Edinburgh 15th August 2007. The Land Court having heard Counsel for the parties on the Reference by the Scottish Ministers under section 81 of the Land Reform (Scotland) Act 2003 and having resumed consideration of the Reference and submissions, under reference to the appended Note, FIND and DECLARE (One) that section 23(3) of the Crofters (Scotland) Act 1993 does not apply to leases of common grazings nor to an interposed lease of a croft estate and that accordingly absence of consent by the Crofters Commission does not invalidate such leases (Two) that in terms of section 73 of the Land Reform (Scotland) Act 2003 Pairc Trust Limited may acquire an owner's eligible land subject to the real rights of third parties such as crofters, interposed lessees and other lessees and (Three) subject to any relevant history as to the status of any particular stretch of water, lochs or watercourses lying within a geographical area known as common grazings will fall to be treated as eligible croft land within the meaning of section 73 of the Land Reform (Scotland) Act 2003; *quoad ultra* CONTINUE for consideration of further procedure; ALLOW parties to lodge motions on expenses, if they wish to do so, with the Principal Clerk, George House, 126 George Street, Edinburgh EH2 4HH within twenty-one days of the date of intimation hereof.

Chairman Member of Court

Note

[1] This is a reference by the Scottish Ministers under section 81 of the Land Reform (Scotland) Act 2003. It arises out of an application by Pairc Trust Ltd (hereinafter "PTL"), a crofting community body in terms of section 71 of the Act, for the consent of the Scottish Ministers under section 73 of the Act to the purchase by PTL of part of the Pairc Estate in the Island of Lewis.

[2] That application is the first part of an intended two-stage acquisition of the estate. The present stage was intended to deal only with the common grazings with a subsequent application proposed to deal with the inbye croft land. As noted below, it emerged in course of the debate that the present application also covered apportioned areas of common grazing.

[3] Since 1924 Pairc Estate has been owned by Pairc Crofters Limited ("PCL"), a company which, despite its name, is not now comprised of crofters as shareholders nor, in any sense, representative of the crofting community on the estate.

[4] By lease dated 20 and 24 August 2004 PCL leased the whole estate to a company called Pairc Renewables Limited ("PRL") and by lease dated 26 November 2004 PRL sub-let part of the Estate to SSE Generation Limited ("SSEG") for the purpose of developing a windfarm. We understand from the pleadings lodged by PCL and from what was said by counsel on their behalf at the hearing that said sub-lease relates only to the common grazings on the estate - including apportioned areas - but we have been unable to confirm from the copy of the lease lodged with us or from the original lodged with the Registers of Scotland that that is so. However, since the lease in favour of PRL covers the whole estate, in what follows we have to consider the legal position in relation to both common grazings and inbye land so it is unnecessary to insist on identifying precisely, at this stage, the land covered by the sub-lease.

[5] In addition to the Scottish Ministers and PTL the parties to the reference are, therefore, PCL, PRL and SSEG. PCL have lodged answers which have been adopted by PRL. SSEG answered by way of an informal letter indicating their support for the validity of the leases but took no further part in procedures. Their interests are essentially subsumed within those of PCL and PRL.

[6] The answers lodged for PCL contain seven questions upon which they seek a decision from the Court under section 81. However, after a procedural hearing we, by Order of 2 February 2007, restricted the present hearing to the two questions posed in the reference by the Scottish Ministers and question 2 of the questions posed by PCL.

[7] These questions are:-

For the Scottish Ministers

(i) Whether, in the absence of the consent of the Crofters Commission in terms of section 23(3) of the Crofters (Scotland) Act 1993 ("the 1993 Act") said leases are valid or void; and

(ii) If they are valid, what are the nature and extent of the interests which may be acquired by PTL under section 73 of the 2003 Act?

For PCL and PRL

Whether the lochs and water courses lying within the general geographical area of the common grazings sought to be acquired by PTL are "eligible croft land" in terms of section 68 of the 2003 Act?

[8] We heard debate on these questions on 12 and 13 June 2007 when the Scottish Ministers were represented by the Dean of Faculty, Mr Roy Martin, QC, with Mr Graham Hawkes, advocate, PCL and PRL by Sir Crispin Agnew of Lochnaw, QC, and PTL by Mr John Campbell, QC, with Ms Isla Davie, advocate.

The relevant statutory provisions

Crofting Reform (Scotland) Act 1976

Crofting Reform etc. (Scotland) Act 2007

Crofters (Scotland) Act 1993 ("the 1993 Act")

Housing (Scotland) Act 1987

Land Reform (Scotland) Act 2003 ("the Act" or "the 2003 Act").

Land Registration (Scotland) Act 1979 ("the 1979 Act").

Land Tenure Reform (Scotland) Act 1974 ("the 1974 Act")

Registration of Leases (Scotland) Act 1857 (the "1857 Act")

The statutory material referred to was voluminous. It is readily available in print and the more recent provisions are available on-line through http://www.opsi.gov.uk/legislation/scotland/s-acts.htm In the circumstances we see no point in reproducing the various provisions.

Authorities

Barr v MacLeod 1981 SLCR 79

Crofters Commission v Arran Limited	1996 SLCR 103
Ellen Street Estates Ltd v Minister of Health	[1934] 1 K.B. 590
Fitzgerald v Hall, Russell & Co. Ltd.	[1970] A.C. 984
Fforde v McKinnon	1998 S.C. 110
Highland Primary Care NHS Trust v Thomson	1999 SLCR 32
Hilleary v MacAskill	2004 SLCR 162
Jamieson v Police Commissioners of Dundee	(1884) 12 R 300
Kildrummy (Jersey) Limited v Calder (No. 2)	1997 S.L.T. 186
Macdonald v Prentice's Trustees	1993 S.L.T. (Ld. Ct.) 60
McColl v Trustees of Downie	1962 SLCR 28
Metheun-Campbell v Walters	[1979] Q.B. 525
Pilkington Bros Ltd. v IRC	[1982] 1 W.L.R. 136
Ross v Graesser	1962 S.C. 66
Scott v Napier	(1869) 7 M (H.L.) 35
Slamon v Planchan	[2004] 4 All. E.R.407
Sutherland v Sutherland	1986 S.L.T. (Ld. Ct.) 22
Trs. for the Proprietors of Halistra Common Grazings v Lambert	1997 S.L.T. (Ld. Ct.) 7
Vauxhall Estates Limited v Liverpool Corporation	[1932] 1 K.B. 733
Waugh v Wylie	(1885) XXIII S.L.R. 152

Texts

Bankton, *Institute of the Law of Scotland*, II

Bennion, *Statutory Interpretation,* 4th ed.

Dicey, *The Law of the Constitution*, 10th ed.

Paton and Cameron, *Landlord and Tenant*, 1st ed.

Stair, *Institutes of the Law of Scotland,* II

Stair Memorial Encyclopaedia, Vol 12

Submissions

(i) Opening remarks for Scottish Ministers

[6] In opening his submissions on behalf of the Scottish Ministers, the learned Dean of Faculty explained that the Ministers' position, in relation to both their own questions and the question posed by PCL, was one of neutrality. They did not have

"preferred answers". Rather he intended to assist the Court by setting the factual and legal context within which the questions arose, leaving the presentation of the full arguments on each side to the parties in contention but reserving the right to comment on these arguments once they had been heard.

[7] Following that approach, he took us through what he called the physical, factual and legal "geography" of the application. He identified the land which is subject to the application for the Ministers' consent, the salient features of the lease and sub-lease, the pleadings which had been lodged on behalf of the various parties and the statutory framework with which we are concerned. That framework, he explained, included not just the relevant provisions of the 2003 Act but also the 1993 Act, section 17 of the 1974 Act and section 28 of the the 1979 Act.

(ii) Submissions for PCL and PRL

[9] Sir Crispin opened his submissions by querying whether the debate was simply academic. The new section 69A of the 2003 Act, introduced by the Crofting Reform etc Act 2007, would come into force on 25 June 2007 and would give a crofting community body the right to buy the interest of an interposed tenant. He understood that the assessment of compensation would proceed in a different way but, the end result, for the community body ought to be broadly the same. It is convenient to note at this point that after some further discussion it was agreed that the issues before us were not wholly academic and could properly be heard.

[10] Sir Crispin then invited us to answer the first question for the Scottish Ministers to the effect that both leases were valid as the consent of the Crofters Commission was not required and to answer the second question by holding that PTL would acquire only PCL's interest as head landlord under the lease in favour of PRL including the rights reserved in that lease to the landlords but subject to the crofters' grazings rights, including their right to water stock in the lochs, rivers and streams on the common grazings. So far as PCL's own question was concerned, we should hold that lochs, streams and water courses within the common grazings area were not "eligible croft land" for the purposes of the Act, and accordingly answer that question in the negative. That was subject to a limited exception in favour of what he called

"*de minimis"* water courses, that is to say those which did not contain "fishable fishings". These could be included in any conveyance of the common grazings to PTL.

[11] It was important for us to note that the lease to PRL was a lease of the whole estate while the application to buy covered only the common grazings. Therefore, if PTL were to buy the common grazings they would be buying only part of the estate. The result would be that PRL, as the party now entitled to receive the estate rents, would be the landlords of the crofts and PTL would be the owners of the common grazings. In that respect PTL would become "joint landlords" with PRL on completion of the buy out.

[12] What PTL would be acquiring would be the landowner's interest in the common grazings subject to the lease to PRL, the sub-lease to SSEG and various other leases, including a lease of the shootings in favour of the neighbouring estate, a lease of 0.1 ha at Habost, leases of Lemreway and Marvig Piers and a lease at Gravir to British Telecom.

[13] With reference to the first of the Scottish Ministers' questions, Sir Crispin submitted that the rights of crofters in a common grazing were not real tenancy rights in the land but merely rights of grazing over the land (*Ross v Graesser* per Lord President Clyde at page 74, Lord Sorn at page 136; *Trustees for the Proprietors of Halistra Common Grazings v Lambert* at pages 10 to 11; *MacDonald v Prentice's Trustees* at page 65 and *Crofters Commission v Arran Ltd* at pages 123, 124-125, 131-132, 135 and 137; *Hilleary v MacAskill*).

[14] Section 3(4)(a) of the 1993 Act also made clear that the right a crofter had in common grazings was a "right in pasture or grazing land" and was analogous to a servitude right of grazing which might be enjoyed as part and parcel of the rights pertaining to a dominant tenement in the law of property. It was in that sense that a right of grazing over common grazings was "part of a croft" as provided for in section 3(4)(a).

