of affordable housing. Section 2 covers housing land audits and replaces *Annex A (Housing Land Audits) of Scottish Planning Policy 3: Planning for Homes*, which was published in 2008. It sets out advice on good practice in the preparation of housing land audits. The PAN can be found at: <http://www.scotland.gov.uk/Resource/Doc/212607/0103970.pdf>.

Planning Advice Note 3/2010: Community Engagement. This PAN provides advice to communities on how they can get involved and advice to planning authorities and developers on ways of effectively engaging with communities on planning matters. The PAN can be found at: <http://www.scotland.gov.uk/Resource/Doc/322754/0103851.pdf>.

Two new consultations have also been launched this month. There is a consultation on **Permitted Development Rights for Microgeneration Equipment on Non-Domestic Properties**. This consultation is done under the Climate Change (Scotland) Act 2009 and concerns the thresholds for microgeneration equipment on non-domestic properties. The proposals would remove the need for a planning application to be submitted for the equipment falling within the thresholds. Written responses are to be submitted by **8 October 2010**.

The other consultation is on **Resourcing a high quality planning system**. The consultation seeks views on how the planning service can be more effectively resourced and focused on quality of service, and looks at options for amending the fee structure. Written responses to this consultation paper are to be submitted by October 15, 2010.

Full information about both of these consultations and contact details for further information can be found at [Current Consultations](#)

Travellers

At the same time that the Westminster government was planning a crackdown on illegal traveller sites in England, newspapers also reported the case of **Boswell v Basildon Council** in which the applicant seeks a judicial review of an offer of bricks and mortar accommodation made by the local authority. It is being argued that the council has a duty to find an alternative site due to the applicant's cultural background. A judicial review hearing

will take place in the High Court on 20 September 2010. Meanwhile the Secretary of State for Communities and Local Government announced that existing English planning circulars stipulating requirements on the provision of land for Travellers will be revoked and consideration given to options for increasing local authority powers on unauthorised encampments, expanding the provision of traveller sites and including them in a new homes bonus scheme. The Court of Session regularly deals with petitions by landowners seeking the removal of travellers who have made temporary encampments on their land. Complaints are frequently made about their being a lack of official sites in Scotland, and the rents charged for these.

Waste

It has been frequently suggested that fines for environmental offences in Scotland are significantly lower than in England, implying that such offences are treated more leniently and less seriously in Scotland. That view, even if it has any basis, is likely to be altered by the decision of the Appeal Court, High Court of Justiciary in ***HMA v Doonin Plant Limited***, [2010] HCJAC 80 (3 August 2010). The case also highlights the responsibility of all those involved in waste disposal to take have in place management procedures sufficiently robust to ensure that they are satisfied that proper waste management control is taking place.

SEPA had suspended the waste management licence held by the Company in 2006. The company continued to accept and dispose of waste at the site. In November 2009 the company pled guilty on indictment to disposing of controlled waste in a manner likely to cause pollution of the environment or harm to human health. The maximum penalty for conviction was imprisonment for a period not exceeding five years or a fine or both. There is no limit to the fine which may be imposed on conviction on indictment. The maximum fine on a summary conviction on the specified charge is £50,000. The original fine was £8,000 (reduced from £10,000 to take account of the early plea). The Crown appealed on the grounds that this was unduly lenient, and the discount was unduly generous. The Appeal Court agreed on both points and raised the fine to £90,000 (reduced from £100,000 to take account of an early plea). The Appeal Court judges observed that fines under health and safety prosecutions did not provide an appropriate comparison as different considerations applied. It also stressed that where the financial well being of the accused was relevant to the level of the fine, it was not for the court to speculate about this, but it was the obligation of the convicted party to provide relevant information to allow an appropriate decision to be made. It stated that a fine in such cases requires *'to be large enough to bring the message home to those who manage and are shareholders in companies like the present that the statutory provisions designed to protect our environment must be taken seriously by them'*. The discount for pleading guilty was reduced from 20% to 10% as the guilty plea came only after preparation for the trial had been virtually completed. Six other companies were also fined for disposing of waste on land without a waste management licence. Although these companies had been told the waste could be accepted, they never actually checked to make sure a waste management licence was in place. The practices at the site were so inconsistent with good practice that any company involved with the waste industry should have realised this and questioned the existence of a site licence.