

# **A Survey of Rural Law Developments in Scotland in July 2010**

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*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 developments which may be of interest under relevant subject headings.*

### **Agricultural Holdings**

In *Sinclair v Sinclair*, SLC/136/09, 23 July 2010 the Scottish Land Court refused an application for a declarator of an agricultural tenancy. The case arises from an agreement in 1998 and a subsequent long-running dispute between the parties about the existence of a croft tenancy over certain land. Proceedings had been raised in 2001 about the existence of a crofting tenancy, which was settled by Joint Minute. In 2005, as part of the same application, the Court fixed a rent for the croft. In an application to buy the croft the landlord successfully disputed that certain areas formed part of the croft. In 2009 the tenant was granted the right to purchase the ground found to form the croft, and the purchase price was calculated by reference to the rent fixed in 2005 as adjusted to take account of the land the Court determined was not part of the croft. The applicant raised the present application for a finding that a number of the areas which were found not to be part of the croft were an agricultural tenancy. The applicant argued that a tenancy agreement was entered into in 1998 which covered the disputed areas. Furthermore the agreement constituted by the Joint Minute in 2001 also led to the existence of a tenancy of the disputed areas. After a proof hearing the Court has determined that there was no agreement as to rent made in 1998. It decided that the Court had unwittingly acted *ultra vires* in fixing the rent in 2005 by including in that rent calculation areas of ground which were not croft land. The absence of an agreement as to rent was fatal to both parts of the applicants' case. Certain buildings claimed by the applicant were not in any event part of any agreement capable of being a lease as occupation of these was to be shared between the parties.

In *Salvessen v Riddell*, SLC/3/09, 29 July 2010 the Scottish Land Court has refused the application by the landlord that a notice of termination of a limited partnership was not intended to deprive the general partner of a limited partnership of rights under Section 72(6) of the Agricultural Holdings (Scotland) Act 2003. This is the first decided case by the Court under Section 72(8) of the 2003 Act.

The limited partnership was stated to last until 28 November 2008 and from year to year thereafter unless a written notice of dissolution was given not less than eighteen months prior to the intended dissolution. The landlord served a written notice of dissolution on 3 February 2003, which was the same date as the publication of a proposed amendment to the Agricultural Holdings (Scotland) Bill limiting the landlord's rights to terminate the tenancy if a notice of dissolution of a limited partnership was served on 4 February. The final version of the 2003 Act was in different terms, and contains different provisions about the effect of a notice of dissolution of a limited partnership depending upon the date of service of the notice. The issue for the Scottish Land Court was the effect of Sections 72 and 73 of the 2003 Act on the notice that had been served on 3 February 2003.

The Court concluded that although the landlord's stated reason for serving the notice was in order to fulfil a long held plan to take the farm in hand, it could properly be said that the main

purpose of the notice was to avoid the risk that the Act would contain a provision which would prevent the landlord from being able to terminate the tenancy at the earliest contractual date. It accepted that the provision of Section 72 were clearly intended to have retrospective effect and created four different classes of rights in relation to general partners, depending upon the date when a notice of dissolution was served. The Court decided that the right to prevent the landlord from seeking to avoid the potential consequences of the legislation was at the heart of Section 72. As a result it could not make the order under Section 72(8) which the landlord had applied for in this case.

The Court's decision will only affect a small category of cases, namely where notices of dissolution of limited partnership tenancies were served during the Bill stage of the 2003 Act in order to prevent any tacit continuation of a limited partnership agreement. In a number of such cases the parties will by now have entered into new arrangements and will not be affected by the decision. There are however other cases before the Court or likely to be raised where this decision will have an effect.

## **Common Agricultural Policy**

On 16 July 2010 the European Commission adopted a decision to claim back €65.02 million of agricultural aid payments from 10 member states, including the United Kingdom. The money is being claimed back because of non-compliance with EU rules or inadequate control procedures on agricultural expenditure. The countries affected are: Austria, Denmark, Finland, Germany, Hungary, Luxembourg, Slovakia, Slovenia, Spain and the UK. Within the UK payments are being reclaimed from England, Northern Ireland and Scotland. The cause of the claw back in Scotland totals €14,000 and relates to inaccuracies in LPIS-GIS (the Land Parcel Identification Scheme), and incorrect calculation of reductions and sanctions.