[15] Although section 3(5)(a) of the 1993 Act provided that where a crofter had acquired (by purchase of the heritable interest) his entire croft other than such right or land as is referred to in section 3(4) (rights in pasture or grazing land and land comprising apportionments) that person was deemed to hold the right or land referred to in section 3(4) in tenancy and that right or land was to be deemed to be a croft, that did not alter the fundamental nature of the right in the common grazing. The deeming provision was simply necessary to give the right an independent existence: it did not alter the basic nature of the right, which was a right of grazing.

[16] Similarly, the fact that crofters sharing in a common grazing may have ancillary rights, such as the right to appoint a grazings committee under section 47 of the 1993 Act, a right to seek an apportionment under section 52(4) of that Act and, at common law, a right to a supply of water for watering stock and a right to take peat, that too did not alter the nature of the basic right, which remained a right to graze over the land rather than a right in the land itself. In this case the nature of the crofters' rights had been recognised in both the lease to PRL and the sub-lease to SSEG; both leases were expressly burdened by the rights of the crofters both as tenants of their crofts and in respect of their grazing rights.

[17] As to the validity of the leases, Sir Crispin's submission was that interposed leases were recognised as lawful both by the 1974 Act and the 1993 Act. Section 16(5) of the 1993 Act referred, in the context of a crofter's right to buy his croft, to the possibility that a person other than the landlord might own the land and entitled the crofter to a conveyance of the land from such a person. Section 61(1) defined "landlord" as meaning "(a) in relation to a croft any person for the time being entitled to receive the rents and profits, or to take possession of, the croft". The case of *Fforde v McKinnon* recognised (per Lord Justice-Clerk Cullen, at pages 116 to 117) that the word "or" in the equivalent provision of the Agricultural Holdings (Scotland) Act 1991 meant that a person could be a landlord for the purpose of collecting rents but not for the purpose of removing the tenant. These sections of the 1993 Act, therefore, recognised that there could be interposed leases in the crofting context. In particular section 16(5) recognised that a person other than the landlord could be infeft, allowing for the possibility of an interposed "head tenant" or "mid landlord" and section 61(1) recognised the possibility of an arrangement whereby one person,

who was not infeft, was entitled to the rents and another person, who was infeft, was entitled to possession, again recognising the possibility of an interposed head tenant or mid landlord. The case of *Fforde*, although it arose in the Agricultural Holdings context rather than the crofting context, supported the proposition that the landlord of a croft could in fact be the tenant under an interposed lease.

[18] With reference to the 1974 Act, section 17(1) provided expressly that interposed leases were lawful, with the effect of making the interposed tenant the landlord of the original tenant. In the crofting context therefore, the interposed tenant would become landlord of the crofts. It was significant that what was now section 16(5) of the 1993 Act had been law since the passage of the Crofting Reform (Scotland) Act 1976, just two years after the passing of the 1974 Act.

[19] It was clear, therefore, that the argument, to be advanced on behalf of PTL, that the 1976 Act impliedly repealed section 17 of the 1974 Act was wrong, because the 1976 Act, and now the 1993 Act, contained express recognition of the possibility of an interposed lease. If the intention had been to exclude that possibility, one would have expected to see "landlord" defined as "heritable proprietor". In any event, section 17 of the 1974 Act contained a specific statutory provision making interposed leases generally competent, so it would require very clear words in subsequent legislation to have the effect that interposed leases were not to be valid in the crofting context.

[20] Likewise section 17(1) of the 1974 Act, with its provision for deemed entry of the interposed land, provided the answer to the argument, again to be advanced on behalf of PTL, that possession was required for the validity of any lease and that here there was nothing in the way of possession.

[21] Section 2 of the Registration of Leases (Scotland) Act 1857 ("the 1857 Act") provided that leases registrable under that Act became, by virtue of such registration, effectual against singular successors. Both of the leases here had been presented for registration. Although the registration procedure was presently "on hold" pending the outcome of this case, were it to be decided that these leases were valid, their registration would be backdated to the date upon which they were first received by the

Keeper of the Register. The result would be that PTL, on completion of the buy-out, would become singular successors to PCL and the leases in favour of PRL and SSEG would be effectual against them. Section 16 of the 1857 Act provided that registration of all such leases completed the right of the grantee as if he had entered into actual possession of the subjects as at the date of registration. So the leases were effectual and there was deemed possession under them.

[22] *Kildrummy (Jersey) Ltd v Calder (No 2)* (at page 191 E-F) recognised that where there was an interposed lease it had the effect of removing the landlord as landlord and making the tenant under the interposed lease the landlord. Therefore, in this case, the effect of the lease in favour of PRL was to make them the landlords of the crofts. That also made them landlords of the grazing rights which were parts of the crofts.

[23] The result, therefore, was that the leases in favour of PRL and SSEG were valid leases, burdened by the crofters' rights in their crofts and their grazing rights over the common grazing.

[24] Sir Crispin then referred to the terms of section 23(3) of the 1993 Act. It was clear, he submitted, that the section applied to the letting of the croft and not to the letting of the landlord's interest in the estate. Here the crofts were already let and it was only the landlord's interest which was being leased to PRL and SSEG. In that the sub-section referred to "the croft or any part thereof", it was accepted that the grazing right over the common grazing was a "part" of the croft and that that part may be let. However, it would be a let of the grazing right and not of the land itself. The landlord was free to let the land itself to another party. Therefore the Crofters Commission's consent to the let of common grazing land was not required. That let would, however, be burdened by the crofters' grazing rights (*Halistra, MacDonald v Prentice*; *Hilleary v MacAskill*).

[25] So far as PTL's averment that interposed leases were "subject to the overriding statutory right to purchase the heritable interest" was concerned, Sir Crispin submitted that there was nothing in part 3 of the 2003 Act to suggest that the right to buy the heritable interest, if exercised, had the result of extinguishing

interposed leases. A number of Highland estates operated on interposed leases for a variety of reasons, including overseas company lets to United Kingdom companies or family trust lets to a main beneficiary who lived on the estate (e.g. *Kildrummy (Jersey) v Calder (No 2)*). Indeed most wind farm developments were proceeding on the basis of interposed leases not dissimilar to the lease between PRL and SSEG (e.g. *Hilleary v MacAskill*).

[26] The argument based on an "overriding statutory right to purchase" was wrong for a number of reasons. Firstly, the normal rule was that leases, where there was possession (and here there was deemed to be possession under the 1857 and 1974 Acts), were good against singular successors of a landowner. Section 2 of the 1857 Act expressly provided that that was so in relation to leases registered under it. Secondly, the extinction of the rights of parties would require clear wording. That was particularly so where there was to be extinction without compensation. Thirdly, there was a presumption that legislation did not remove rights without compensation but in any event the removal of PRL's and SSEG's rights without compensation would be a breach of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms and legislation by the Scottish Parliament in breach of such rights was not law (section 29 of the Scotland Act 1998). Fourthly, any presumption that the crofting community right to buy legislation extinguished existing leases was not compatible with the fact that such legislation clearly did not have the effect of extinguishing existing leases of crofts. That legislation could not have the effect of extinguishing rights under some leases but not others. Fifthly, section 16(5), which is part of the right to buy provisions of the 1993 Act, clearly recognised the possibility of the existence of interposed leases and the crofter's right to buy under the 1993 Act could not therefore have been intended to render them incompetent. And, sixthly, the 2003 Act made specific provision for the buying out of certain types of lease (for example, section 70(2) provided for the purchase of "eligible sporting interests" which phrase was defined at section 70(4) as including "any right under any lease or contract to shoot or fish on the land"). If the effect of the Act was to extinguish leases generally there would be no need for providing for specific cases in this way.

[27] For all of the foregoing reasons we should find said leases to be valid and answer the first question for the Scottish Ministers accordingly.

[28] Sir Crispin then moved to the second question, as to the nature and extent of the interest to be acquired by the applicants. In his submission the only such interest comprised the landlord's rights over the common grazing reserved in the lease to PRL. These reserved rights were burdened by the additional leases referred to earlier, such as the lease of the sporting rights to the neighbouring estate.

[29] The rights which might be acquired would also depend on the answer to PCL's own question as to whether the lochs and water courses were included within the definition of "eligible croft land". If they were not, then it was accepted that the applicants would acquire a right to sufficient water for the stock which the crofters were entitled to pasture on the common grazings.

[30] Sir Crispin then dealt with that question. In his submission the definition of "eligible croft land" in section 68 of the 2003 Act did not include lochs, streams and other water courses. That was because, on a proper construction of section 68, it was the intention of the Scottish Parliament that the crofting community should be entitled to buy those areas of land which were physically occupied by the crofters as either their crofts or as part of their crofts, which would include land over which they had grazing rights but would not include lochs and water courses over which there were, for obvious reasons, no such rights.

[31] Section 68 was an expropriatory provision in that it involved a compulsory sale of property by an unwilling seller. Although the legislation involved compensation at full value, the provision was nevertheless expropriatory in the foregoing sense. Accordingly it had to be construed strictly and any ambiguity required to be resolved in favour of the landowner who was being deprived of his property. Clear words were required to deprive a person of his property: Stair Memorial Encyclopaedia, Vol. 12, paragraph 1131; Bennion section 278, pages 723-725; *Methuen-Campbell v Walters* per Goff LJ at 529G and Buckley LJ at 542F; *Slamon v Planchan* per Longmore LJ at 39.

[32] With particular reference to what was said by Buckley LJ in *Methuen-Campbell v Walters* (at page 542F) to the effect that where the legislature used a technical term it should be taken to be used in its technical sense, that was relevant to this case in as much as "common grazing" in section 68 had to be taken in its technical sense of land subject to grazing rights. Lochs and water courses were not subject to grazing rights.

[33] What was said by Longmore LJ at paragraph 39 of his opinion in *Slamon v Planchan* to the effect that where legislation was clearly intended to be expropriatory Parliament's intention was liable to be flouted if the legislation was construed favourably to the landlord save in a case of genuine ambiguity did not detract from what had been said in *Methuen-Campbell*: where there *was* ambiguity the legislation should be construed in favour of the landlord who was being deprived of his property.

