

A Survey of Rural Law Developments in Scotland in June 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 and consultations on proposed legislation which may be of interest under relevant subject headings..

Agricultural Holdings

In the first rent review case decided by the Scottish Land Court in many years, a number of issues have been decided by the Court. The decision is lengthy, 206 paragraphs plus an appendix. It is also understood that there has been an appeal lodged. The case is ***Morrison-Low v Executors of the late T H Paterson, SLC/233/08, 2 June 2010***. The following comments are intended to note most of the main points of general application, but it is not a full summary of the judgement, and does it cover all the issues discussed.

The Court made it clear that it cannot just make a determination as to what is the appropriate rent, but has to make its decision based on the evidence put before it (although like an arbiter, it may apply its expertise to that evidence). The Court also commented that there was no reason why parties could not choose from one of a number of different methods for determining rent. This could include using an agreed expert valuer, or by an application to the Court proceeding by way of written submissions and an inspection.

The Court made comment in respect of the statutory disregards of the tenant's occupation and of scarcity. It accepted that limited duration tenancies and short limited duration tenancies could be considered as evidence of rents for comparable holdings, subject to taking into account any different lease terms. The Court expressed the view that when considering the current economic conditions in agriculture, it was not appropriate to assess a rent based on a budget for a single year. Current economic conditions were simply one important factor in the assessment of an open market rent. It was to be assumed that any potential tenant should be taken as having an appropriate level of single farm payment, and that a potential tenant with entitlement to SFP would be able to pay a higher rent than one without. SFP was not to be considered as part of the farm income, but there would be an allowance to the landlord in recognition of the benefit of being able to realize his SFP entitlement rather than renting naked acres. A hypothetical tenant would have sufficient capital to provide necessary equipment, but he would be expected to borrow to cover annual variable costs. The cost of borrowing is a proper outlay in calculating farm earnings. Having regard to the over-all benefits provided by the lease and income support provided by SFP, a tenant would be prepared to allow a major share of profits from the farm to go to the landlord. After taking into account a number of other factors particular to the individual farm, the Court determined the rent for the farm.

Crofting

The **Crofting Reform (Scotland) Bill** passed Stage 3 of the Scottish Parliament legislative procedure on 1 July 2010. The Crofting Reform (Scotland) Act 2010 will rename the Crofters Commission as the Crofting Commission, and reform how the Commission is constituted. It also provides for the establishment of a new (map based) register of crofts. Changes are made to the duties of crofters and certain owner-occupiers of crofts, and for the enforcement of those duties by the Commission.

Mooring rights

The issue of mooring rights in Kames Bay, was considered in *The Crown Estate Commissioners, Petitioners*, [2010] CSOH 70 (Lord Uist, 4 June 2010). After a couple of years of consultation and development, the Crown Estate Commissioners (CEC) introduced a system of mooring licences in 2007. A mooring licence was available for either £35 or £70, depending on who it was obtained through. Certain mooring equipment remained in place without being licensed and without the owners of that equipment identifying themselves. The issue was whether the CEC were entitled to remove mooring equipment within Kames Bay which had not been licensed by the CEC. The case also considered what was meant by the term 'free port and harbour' in mediaeval royal charters. Solicitors representing an individual affected by the case had contacted the Court suggesting the appointment of an *amicus curiae*, which was done.

The Court granted the declarator asked for. It held that a Royal Charter of 1584 making Rothesay a royal free burgh (and which approved, ratified and perpetually confirmed a Charter of 1400) did not grant ownership of the seabed in Kames Bay to the Royal Burgh of Rothesay. The grant of a right of free port and harbour to the magistrates and inhabitants of did not mean that the individual inhabitants of Bute had a right to lay permanent moorings. The right of a free port and harbour carried a right of unimpeded access to the port or harbour, but that it did not mean that use of the harbour was to be free as there were clearly intended to be charges. The right did not carry with it a right to permanent moorings on the seabed, which were unknown at the time of the grant.

Planning

The current Scottish Government consultation on **Tree Preservation Orders** ends on 9 July 2010. The consultation on **Planning Obligations and Good Neighbour Agreements** ends on 30 July 2010.

The **Historic Environment (Amendment) (Scotland) Bill** (which was introduced to the Scottish Parliament on 4 May 2010) is still going through its Stage 1 process, which will not be completed until some time after the parliamentary summer recess.

Wildlife and natural environment

The **Wildlife and Natural Environment (Scotland) Bill** was introduced in the Scottish Parliament on 9 June 2010. The Bill covers four substantive areas: (1) changes to the Wildlife and Countryside Act 1981; (2) changes to the Deer (Scotland) Act 1996; (3) changes to the Protection of Badgers Act 1992 and the Hill Farming Act 1946 (regarding muirburn); and (4) changes to the Nature Conservation (Scotland) Act 2004 (regarding SSSI's).

The Bill abolishes the requirement to have a licence for game shooting and modernises anti-poaching legislation. It proposes that game birds are brought under the regime applying to wild birds, making it an offence to kill, take or injure game birds (partridges, pheasants, mallards, red grouse) except outside a statutorily defined close season and provided that there is a legal right to take or kill such a bird (either a common law, under a shooting lease or other contract, or under statute). Existing Areas of Special Protection (ASP) for wild birds are to be repealed. Close seasons are also set for mountain hare and brown hares. Changes are proposed to the use of snares. Snares will require to have an ID tag showing the operator's ID number and whether the snare is intended to catch foxes or rabbits/hares. ID numbers will be provided by the police and the operator must be able to satisfy the police that they have been trained before they can be given an ID number.

New controls are proposed over the release of non-native plant species and animals. There is to be a statutory Code of Practice to provide for sustainable deer management. Scottish Ministers would be given a reserve power to require deer stalkers to demonstrate their skill and knowledge and for them to be registered. The protection of badgers legislation is to be strengthened by the introduction of new offences concerning knowingly causing or permitting unlawful acts. Muirburning legislation is to be modified so that muirburning will not be permitted after 30 April, and that out of season muirburning may be allowed for new beneficial purposes. The requirement to notify neighbours of each act of muirburning is to be eased.

New procedures are proposed which would allow existing SSSI's to be merged into a single SSSI. SSSI's would be capable of being de-notified without having to follow the existing procedure for doing so. It is proposed that there should be a power to allow new exemptions to be made to the list of operations not requiring consent from Scottish Natural Heritage before they can be undertaken on an SSSI. In order to encourage restoration following illegal damage to an SSSI, SNH would also be given the power to serve restoration notices without the person having been convicted of an offence. Failure to comply with the notice would be a criminal offence.