## **Crofting**

The **Crofting Reform (Scotland) Bill** was passed by the Scottish Parliament on 1 July 2010. The Bill 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 Bill 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. It has also been announced that the croft registration fee will now be set at between £80 and £130 for first registration, compared to £250 as originally proposed. It is proposed that registration fees will be discounted where there is an application for 'community mapping' by 10 or more crofters. If this is successful in encouraging registration of crofts then compulsory measures for registration may be postponed for a year after the new Crofting Register commences.

Measures to deal with absenteeism and neglect on croft land are set out, including a requirement on the new Commission to take action against these. 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 Government Rural Payments and Inspections Directorate

## **Environment**

The Scottish Government is currently consulting on the draft **Environmental Impact Assessment (Scotland) Regulations 2010**. The consultation paper sets out proposals for consolidating and updating Part II of the Environmental Impact Assessment (Scotland) Regulations 1999. A number of changes are intended to reflect the outcome of UK and ECJ case law. In some instances there are different possible methods of doing this, and the consultation document explains the options and asks whether there is support or invites comment on what is proposed. It also notes that the European Commission are presently reviewing the EIA Directive and that in some instances it would be more appropriate to await the outcome of that before making further amendments to the Scottish Regulations.

The main changes proposed are: amendment to Schedule 2 so that any applicable Schedule 2 threshold applies to the development as a whole once modified, and not just to the change or extension; a new provision requiring that all changes or extensions to Schedule 1 projects, where these are not Schedule 1 developments in their own right, must be screened as to the need for EIA; a new provision to clarify the requirement that, where Scottish Ministers or a planning authority issue a negative screening decision, they shall make available on request the reasons for that conclusion; an extension of existing provisions applying EIA to applications for approval of conditions to a planning permission in principle to also include other types of multi-stage consents under the Town and Country Planning (Scotland) Act 1997; other miscellaneous amendments intended to update the regulations or to address issues raised previously which concern the day to day operation of the planning EIA regime.

The Consultation also states that it is intended to publish updated procedural guidance (currently Circular 8/2007). The consultation period closes on **27 August 2010**.

## **National Parks**

On 30 June 2010 the Scottish Government made two formal statements to the Scottish Parliament as regards its consultation on proposed modifications to the Designation Orders relating to the Loch Lomond and the Trossachs National Park (LLTNP) and the Cairngorms National Park (CNP). As regards the LLTNP the Scottish Ministers propose to reduce the size of the board from 25 to 17 members: 6 members nominated by local authorities, 6 Ministerial appointees and 5 directly elected. As regards CNP the Scottish Ministers propose to reduce the size of the board from 25 to 19 members: 7 members nominated by local authorities, 7 Ministerial appointees and 5 directly elected. It is also proposed to extend the southern boundary of the CNP so that Killiecrankie, the National Trust for Scotland visitor centre and the whole of the site of the battle of Killiecrankie should be included within the National Park. The rationale for reducing the size of the boards of the National Parks is that whilst larger boards were useful when the Parks were being established, now that they are well established such large boards are no longer necessary. The statements to the Scottish Parliament noted the responses to consultations on the draft modifications, and advised that the Scottish Ministers have decided not to make any changes to the draft Modification Order.

## Planning

The Education, Lifelong Learning and Culture Committee of the Scottish Parliament has issued a call for written evidence on the general principles of the **Historic Environment (Amendment) (Scotland) Bill**. Comments by **20 August 2010**.

## Waste

Although not within the stated time frame of this article, it is worth noting the English case of *R v W, C and C*, [2010] EWCA Crim 927 (11 May 2010). A large quantity of materials extracted principally from one farm in the course of construction of new hotel premises was deposited on a neighbouring farm for the purpose of creating an area of hard standing for the extension of the farm facilities and the construction of a new farm building on top of it. The trial judge held that the material deposited was not ‘waste’ and found that there was no case to answer. The Appeal Court held that the matter should have been sent to the jury to determine whether or not the material was waste in all the circumstances. The Court discusses the extensive case law on the definition of waste before concluding that “*All would depend on the facts of the individual case. There may be cases where what is deposited as waste in the recipient's hands is deprived of that character by later acceptable use. However, in the present case, the answer ... is likely to resolve all five counts on the indictment, by virtue of the jury's view of the respondent's intended and immediate actual use of the materials.*” The case is another reminder of the complexities involved in defining ‘waste’, and how small differences in circumstances have the potential to lead to different outcomes.