[34] Where a statute was dealing with technical aspects of law it was proper to give the language the meaning it would be expected to have in its context. Section 68 was a provision dealing with the law of property and should be construed in that way: Bennion section 332

[35] It was important to understand what rights a crofter had in water courses (i) on his croft, and (ii) on common grazings. While water courses running through a croft may or may not be let along with the croft, water on a common grazing could not be let along with the common grazing because all a crofter had on the common grazing was an incorporeal right to graze and not a real right of tenancy. In other words there was no let of which these could be part. So far as water on the common grazing was concerned all a crofter had was the right to water his stock. The case of *Barr v MacLeod* made clear that water courses could be included within the lease of a croft unless the landlord clearly reserved them. *MacColl v Trustees of R M Downie and Another* made clear that crofters' rights to water on a common grazing were restricted to the right to sufficient water to water their stock.

[36] More generally, and less technically, Sir Crispin questioned the use of the phrase "eligible croft land" in section 68 if the intention had been that the crofting community body was to be entitled to acquire everything within the external

geographical boundaries of a common grazing. If that had been the intention, he submitted, the Scottish Parliament could have defined what was to be acquired by reference to such geographical area. As it was, however, the Parliament had decided to define it by reference to land over which crofters had rights. The whole scheme of section 68 was to define what could be acquired by reference to land to which a crofter had a right, with the express addition of two particular interests in land to which crofters currently did not have rights, *viz* salmon fishings and mineral rights in terms of section 68(2)(d). Following that approach, if it had been the intention to include the water on the common grazings – something to which crofters did not currently have any right other than the right to water their stock – that should have been expressly included in section 68. It was wrong, therefore, to suggest that if such water was to be excluded it should have been expressly excluded. In any event, if there was ambiguity it fell to be resolved in favour of the landowner.

[37] Sir Crispin next dealt with the provisions relating to water and fishings contained in Schedule 2 to the 1993 Act. These are at paragraph 11(c) and (h) and reserve to the landlord or any person authorised by the landlord the right, in terms of paragraph (c), of "using for any estate purpose any springs of water rising on the croft and not required for the use thereof" and, in terms of paragraph (h), of "hunting, shooting, fishing or taking game or fish, wild birds or vermin". Paragraph 11(c) was obviously confined to the croft and did not extend to the common grazings (*MacColl* and *Barr*). Paragraph 11(h) reserved to the landlord, among other things, fishing or the taking of fish and was applicable to water courses running through crofts but did not require to apply to common grazings because crofters had no real rights in water courses.

[38] Section 68 of the 2003 Act defined the land that could be bought under the Act. In terms of sub-section (2)(a) "eligible croft land" meant "land within the meaning of 'croft' giving by section 3 … of the [1993 Act] together with any land or right which is deemed by sub-sections (4) or (5) of that section to be a croft or part thereof (including arable machair and scattalds)" and in terms of sub-section (2)(c) "any land – (i) comprising any part of a common grazing held by a tenant of a croft; or (ii) held runrig by a tenant of a croft, which has not been apportioned for the exclusive use of a tenant of a croft under section 52 of the 1993 Act; and (iii) any

land which consists of salmon fishings and inland waters within or contiguous to, or mineral rights (other than rights to oil, coal, gas, gold or silver) in, land referred to in paragraphs (a) to (c) above (including any such fishings or rights which are owned separately from that land)".

[39] The points to note from that were, said Sir Crispin, firstly, that "eligible croft land" meant "land within the meaning of a croft" as defined by section 3 of the 1993 Act including any land or right which is deemed to be part of a croft under sections 3(4) and 3(5) of that Act. It was accepted that, over and above that, in a sale to PTL, they would acquire a right to sufficient water for the stock which the crofters were entitled to pasture on the common grazings because that was a right pertaining to the grazing right. Secondly, "eligible croft land" included any land on which there was a right of pasture or grazing. It was not clear why paragraph (b) of section 68(2) was necessary because what it said seemed to be included in the definition at paragraph (a). Thirdly "eligible croft land" comprised, in terms of paragraph (c)(i), "any land comprising any part of a common grazing" which had not been apportioned. Finally, in terms of paragraph (d) of section 68(2) "eligible croft land" included certain salmon fishing and mineral rights.

[40] Sir Crispin next took us to section 3 of the 1993 Act and the definition of "croft" contained there. The definition was of a croft as "a holding" occupied by a landholder or statutory small tenant, including those added to the register by direction. One therefore had to look to the Crofters Holdings (Scotland) Act 1986 ("the 1886 Act") for the definition of "holding" and to the Small Landholders (Scotland) Act 1911 ("the 1911 Act") for the definition of "statutory small tenancy".

[41] The original definition of "holding" (later repealed by the 1911 Act) contained in section 34 of the 1886 Act defined "holding" as "any piece of land held by a crofter, consisting of arable or pasture land, or of land partly arable and partly pasture, and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone, or in common with others) immediately preceding the passing of this Act, including the site of his dwellinghouse and any offices or other conveniences connected therewith, but does not include garden ground only appurtenant to a house". The emphasis there was on land which was arable or pasture

land and the description was not habile to include lochs and water courses. These were neither arable nor pasture and could not have been "occupied and used" as such.

[42] Section 26(3) of the 1911 Act defined the types of land or tenancy which did not come under the provisions of that Act. Sub-section 26(3)(f) was relevant for our purposes. It provided that "any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act 1908" was excluded from the provisions of the Act. Section 35 of the 1908 Act defined holding as "any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden …". Again the references to "agricultural" or "pastoral" land were not habile to include lochs and water courses.

[43] Further, insofar as sub-section 68(2)(a) and (b) of the 2003 Act included grazing rights in common grazings, this must be so that a crofting community body which had acquired ownership of the crofts also acquired the grazing rights pertaining to the crofts, in the sense that they became landlords of each croft including its grazing rights. But that made them only "landlords" of the grazing right and not of the land subject to that right (*Halistra*).

[44] Paragraph (c) of section 68(2), however, also included in the definition of "eligible croft land" land "comprising any part of a common grazing held by a tenant of a croft … which has not been apportioned for the exclusive use of a tenant of a croft under section 52 of the 1993 Act". In Sir Crispin's submission, "any land", in this paragraph meant land over which there was a grazing right as a pertinent of a croft. Grazing could only be carried out on land and not on water. Therefore lochs and water courses could not be included within the definition of "any land".

[45] Sir Crispin accepted that section 5 and Schedule 1 of the Interpretation Act 1978 defined "land" as, unless the contrary intention appears, "including building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land". Here, the contrary intention of the 2003 Act was clear since it defined "land" by reference to the extent of the crofters' rights in the common grazing. That was reinforced by the principle that the statute should be construed

restrictively in favour of the landowner since it deprived him of rights in land against his wishes.

[46] With reference to the treatment of water rights in the context of conveyancing law, the cases of *Jamieson v Police Commissioners of Dundee*; *Scott v Napier* and *Waugh v Wylie* all made clear, in his submission, that whereas there are presumptions about the ownership of lochs, rivers and streams, these presumptions can be rebutted by the terms of the conveyancing description used in the title deeds of particular subjects. The result was, therefore, that it was competent to exclude lochs and water courses in a conveyance of contiguous land.

[47] Sir Crispin then turned to the terms of Explanatory Notes which, he understood, had accompanied the Bill which became the 2003 Act on its passage through the Scottish Parliament. At paragraph 183, in a commentary on section 68(2) the Notes stated that that sub-section was "intended to apply to all lands which [were] subject to crofting tenure and regulation". So far as the land of the common grazings was concerned, it was not subject to crofting tenure but was subject to crofting regulation. So far as the lochs and water courses on common grazings were concerned, these were subject neither to crofting tenure nor to crofting regulation as was shown in *MacColl v The Trustees of R M Downie* at page 30 where the Court, having referred to the right of the Crofters Commission to regulate the use of peat bogs, heather or grass, had said "there is, however, no mention of the use of water or the regulation of the use of water on common grazings in section 27(8) or in any other part of the 1955 Act".

[48] With reference to the provisions of section 70 of the 2003 Act (dealing with land which may be bought in addition to eligible croft land) an acquisition under that section by a crofting community body could only be made with the consent of this Court under section 77 which required the Court to be satisfied (sub-section (3)(a)) "that the purchase of the eligible additional land by the crofting community body is essential to the development of the crofting community". Such an approach was consistent with the fact that fishing is one of the main interests of a Highland estate and should not readily be taken away by compulsory purchase. On this approach, the

Scottish Parliament had allowed for the taking away of one of the landowner's main interests in the estate but only where strict tests of need were fulfilled.

[49] Insofar as the 2003 Act may be said to contain indicators contrary to his approach, Sir Crispin submitted that these could be explained and were not in themselves sufficient to displace his approach. Firstly, so far as the right to acquire salmon fishings in terms of section 68(2)(d) was concerned, the fact that the crofting community body were to be allowed to buy salmon fishings did not necessarily mean that the intention was that that body would acquire the rest of the fishings when the rest of the fishings were not "eligible croft land" as that was defined in the Act. The result would rather be that purchase by the community body of the salmon fishings would leave the landowner with the right to fish for trout and other fish. Secondly, whereas section 70(2) provided that where eligible croft land was being, or had been, bought under the Act, "eligible sporting interests" could also be bought that did not mean that lochs and water courses could be bought under the Act because section 70(4) defined "eligible sporting interests" as "the rights of a person other than the owner of eligible croft land under any lease or other contract to shoot or fish on the land". What that referred to, so far as relevant, was the right to buy out the lease of fishings on crofts rather than common grazings. Fishings on crofts were reserved to the landlord in terms of paragraph 11(h) of Schedule 2 of the 1993 Act. The position on common grazings was different because, for the reasons already given, the exercise by the landowner of shooting and fishing rights there was not by virtue of any reserved right but by virtue of his right to the land burdened only by the crofters' grazing rights.

[50] In summary Sir Crispin submitted that "eligible croft land" did not include lochs and water courses on common grazings because crofters had never had real land rights in these and therefore any conveyance of the common grazings should exclude lochs and water courses and reserve to the present landowner necessary rights of access as set out in PCL's statement of suggested conditions to be attached to any conveyance.

[51] Finally, Sir Crispin moved us to certify the cause as suitable for the employment of senior counsel, all parties having instructed senior counsel, the

legislation being new legislation which raised difficult questions of statutory construction and the matter being of significant importance to both PCL as landowner and PRL as interposed mid-tenant. *Quoad ultra* the question of expenses should be reserved for written submissions.

(iii) Submissions for PTL

[52] Mr Campbell's submissions on the Scottish Ministers' first question fell into three parts. Firstly, the leases in favour of PRL and SSEG required the consent of the Crofters Commission, in the absence of which they were void. Secondly, it was incompetent for a landowner to constitute interposed leases over croft land or apportioned common grazings and accordingly they were void. Thirdly, there was a lack of civil possession which rendered the leases invalid.

[53] The requirement for the consent of the Crofters Commission arose from section 23(3) of the 1993 Act which applied to any intended alienation of a croft or part thereof. Although that section was headed "vacant crofts" the heading of a section was of very limited use in interpretation of the meaning of the section because of its necessarily brief and inaccurate nature (Bennion, section 255). The plain literal meaning of the words of a section could not be overridden purely by reason of the heading (*Fitzgerald v Hall, Russell & Co Ltd* and *Bilkington Brothers Ltd v IRC*).

[54] In section 23 of the 1993 Act, subsection (3) could be read independently of the other subsections. Of those other subsections only (5) and (7) dealt expressly with the subject of vacant crofts. There were, in subsection (3), no cross-references, mutual definitions or incorporated references requiring it to be read together with any other subsection. One had to ask, as part of the task of interpretation, what its purpose was. Its purpose was clearly to give the Crofters Commission control over letting wherever a letting of croft land was proposed by a landlord. In the present case no consent to the granting of the leases in favour of PRL and SSEG had been obtained from the Crofters Commission and the leases were therefore null and void.

[55] If he was wrong about that and if section 23(3) was restricted to vacant crofts, it would still apply in this case because common grazings constituted vacant croft

land. They were vacant because the unapportioned grazing rights enjoyed by the crofters did not amount to a real right of tenancy (*Ross v Graesser; Hilleary v MacAskill and Another*). Furthermore, in terms of the definition of a vacant croft given in sub-section (10) a common grazing was "occupied otherwise than by the tenant of the croft". Subsection (3) therefore applied with the result that any proposed let of the common grazing required the consent of the Crofters Commission.

[56] Sir Crispin had said that the interest which had been leased, in terms of said leases, had been the landlord's interest: the leases were not, therefore, leases of crofts. Section 23(3), however, drew no distinction between landlords' rights, crofters' rights, grazing rights or leases of the land itself. Here the leases covered crofts, common grazings and apportioned parts of common grazings. Accordingly section 23(3) applied.

[57] Mr Campbell's second submission on this question was that whereas interposed leases were valid and indeed quite common in other landlord/tenant relationships they were not valid in the crofting context.

[58] That was firstly because the enactment of the crofter's right to buy provisions now found in the 1993 Act, had impliedly amended section 17 of the 1974 Act. Questioned by the Court as to what the position had been before any such amendment and, in particular, as to whether the terms of section 17 were habile to cover the landlord/crofter relationship, Mr Campbell accepted that its terms were such that it could apply in the crofting context but went on to submit, at a later stage in his argument, that section 17, despite its terms, had never applied to crofting at all or, if it had, it had been disapplied as a result of implied amendment by the provisions now contained in the 1993 Act.

[59] So far as implied amendment was concerned, it was a trite law that the powers of Parliament were not constrained by anything done by a previous Parliament or, indeed, anything done earlier in the same Parliament. So if an Act of Parliament was inconsistent with an earlier Act of Parliament, one had to construe the latter as containing an implied repeal or amendment of the earlier. (Dicey pp 39, 40 and 68;

Bennion section 80; *Ellen Street Estates Ltd v Minister of Health* at page 597 and *Vauxhall Estates Ltd v Liverpool Corporation*).

[60] The general principles of the common law of leases applied to crofts only to the extent to which they were not displaced by statute and crofting tenure was really *sui juris* (dicta of this Court in *Sutherland v Sutherland* at pages 23-24).

[61] Section 17 of the 1974 Act related to leases governed by what Mr Campbell called "the ordinary law of landlord and tenant". It did not say that leases could be interposed in a statutory lease regime, such as crofting. The purpose of section 17, as shown by its annotations in Current Law Statutes, was to allow leases to be interposed in the commercial context, in situations such as urban property development projects. When one contrasted these with the crofting regime one saw that all they had in common was the existence of a landlord and a tenant. Beyond that the crofting regime was entirely statutory. The crofting regime was, therefore, very different from that at which section 17 of the 1974 Act aimed.

[62] Mr Campbell recognised both that the 1974 Act had had a provision specifically to do with crofting (section 14 now repealed), albeit not to do with interposed leases, and that the 1993 Act was consolidating legislation. But the 1993 Act contained provisions which were inconsistent with the validity of interposed leases in the crofting context.

[63] In particular section 12 of the 1993 Act entitled a crofter, either by agreement with his landlord or following a successful application to this Court, to acquire the land tenanted by him. A landlord in an interposed lease would have no proprietary interest to confer upon the acquiring crofter. Section 12 would therefore be unworkable where the landlord was an interposed tenant. The conclusion was, therefore, that the enabling provision in the 1974 Act, permitting interposed leases, was impliedly repealed by the 1993 Act so far as crofting was concerned.

[64] As to whether section 16(5) of the 1993 Act provided the answer to the difficulty to which he had drawn attention, Mr Campbell queried how section 16(5) might work in the interposed lease context. If an acquiring crofter made application

to the interposed tenant, as his landlord, that interposed tenant could not give the crofter the rights he wanted to acquire because he himself did not have them. The acquiring crofter would then have to apply to the Court with a view to the Court granting an order for a conveyance against the infeft proprietor but that proprietor could only grant the acquiring crofter his interest subject to the interposed lease, which, said Mr Campbell, fell short of what section 12 of the 1993 Act envisaged.

[65] The individual crofter's right to buy, which is now found in sections 12 to 19 of the 1993 Act, was first introduced by the Crofting Reform (Scotland) Act 1976. In Mr Campbell's submission there were two possibilities: (a) it had never been competent to grant an interposed lease in crofting, or (b) it had ceased to be competent to do so on the introduction of these provisions. He favoured the view that section 17 of the 1974 Act, despite its terms being habile to cover any relationship of landlord and tenant, had never applied in the crofting context but submitted that, in any event, the granting of such leases had become incompetent consequent upon the 1976 Act.

[66] In further support of that position we should note that section 16(5) did not sit alone and it was difficult to see how divided landlordship applied in relation to other provisions of the Act such as section 13(4) which allowed the Court, when making an order authorising a crofter to acquire croft land, to impose a condition that he grant a standard security in favour of the landlord to secure any sum which may become payable by him under section 14(3) in the event of disposal of the croft or any part of it outwith his family within five years of acquisition. In favour of whom would such a standard security be granted in a situation where there was an interposed tenant?

[67] As to who was the landlord of the crofts in the present case, it could not be PRL because the lease in their favour said nothing about assignation of the rents and section 61(1) of the 1993 Act defined "landlord" in relation to a croft as "any person for the time being entitled to receive the rents and profits, or to take possession of, the croft". PRL were entitled to do neither.

[68] Mr Campbell then turned to his argument on possession. For a lease to be valid, possession was essential (Leases Act 1449, Rankine pages 136 to 139; Paton and Cameron page 14).

[69] Possession could be either natural or civil. In the present case there was neither, whether in the hands of PRL or SSEG. Instead it was simply proposed that in time land would be taken out of the common grazings to be devoted to wind farm purposes. Thus Clause Five of the sub-lease in favour of SSEG provided for vacant possession to be given to them. It envisaged that the common graziers would require to give up their shares in parts of the common grazings in order for such possession to be obtained. Pending the obtaining of such possession, however, all the sub-tenants had was a personal contract and not a real right. That personal contract did not amount to a valid lease. Any form of possession on the part of PRL was also dependent on possession by SSEG, as their sub-tenants, and that in turn was dependent upon the land being given up piece by piece, as and when sites for the wind farm were identified, and the graziers' rights over these areas being resumed. The result was that there was not here the possession required for a valid lease or sub-lease.

[70] In answer to the Scottish Ministers' second question, as to the nature and extent of the interests which could be acquired under section 73, in Mr Campbell's submission, if leases such as we had here were valid, they gave way to the statutory right to purchase under the 2003 Act or, if that were not the case, PTL would become entitled to acquire the lease and sub-lease interests when section 69A of the 2003 Act came into force.

[71] If section 17(2) of the 1974 Act applied here at all the leases were subject to the overriding statutory right of a crofting community body to buy the heritable interest and they must cede to that overriding interest.

[72] Section 17(2) provided that the lessee under an interposed lease became the lessor of the lessee in the subsisting lease on the same terms and conditions as if the subsisting lease had been assigned to him. That meant that in an interposed lease the grantee must accept the whole existing rights of the individual crofter, under the 1993 Act, and of a crofting community body, under the 2003 Act: an interposed lease could not lessen, diminish or dilute the rights of tenants under the subsisting lease. Following on from that it was necessary to infer a renunciation of the interposed lease

where there was a conveyance to an individual crofter or to the community body. That was not expropriatory because the tenant and sub-tenant in the interposed lease had acquired the rights always subject to existing crofting rights. The leases here had come into effect in 2004, after the coming into effect of the 2003 Act and must, therefore, be regarded as always having been subject to the overriding rights contained within the 2003 Act. By contrast, an interposed lease, granted before the coming into force of the 2003 Act, assuming such a lease to be valid, would not be subject to the rights contained in that Act.

[73] Finally Mr Campbell dealt with PCL's question. In his submission lochs and water courses were "eligible croft land" in terms of section 68(2) by virtue of the definition of "land" contained in the Interpretation Act 1978, or lochs and water courses transferred as a pertinent of ownership of the surrounding land (Stair II.iii, 73 and Bankton II.iii, 12(165), Ferguson pages 137 to 140).

[74] Sir Crispin's approach to the interpretation of section 68(2) had been a brave attempt to make the matter more difficult than it needed to be. On any commonsense view, given the nature of common grazings and the fact that there were almost always lochs and water courses on common grazings, it had plainly been the intention of Parliament that such lochs and water courses could be acquired by the crofting community body along with the land within which they were situated.

(iv) The Dean of Faculty in reply

[75] The Dean opened his submissions in reply by stating that the Scottish Ministers did not depart from their position of neutrality. His submissions were simply designed to assist the Court in exploring the issues which had arisen.

[76] In relation to question 1 and the possible need for the Crofters Commission's consent to the leases in terms of section 23(3), if one looked at the definition of "croft" in section 3(4)(a) one saw that what was included in a croft there was a right over the common grazings and not the land subject to that right. He observed that it had now emerged that some of the land subject to the present application was apportioned common grazings whereas Sir Crispin's argument had been on the basis

of unapportioned common grazings. Where part of the common grazings has been apportioned, then in terms of section 3(4)(b) that land was included in the croft to which it had been apportioned. So, if there was here land which had been apportioned from the common grazings, Sir Crispin's argument as to whether the Commission's consent to the leases was required would not apply in respect of that land.

[77] With reference to the second of the Ministers' questions, Sir Crispin had suggested that all PTL were entitled to acquire was part of PCL's interest as landowner of the land, burdened by all leases, including the lease to PRL and sub-lease to SSEG, together with any reserved rights in favour of the landowners in terms of these and any other leases. The question with which the Ministers were concerned was what were the interests PTL could buy under the Act and, thus, what the Ministers could lawfully consent to them buying. Sir Crispin, he said, had not dealt with this matter at any length: paragraph 17 of his written note of argument was merely an assertion to the foregoing effect. The Court had not, therefore, heard submissions as to why the only interests the crofting community body could buy and the Ministers consent to them buying, so far as the present leases were concerned, were the landlords' interests in the lease to PRL. The Ministers, of course, accepted that PTL could make an application for the purchase of said leases once section 69A of the 2003 came into force but the fact was that that application had not been made yet. What had been made was an application under the existing legislation.

[78] That application raised the issue of what a crofting community body could buy and that was a matter of general significance, going beyond the question of validity of interposed leases, and raising starkly the question of what was "eligible croft land" in terms of section 68.

[79] Looking, for the purpose of answering that question, first to section 3 of the 1993 Act, it was dealing with the meaning of "croft" and within that meaning one could distinguish between an incorporeal right in common grazings which had not been apportioned and land which had been apportioned to the croft. The land in the common grazings which had not been apportioned was not part of a croft. Land, formerly part of a common grazings, which had been apportioned was part of the croft to which it had been apportioned.

[80] That was not, however, a distinction which mattered for the purposes of part 3 of the 2003 Act and that was because, if one looked at the definition of "eligible croft land" in section 68, in all material respects it was talking about land, not rights. Thus, in terms of section 68(1), it was *land* which may be bought, and paragraphs (a), (b) and (c) of subsection (2) all referred to land. In terms of paragraphs (b) and (c), where there existed an incorporeal right to graze, it was the land subject to that right which could be bought.

[81] Although there was no reference in the 2003 Act to the 1979 Act, "interest in land" as defined in section 28(1) of the 1979 Act meant "any estate, interest, servitude or other heritable right in or over land, including a heritable security but excluding a lease which is not a long lease". Accordingly long leases were expressly included in the definition. Also, in terms of Schedule 1 to the Interpretation Act 1978 "land" included "building and other structures, land covered with water and any estate, interest, easement, servitude or right in or over land". By virtue of that definition any reference in a statute to "land" would include a bundle of interests in the particular land in question and one of these interests could be that of a tenant under a long lease. There appeared to be no reason why each of those interests in land could not be an interest which a crofting community body could apply to buy under the 2003 Act.

[82] To take a hypothetical situation, where ownership of a piece of land was unburdened by anything such as a lease, a crofting community body could seek consent to acquire that land and what they would acquire would be the land unencumbered by anything other than the existing croft tenancies. Why, the learned Dean asked, should it be different if a heritable proprietor had ceded one element of his interest to a tenant? Surely, in that situation, a crofting community body could still include the right so ceded in a right to buy application. That was because it was one of the interests in the land in question. At the end of the day the crofting community body in that situation would acquire no more than they would have acquired had the right not been ceded in the first place. So the rights to be acquired were the same bundle of rights, it was just that where there was a lease they had become separated but that did not prevent a crofting community body from applying to buy them all.

[83] The Dean then turned to PTL's argument on the validity of interposed leases in the crofting context. The answer to that argument was to be found in section 16(5) of the 1993 Act which clearly envisaged that one could have a croft in which there was an infeft heritable proprietor but also someone else entitled to recover the rents. That was entirely consistent not only with the validity of interposed leases in the crofting regime but also with the thinking that there were different types of interest which may exist in land which was eligible croft land. It was also consistent with section 95 of the 2003 Act, subsection (1) of which talks of "the owner of the land or person entitled to the interests to which an application under section 73 above relates". The reference there to "interests" was not to be read so as to confine its meaning to salmon fishing, mineral or other rights specifically mentioned earlier in the Act. In particular the reference in section 95(1) was capable of including the interests of interposed tenants. Section 73(5)(b) also recognised that there could be a range of rights and interests included in subjects covered in a buy-out application.

[84] Moreover, one was entitled to have some regard to the purpose of this legislation. Its purpose was to allow a crofting community body to acquire title to eligible croft land. As to the legislation being expropriatory, he referred to what had been said by Longmuir LJ in *Slamon v Planchon* (at page 151, paragraph 39) to the effect that where legislation was intended by Parliament to be expropriatory, that intention was liable to be flouted if the legislation was construed favourably to the landlord save in a case of genuine ambiguity.

[85] The clear purpose of the crofting right to buy legislation was to give a properly constituted crofting community body the right to buy croft land and if one were to construe the legislation in such a way as to allow the landlord to dispose of a considerable part of the value of the land then that may be, as Longmuir LJ had put it, to flout Parliament's intention.

[86] The Scottish Ministers recognised that it was possible to regard this legislation as expropriatory but it had to be borne in mind that the crofting community body had to pay full value for what they were buying (section 88(6)). If the only interest which PTL could buy was the residual benefit of the land and the modest rent of £1,000 per

annum payable under the lease to PRL, then that value was modest and the price would be correspondingly modest. If, on the other hand, PTL were allowed to buy the interests of PRL the value would be far higher and the price correspondingly so but the result of that would be that PRL would be adequately compensated for their loss.

[87] That led to a consideration of what had been done in this case. What had happened, in terms of the leases, was that PCL had leased certain subjects to PRL and PRL had sub-leased part of the same subjects to SSEG. There was no explanation as to why PCL had not entered into a lease directly with SSEG but one might infer that things had been structured in this way so as to avoid the value of the ultimate lease to SSEG being acquired by the crofting community body. It was because of such an arrangement that the Ministers needed to know where they stood regarding the extent of interests in land which may be the subject of an application for their consent.

[88] Responding to a point raised by the Court earlier in his submissions as to whether, and if so how, the crofting tenancies themselves were excluded from "eligible croft land", the Dean said that the croft tenancies were not so excluded and that a crofting community body could therefore seek consent to acquire the croft tenancies but in practical terms the Ministers would be very unlikely to consent to that and in any event even if these tenancies were acquired by a crofting community body they would be required by the Crofters Commission to relet the crofts on a crofting tenancy so that the exercise of acquiring the tenancies in the first place would be a pointless one.

[89] The Dean then dealt with what had been said about section 17 of the 1974 Act. He made two points. Firstly, the section provided that the grantee under an interposed lease was to be deemed to have entered into possession of the land leased. In the present case, therefore, SSEG were deemed to have entered into possession. Secondly, subsection (2) provided that, subject to any agreement to the contrary, the lessee under an interposed lease became the lessor of the lessee in the subsisting lease on the same terms and conditions as if the subsisting lease had been assigned to him. That resulted in the relationship between the lessee in the interposed lease and the lessee in the original lease becoming one of landlord and tenant so that lessee in the interposed lease was the person entitled to the rents. On a proper analysis of matters

in the present case it was, in the Dean's submission, SSEG who had become the landlords and not PRL. If the sub-lease came to an end that entitlement would move one up, to PRL, and, if they too disappeared, PCL would then become the party entitled to the rents.

(v) Sir Crispin in reply

[90] Sir Crispin dealt first with the question of who were the landlords of the crofts. In his submission the landlords were PRL. Section 17(2) of the 1974 Act said that, subject to any agreement to the contrary, the interposed tenant becomes the landlord of the lower lease. The lease to PRL here was a lease of certain rights of use of the land which were compatible with the continuing crofting interests and not a lease of the crofts. It was clear that one could have leases of the same area of land for different purposes, the classic example being land subject to an agricultural lease, a sporting lease and a mineral lease.

[91] The sub-lease here was basically a lease for the purpose of building a wind farm. In terms of Clause 5 of the sub-lease, PRL had retained possession of the land and were taken bound by an obligation to obtain any necessary resumptions in respect of land on which SSEG had obtained planning permission for their wind farm. These would be limited areas and the situation was like a shooting lease over 20,000 acres where, in fact, all the birds were on 2,000 acres.

[92] Clause 7 of the sub-lease specified use of the leased subjects. 7.1 allowed use of the subjects for making investigations as to their suitability for the operation of wind turbines, erecting and maintaining an anemometer, digging trial pits and drilling bore holes, carrying out surveys, and the like. All of these things had already been done by SSEG and in that sense they had taken possession of the subjects. So the sub-lease to SSEG was a lease of rights to use land which rights were separate from the lease of the "landlordship" of the crofts. SSEG were not, therefore, the landlords of the crofts. The landlords of the crofts were PRL, who were entitled to the rents.

[93] Sir Crispin then turned to the definition of "land" for the purposes of section 68. The definition of "land" contained in the Interpretation Act 1978 was subject to

the proviso "unless the contrary intention appears" contained in section 5. What we had in the present case was a right to buy land but only land over which there were crofting rights. It was misleading to try to define land as including other "interests" where the Act used the word "interests" in a particular context, such as the reference to "eligible sporting interests" in section 70(2). So in part 3 of the 2003 Act the word "interests" had a particular meaning and was used in contrast to the term "eligible croft land" rather than as an expansion of what was included in that term. So when one found the word "interests" used in part 3, what was being referred to was eligible sporting interests. The reference to "interests" in section 73(5)(b) was a reference to the interests of others - third parties - in the subjects. Such interests had to be listed in an application for the Ministers' consent to a proposed buy-out. That was clear from section 73(8), which required Ministers to invite views on the application from, among others, any person whom they considered to have an interest in it.

[94] In relation to section 23 of the 1993 Act, his submission on apportioned land had been misunderstood. The submission was that where land has been apportioned it became part of the land of the croft. The crofter is limited in what he can do on that apportionment by the terms of Schedule 2 of the 1993 Act. The interposed mid-tenant becomes the landlord of the croft and apportionment and the tenant of the common grazings burdened by the crofters' grazing rights. If there is a relet of the croft or any part of it, including the apportionment, it has to be with the consent of the Crofters Commission.

[95] On further reference to section 23 it had to be understood that what subsection (3) was dealing with was a letting of the crofting interests, not the landlords' interest. The distinction between the two had been recognised by the Court in *Highland Primary Care NHS Trust v Thomson*. Further, if the heading could be used as an aid to construction, then the heading of "vacant crofts" on section 23 aided his position. But, it was not just the heading which referred to vacant crofts. Sub-section (1) dealt with the tenant of a croft giving up the tenancy in one way or another and subsection (5) dealt specifically with vacant crofts. In Sir Crispin's submission therefore, subsection (3) was also to be taken as referring to vacant crofts.

[96] Whether a common grazings was a vacant croft for the purposes of section 23 could be tested by asking whether the Crofters Commission could direct reletting of a common grazings. Plainly they could not. So it was wrong to view a common grazings as a vacant croft.

[97] Furthermore section 16(5) made clear that one could have an interposed lease in the crofting context and there was no suggestion in that subsection or elsewhere that an interposed lease required the consent of the Crofters Commission.

[98] As to the question whether the purchase by the crofter of the croft caused an interposed lease to fly off, that could not be right. But to get over the difficulty which would otherwise be caused by interposed leases in the croft purchase situation, section 16(5) provided a statutory mechanism whereby the crofter could acquire the respective rights of the landlord and infeft proprietor where those were different people. The purchase by a crofter of his croft in an interposed lease situation could be viewed as a statutory resumption of part of the interposed lease.

[99] So far as Mr Campbell's argument that section 17(2) of the 1974 Act could not apply to statutory lease regimes was concerned, that could not be right because in the *Kildrummy (Jersey) Ltd v Calder (No. 2)* case it had been decided that one could have an interposed lease in the agricultural holdings regime, which was also a statutory regime, and if one could have a valid interposed lease in that situation, why could one not have it in the crofting context?

[100] Sir Crispin next dealt with possession under the leases. Possession here arose in a number of ways. First of all there was deemed possession under section 17 of the 1974 Act. Then there was civil possession on the part of PRL by virtue of their entitlement to the rents. Thirdly there was natural possession by SSEG, by virtue of them having possessed the subjects for the purposes of inspection etc.

[101] But in any event whether there was possession or not did not affect the validity of a lease as between the parties to it. One could have a binding lease which provided that possession was to be taken at a later date. Possession was relevant only in a question with singular successors. So even if there was no possession under the

present leases at this point in time, that did not invalidate the leases. If the tenants had still not taken possession when PTL came to complete the buy-out there may be a question as to the validity of the leases at that time. But at the moment the question did not arise. Possession just did not affect validity: it affected only whether a lease was binding against singular successors.

[102] Sir Crispin next dealt with whether water courses on a common grazings were included in "eligible croft land" for the purposes of section 68. He reiterated that, despite the fact that this would be an acquisition for value, the nature of the purchase was expropriatory in that it involved property being taken from an unwilling seller. The narrow interpretation of section 68 was therefore required. Lochs and water courses could, after all, be very valuable to a landowner, for example, for hydro electricity schemes.

[103] With reference to what could be bought in a buy-out application, Sir Crispin submitted that if a crofting community body was entitled to buy all rights and interests in the land in question there would have been no need to make special provision for sporting interests and the position of heritable creditors (section 87(6)). And with reference to the Dean of Faculty's submission that a crofting community body could buy out the crofting tenancies, that was clearly not the intention of the legislation. It was wrong, therefore, to view the word "land" in section 68 as comprising every interest in that land. In his submission a crofting community body could not, for example, buy out a servitude right in favour of a third party. There were a lot of different interests which one could have in an estate and it could not be the case that a crofting community body was intended to be entitled to buy out all of them. Nor was it a correct approach to leave what could and what could not be bought to the discretion of the Scottish Ministers.

[104] The position being advanced for PCL and PRL as to what could be acquired was also consistent with section 89 of the 2003 Act which dealt with compensation for "an owner or former owner of land or person entitled to sporting interests" who had incurred loss or expense in relation to an application. That was clearly suggestive of the category of persons whose rights could be acquired in a buy-out being restricted to owners and former owners of land and persons entitled to sporting interests over

that land. It could not, therefore, have been the intention that third party rights outwith the estate, such as servitudes, could be bought out.

[105] Questioned by the Court as to the intention of the Act having been to benefit the crofters, Sir Crispin said that it was to put the crofting community body in the same position as the owner of the estate and, in addition, to give specific rights to buy salmon fishings and mineral rights. So the scheme of the Act was the substitution of one landowner for another in respect of only that land over which there existed crofting rights. In becoming substituted for the previous landowner in this way, a crofting community body took the land burdened by any interests which had burdened it before the transfer in their favour, whether such interests were in the way of leases, servitudes or otherwise. In addition to that they had been given the right to buy salmon fishings, mineral rights and pay off the holder of a standard security over the land. Otherwise, however, they took the land as the previous owner had it. A buy-out was not a compulsory purchase for the purpose of the legislation dealing with compulsory purchases and such title conditions as applied prior to the acquisition by the crofting community body remained thereafter.

Discussion and Decision

[106] As will have become apparent, the parties left no stone unturned in their efforts to put before the Court all relevant material bearing on the statutory provisions underlying the questions posed. We think it clear that the problems arising in relation to interposed leases in a crofting context, arise from the existence of the various right to buy provisions rather than from anything inherent in crofting as such. In relation both to the individual crofters right to buy, first provided in the 1976 Act and the crofting community right to buy under the 2003 Act, the legislation is explicitly aimed only at the right to acquire the landlord's interest.

[107] However, many proprietors have titles restricted by the real rights of others. Interposed leases are just one example of such real rights. The more obvious example is the rights of the existing crofters. Third parties may also have the benefit of servitude rights or other real burdens. Any such right might in certain circumstances have the effect of reducing the value of a proprietor's interest. There was no dispute

that a landowner might have a perfectly good reason for granting an interposed lease covering an entire estate of which the crofting interest might be only a part. There might be good reason for a lease of common grazings to a development company. *Hilleary v MacAskill and Ors* was an example of such a lease. We understood that the lease in that case was to a company in which local crofters had been given an interest but we have no doubt that there could be various entirely proper reasons for use of a separate company as an appropriate vehicle to carry forward a development. The rights of parties under such a lease would be entitled to protection unless there was some justification for setting them aside.

[108] There are no explicit statutory provisions dealing with the potential real rights of third parties, qualifying or restricting the rights of the heritable proprietor, other than provisions relating to security holders. There is a reference to "rights and interests" in section 73(5)(b) which may have some bearing on third party interests. We discuss it further below but consider that it falls far short of what would be required if there had been a positive intention that all competing rights were to be extinguished. There is, for example, no provision in the 1993 Act or the original 2003 Act relating to compensation in respect of such rights. Such provision is, of course, now made in respect of interposed leases by the amendment effected by section 35 of the 2007 Act, adding a new section 69A to the 2003 Act.

[109] It seems to us that the fundamental question is whether the absence of explicit provision dealing with these related rights can justify an inference that there was any intention of the legislature to supersede all rights restricting or qualifying the actual proprietor's right or title or whether that absence of provision is to be explained by reference to a simple intention that the local community should be entitled to take over the landlord's interest in the croft land. We have little doubt that the latter was the intention. Careful examination of the various relevant statutory provisions does not appear to us to disclose a comprehensive scheme which might justify, as a necessary inference, the conclusion that other rights were intended to be superseded.

[110] In this connection it is relevant to have regard to the comparatively elaborate statutory provisions made in the Housing (Scotland) Act 1987 to ensure that tenants of dwellings obtained a full marketable title to their homes free of inappropriate

restrictions. Even with such express provision the operation of the right to buy in that context was not free from difficulty. This material must have been well known to the legislators in 2003 and the absence of any equivalent provision tends to support the view that the intention was simply to allow crofters to "take over" from the landlords rather than to give them any enhanced rights.

[111] As we are satisfied that the various statutory provisions cannot be tied together by assuming a positive intention to supersede third party rights, there is no need to set out the detail of our examination of all the various statutory provisions although we shall attempt to deal briefly with the main arguments. It may also be said that although the rights given to crofters over the years have been described as *sui generis,* we cannot assume an intention to create a special set of rules for crofting by implication. The task of the Court is to construe the statutory provisions applying to crofting against the background of established principles of common law and other statutory material. In short, our task must be to fit conflicting rights together as far as this can be achieved and to identify situations where there is such an inconsistency of intention that it is necessary to treat some rights as having precedence over others.

(i) The validity of the leases

(a) Leases of common grazings

[112] When the reference was first submitted to the Court we queried the assertion that a 'croft' as defined in section 3 of the 1993 Act included common grazings: Statement 21. We referred to the apparent distinctions drawn by the different heads of section 68(2) and to other material including discussion in *Crofters Commission v Arran Limited and Ors*. The application by the crofting community body had made clear its intention to deal only with common grazings, leaving any application for inbye land to a second stage. Accordingly the assertion that common grazings were to be treated as a "croft" seemed likely to be critical. The Ministers decided that it was necessary for the reference to proceed on the basis of that assertion.

[113] However, at the hearing before us all parties were agreed that the rights crofters have in common grazings do not amount to a lease of the land but only to grazings rights over the land. Accordingly, any lease of common grazings is not

"interposed" in the sense under discussion of a lease inserted between landlord and tenant under an existing lease. We think that it also follows that common grazings are not a "croft" for the purposes of the 1993 Act. There is nothing in the provisions of section 3 which would bring them within the definition of a croft and it is clear that the terms "croft" and "common grazings" are always distinguished in practice. Mr Campbell appeared to advance an argument to the contrary under reference to section 23(10) but that provision does not attempt to provide any definition of the word "croft" and we are satisfied that it has no bearing on the issues before us. We are satisfied that there is no reason why an owner could not grant a lease of common grazing land subject to the grazing shareholders' rights. The lessee's rights to use the land would be extremely restricted and, of course, the crofters would have a right to a half share of the development value under section 21.

[114] It emerged, almost as an aside, in course of debate, that parts of the land referred to as common grazings had been apportioned. We heard no detail as to when this had happened but it was assumed that most, if not all apportionment had taken place before the leases in August 2004. It was not disputed that apportioned land had a status equivalent to traditional inbye crofting tenure. Accordingly, although the question of the leases in relation to common grazings appeared, at the end of the day, to present no real difficulty, it turned out that the more difficult issues relating to crofts had to be addressed. In short, although it had appeared unfortunate that the application had suffered delay because of a reference on a point which could hardly be disputed, the effect of there having being apportionments was that difficult issues did require to be addressed. It may be said that we were a little surprised to learn that apportioned grazings were involved when on the face of their application the crofting community body appeared to have deliberately limited the scope of their application to "common grazings". This was expressly said to have been done in an attempt to avoid possible difficulties over inbye land. But it must be recognised that the whole exercise was not an easy one for them.

[115] We return to common grazings in relation to the question of their extent but the other issues are addressed only in relation to inbye croft land and apportioned land. Crofters do, of course, have a right of tenancy over such land and the lease to

PRL at least is an interposed lease in so far as it relates to these areas. It may be added that we were not addressed on the issues which might arise if an apportionment came to be granted after a lease of the grazings had been granted. Our main discussion below assumes a prior apportionment. As will be seen, the conclusion we reach means that no significantly different approach would be required to deal with apportionment following a lease.

(b) Competency of interposed leases in relation to land tenanted as crofts

[116] Interposed leases were introduced into the law of Scotland by section 17 of the 1974 Act. Mr Campbell accepted that there was nothing about the wording of that section which precluded its application in the crofting context. But he submitted that either section 17 had never in fact applied to crofting or, alternatively, that its application had been impliedly repealed in 1976 when the Crofting Reform (Scotland) Act introduced the crofter's right to buy his croft.

[117] We accept that the commentary on section 17 in Current Law Statutes indicates that the need to introduce interposed leases into the law of Scotland arose because of problems in the very different area of commercial development projects, such as city centre developments. However, a limited reason for introduction of a provision does not, in itself, mean that a wider impact was not intended. We have no reason to think the provision was not intended to apply to crofting. We note that section 14 of the same Act related specifically to crofting. Although that section had nothing to do with interposed leases (it made minor changes to the Crofters (Scotland) Acts of 1955 and 1961 to do with absentee crofters) its existence makes it unlikely that section 17 was enacted without Parliament having considered its possible application to crofting. It must be kept in mind that even in the case of a rural estate, the interposed lease could apply to a wide variety of subjects and that croft holdings might be a small part of the whole.

[118] But whatever the intention behind the provision we would not be able to disregard its plain terms unless its application was incompatible with something in the

statutory crofting regime or there was something in the context of the enactment itself which showed that it required to be read in a narrow way. Mr Campbell did not suggest that there was anything of the latter character in the 1974 Act. He did suggest that it was incompatible with the existing crofting regime but his main argument was that, in any event, the position had changed with the enactment of the 1976 Act.

[119] Plainly the 1976 Act did not, by implication, bring about a wholesale repeal of section 17. The argument was that it had the effect of disapplying it in the crofting context. There is a general presumption against implied repeal: Bennion page 225. However, such repeal might be implied if "the later Act cannot stand with the earlier": Bennion page 214. We think that the question of such incompatibility can be seen as arising in two quite distinct contexts. In a broad context, the question is whether the very enactment of the 1976 Act was inconsistent with the validity of interposed leases in a crofting context. The narrower question is whether the provisions of the later Act might have the effect of superseding all or part of an interposed lease in particular circumstances. We look below, in relation to the Ministers' second question, at the effects in specific circumstances but, in the broad context we do not find such inconsistency between the 1976 right to buy provisions and section 17 of the 1974 Act as leads to the conclusion that the later provisions impliedly repealed section 17 in the crofting context. The mere existence of these right to buy provisions does not, in our view, render interposed leases wholly invalid in relation to subjects which include crofts.

[120] The right to buy provisions introduced by the 1976 Act are now replicated in sections 12 to 19 of the 1993 Act. Mr Campbell's submission was that these are incompatible with the existence of interposed leases in crofting. The contrary submission, was that these provisions, far from being incompatible with the existence of interposed leases, effectively acknowledge the possibility of such leases in the crofting context. Section 16(5) of the 1993 Act (originally section 5(5) of the 1976 Act) deals expressly with the possibility that someone other than the landlord (defined in section 61 as "any person for the time being entitled to receive the rents and profits, or to take possession of, the croft") may be the heritable proprietor of the croft land. The provision might have been intended to apply to other situations, such as when the land was owned by a trust with rents appointed to a particular beneficiary, but there

was no reason why it should not have been thought wide enough to apply to interposed leases.

[121] Mr Campbell made the point that section 16(5) did not sit on its own but had to be read with other sections of the 1993 Act. He suggested that section 13(4) was one which would be difficult to apply in the situation of an interposed lease. That subsection empowers the Court to make it a condition of an order authorising acquisition of croft land that the crofter grant a standard security in favour of the landlord to secure any sums which may become payable to him or his personal representative under section 14(3) of the Act. The latter provision entitles a landlord to share in the value of croft land disposed of within five years of acquisition by the crofter. The expanded definition of "landlord" contained in section 16(5) does not apply to section 14(3) although, it might be thought that the person for whose benefit section 14(3) was enacted was the owner of the land rather than the person entitled to the rents. We accept that the provisions do not fit seamlessly together. The purpose of the reference in section 14(3) to the "landlord referred to in section 13(1)" as opposed to "the landlord" is not entirely clear but it does point to a recognition that there may be different potential "landlords". The second part of the definition of "landlord" in section 61(1) includes reference to "any person for the time being entitled to receive the rents and profits, *or to take possession of, the croft*" (italics added) and, accordingly, includes the heritable proprietor. The effect of section 16(5) is that the word "landlord" which occurs twice in section 13(1) may mean different things in the context of that subsection itself. The full implications of these provisions was not worked out before us and may cause difficulties in specific circumstances. But we are not satisfied that difficulties arise only in the context of an interposed lease and cannot accept that the difficulties point to an intention to make such leases void in a crofting context.

[122] Our view is that interposed leases remain competent in relation to crofting estates but, as will be seen, we consider that the answer to the question in the narrow context is that the rights given under such lease may be lost if a crofter exercises certain of his or her own rights. It can be expected that, as in the present lease from PCL to PRL, leases will exclude from warranty the rights of crofters but if they do not

do so that will be a problem only as between landlord and general lessee and not a matter which bears on statutory construction.

(c) Whether present leases invalid due to lack of possession

[123] Section 17(1) contains a "deeming " provision whereby the tenant in an interposed lease is deemed to have entered into possession of the land. Furthermore, that subsection provides that where the interposed lease is registrable under the 1857 Act the rights of parties are to be determined by reference to that Act as amended by any other enactment. The lease to PRL is in that category with the result that, in terms of section 2 of the 1857 Act, once registered it will be effectual against singular successors of the landlord and, in terms of section 16, registration of the lease will be equivalent to possession. So far as the lease to SSEG is concerned, it too is registrable under the 1857 Act and therefore sections 2 and 16 will apply to the same effect as they do in relation to the lease to PRL.

[124] Although the leases have been presented to the Keeper for registration they apparently have not yet been registered. We were given to understand that this was because the Keeper was waiting the outcome of the present reference but we are not aware of the detail of his position and were not addressed on the implications of such delay. In any event, the fact that they have not been registered does not make them invalid. The rule requiring possession relates to third parties, such as singular successors of the landlord, security holders or other tenants. It provides formal notice of the existence of the lease. Its effect is to convert a personal right into a real right: (see *Rankine* page 137). Absence of possession does not invalidate the personal rights which the landlord and tenant under a lease have against each other. Sir Crispin advised us that PRL had issued rent notices and, indeed, that rents had been paid. This was not admitted. A claim to rent might well be good evidence of civil possession. But, in any event, we are satisfied that absence of possession at this stage would not render the leases invalid. If the leases have still not been registered when the buy-out has been completed there may then be a question as to whether they are valid as against PTL but, as matters stand at present, they are not invalid simply because of lack of possession. If there is any dispute about the implications of the delay in acceptance for registration it may have to be explored at that later stage.

(d) Whether the leases of inbye land required consent of the Crofters Commission under section 23(3) of the 1993

[125] The heading to section 23 reads "Vacant crofts". Section 23(3) provides: "The landlord of a croft shall not, except with the consent in writing of the Commission, or, if the Commission withhold their consent, except with the consent of the Secretary of State let the croft or any part thereof to any person; and any letting of the croft otherwise than with such consent shall be null and void**."**

[126] For avoidance of doubt at this point, it may be appropriate to repeat our conclusion that this provision does not cover leases of common grazings as these do not fall within the definition of a "croft" section 3(1) of the 1993 Act. Our concern is with inbye land and apportionments which in terms of section 3(4)(b) are a part of the croft. There is no dispute that subsection 23(3) applies to leases of such units. In the present context we are not concerned with leases of separate grazing shares, as such, although, of course, section 3(5) does make special provision for them.

[127] Although the sub-lease to SSEG may possibly raise different issues being intended to cover only common grazings, the lease to PRL includes land which is currently occupied as inbye croft land and apportionments. The contention is that it was, therefore, caught by section 23(3). Two questions were raised: whether the subsection is restricted to vacant crofts, and whether the lease to PRL is properly to be regarded as being or including a lease of a croft, or crofts, within the meaning of the section.

[128] It was Sir Crispin's submission that this was a lease only of the landlord's interest and was not a lease of the land. Accordingly it could not be a lease of a croft. That is not, however, what the lease itself says. Clause First of the lease in favour of PRL is quite clear as to what is being let. It is the land therein described. We understand it to comprise the whole of Pairc Estate. There is nothing said elsewhere in the lease about the lease being only of certain rights although the warrandice clause does make it clear that the lease is subject to the rights of the crofters. Furthermore, although section 17(1) of the 1974 Act talks of the person in right of the lessor of a

lease granting a "lease *of his interest* in the whole or part of the land subject to the [subsisting] lease", it goes on to say that "said grant shall be effectual…*for all purposes as a lease of land.*" [italics added]. If it was not effective as a lease of land it could not constitute a real right in that land. To refer to the subjects of a lease in terms of the "the landlord's interest in the land" is misleading.

[129] We are satisfied that the lease to PRL is a lease of land and part of the land leased is inbye croft land. But a question remains as to whether it can properly be described as the lease of a croft, or crofts, for the purposes of section 23(3).

[130] The concept of letting a croft is well understood. It relates to the letting of a croft to a crofter as crofting tenant. We think it perfectly clear that section 23(3) had that in mind and was not intended to apply to interposed leases. In other words, the latter were not in direct contemplation when section 23(3) was drafted. However, just as section 17 of the 1974 Act is capable of applying in the crofting context although it may not have been drafted with that specific intention, so section 23(3) of the 1993 Act may apply to situations outwith the contemplation of those who drafted it. The fact that this is plainly not the sort of situation for which it was intended is not, on its own, a basis for holding that it does not apply.

[131] However, all legislation must be construed in context. We are dealing, not with an independent section but with a subsection of a section which is clearly limited in its application to situations where there is no crofter in occupation. The main sanction provided by subsection (4) requires an occupier to give up his "occupation". The section is plainly dealing with the letting of individual crofts. It forbids the landlord of "a croft" from letting "the croft or any part thereof to any person" without the consent of the Commission. Obviously it would also apply where a landlord was intending to let a number of crofts to one person; consent would be required for each let. But the present situation is quite different even from that. The lease is a lease of a crofting estate including land held on a number of different tenures. Although the estate includes crofts, that does not seem to us to change the character of what is happening: it is not a lease intended to give rights of occupation of any croft or crofts but a lease of an estate where the lessee will hold as landlord.

[132] We are satisfied that what is contemplated by section 23 is a lease to an occupier. It contemplates a tenancy on statutory terms and, accordingly, on terms which require an active user of the land and oblige actual use by cultivation: schedule 2 of the 1993 Act. The tenant becomes, in common parlance, a "crofter" subject to the obligation imposed on crofting tenants under the Act and entitled to the rights and benefits conferred on such tenants by the Act. The leases here in issue are radically different in concept, scope and effect.

[133] This approach is confirmed by consideration of the purpose of the subsection. That purpose is obviously to give the Crofters Commission a degree of control over who becomes tenant of a croft. The purpose of that, in turn, is to try to ensure that the tenant is suitable as a crofter in the interests of such things as continued use of the land for crofting purposes and the continuance in being of active and healthy crofting communities. The Commission's concern is with the "end-user" of the croft and that is the aim of section 23(3). Although there may conceivably be a case for extending the Crofters Commission's function so as to give it a regulatory role in the granting of interposed leases, that would be aimed at a quite different purpose from that of section 23(3). It seems to us that an interposed lease has no bearing on the role of the Crofters Commission under that provision. In their written submissions PTL contended that the terms of section 23(3) applied to every "alienation of a croft by a landlord" including the purported leases. In this particular context, an interposed lease is little different from a sale of the whole estate. The Commission plainly have no role in relation to such an alienation.

[134] We conclude that the words "let the croft or any part therof" should be construed narrowly so as to be limited to the well understood concept of a croft let on statutory terms and not in the broader sense required to cover a lease of an estate of which the croft itself is part.

[135] On the above view it is unnecessary to treat the scope of the heading of the section as a separate question. However, we can deal briefly with that issue, applying the guidance contained in the passage from Bennion, at section 255. Headings form part of the statute. They provide assistance in its construction and a court should take advantage of that assistance in construing the section while realising that "a heading is

of very limited use in interpretation because of its necessarily brief and inaccurate nature". Where a heading differs from the material it describes a court is put on inquiry. "It is most unlikely to be right to allow the plain literal meaning of the words to be overridden purely by reason of a heading. . . . .[but] . . . . .where general words are preceded by a heading indicating a narrower scope, it is legitimate to treat the general words as cut down by the heading."

[136] It seems to us that the heading simply confirms the view we have of the intention of the section. Subsection (1) deals with crofts which have become or are about to become vacant by one means or another and the rest of the section goes on to deal with various matters arising from a croft being vacant. Some subsections expressly mention vacancy, others, like subsection (3), do not. But there is no conflict between the heading of the section and the content of any of the subsections. So far as subsection (3) is concerned, it is a matter of inference that it must be dealing with vacant crofts because that is the context in which the provision appears. Only a croft which was vacant could be let to a crofting tenant. The heading simply reinforces the conclusion. On a proper construction, the subsection applies only to vacant crofts and does not apply in the circumstances of a lease of an estate which includes crofting tenants.

[137] For these reasons, we have concluded that the consent of the Crofters Commission, in terms of section 23(3) of the 1993 Act to the granting of these leases was not required. The absence of consent, accordingly, has no bearing on their validity.

(ii) The nature and extent of the interests which may be acquired by the applicants under section 73 of the 2003 Act

[138] What a crofting community body may buy, and therefore what it may apply for consent to buy, is defined in sections 68 to 70 of the 2003 Act. The common theme is eligible land.

[139] Summarising section 68, which is the foundation section, "eligible croft land", means (1) crofts and apportionments; (2) any land in which a tenant of a croft, alone

or with others, has a right of pasture or grazing; (3) any land compromising any part of common grazings or held runrig by a tenant of a croft; and (4) salmon fishing in inland waters within or contiguous to, or mineral rights in, land comprised in categories (1) to (3). Owner occupied or worked crofts are excluded by subsection (3). The right of the Scottish Ministers to consent to the buying of eligible croft land under this section is not dependent upon the consent of the land owner.

[140] Section 69 specifies conditions as to the acquisition of salmon fishings and mineral rights.

[141] Section 70 allows "eligible additional land" to be bought where eligible croft land is being bought and refers to land contiguous with, and in the same ownership as, the eligible croft land and sporting rights over the eligible croft land held on lease by someone other than the owner of that land. In terms of section 74(1)(c), however, Ministers can grant an application for consent to buy additional croft land only where they are satisfied that the additional land is being bought at the request or with the consent of the owner and where that is not the case they must, under section 77(1), refer to this Court the question of whether the eligible additional land may be bought without the owner's consent.

[142] So the emphasis throughout is on the purchase of land. The word is not defined in the Act and the definition contained in section 5 and Schedule 1 of the Interpretation Act 1978 is not of assistance for present purposes. The Dean referred us to section 28(1) of the 1979 Act which includes in the definition of "interest in land" "(a) …any interest in or over land, including any heritable security or servitude but excluding any lease which is not a long lease; and (b) where the context admits, includes the land". But the phrase "interest in land" is not used in section 68, where the emphasis is simply on land. Accordingly a definition of that term does not assist.

[143] Nor does section 73(5)(b) of the 2003 Act help. It was referred to as showing that there could be a range of rights and interests in the subjects of the application. However, on the face of it, that subsection is simply specifying the information which an application for the Ministers' consent must contain. It does not purport to define what can be bought. That has already been done in the sections we have just

discussed and is comprehensively referred to in section 73(5)(a) which requires that an application for consent must show the location and boundaries of "the land or sporting interests in respect of which the right to buy is sought to be exercised". Paragraph (b) does not expand the definition. It requires applicants to list all the rights and interests which, in effect, may be affected by their application, so that Ministers can decide from whom to invite views on the application in terms of subsection 8(a). Interests can be affected by a change of landowner, with possible consequent changes of land use, in many ways short of abolition and we are satisfied that these provisions are fully explained in that context.

[144] The Dean also gave consideration to the matter as an issue of principle, rather than statutory interpretation. When the right to buy could result in a crofting community body acquiring the whole, unfettered, rights of heritable ownership where a landowner had not burdened these rights with leases and other rights in favour of third parties, why should such a body acquire anything less simply because another landowner has chosen, as here, to create such burdens?

[145] We see the attraction of such a submission. Such an approach would prevent the land owner from being the arbiter of what a crofting community body can acquire. It would prevent a situation in which one crofting community might acquire absolute, or near absolute, control of the land and, therefore, of a very valuable asset while a neighbouring community might end up with a relatively useless and valueless residue of rights because what is of value has been put beyond their reach. In short it would avoid the thwarting of what is, on one view, the very purpose of this legislation: to confer upon the crofting community ownership of the land with all the economic benefits which one would expect that to entail.

[146] Our difficulty with the submission, however, is that we cannot find a basis for it in the legislation. And, although we must do what we can to give effect to its purposes by interpreting the legislation purposively, there is a limit to how far we can go. The community body's right to buy is entirely a creation of the 2003 Act and it is only that Act that can tell us what such a body can buy. We think it beyond serious dispute that the right to buy the landowner's interest was not intended to be free of all leases and burdens on his title. We are satisfied that Parliament intended croft

tenancies to remain in force, although certain rights of crofters are suspended pending the course of the application in terms of section 84. Other rights of "pre-emption, redemption or reversion or deriving from an option to purchase" are also suspended in terms of that section. Leases of sporting interests are not affected unless there is a special application under section 70. There is nothing to suggest that the right to buy supersedes or extinguishes existing servitudes or real burdens. If it cannot be said that all third party rights with which ownership of the land may be burdened are terminated on completion of a buy-out, upon what basis can it be contended that the community's right supersedes the real right of one particular type of leaseholder?

[147] There was a faint suggestion that although conflicting rights might not automatically terminate, the crofting community body could apply for consent to the termination of such rights as they wished, and the Scottish Ministers could give such consent. It would in our view require very clear language to produce that result and we see nothing in the legislation which comes close to suggesting such a radical alteration of rights over land on completion of a buy-out. In particular, because of the well established security of crofting tenure it is impossible to accept that Parliament could have intended to allow individual crofts to be at the mercy of Executive discretion.

[148] Mr Campbell's submission on this question was to the effect that interposed leases were displaced on exercise of the statutory right to buy because an interposed lease could not "lessen, diminish or dilute" rights and obligations under the subsisting lease. Therefore, interposed leases granted after the commencement of the 2003 Act were subject both to the individual crofter's right to buy and to the community right to buy. The result was an inferred renunciation of such leases once these rights were exercised.

[149] We have no doubt that, although there is no provision expressly to that effect in any relevant Act, an interposed lease is not effective against a crofter exercising his individual rights under the Crofters Acts. We recognise the apparent similarity in relation to the provisions in favour of the community body. However, we think there is a radical difference. In the case of purchase of his croft land by a crofter it is clear that any lease arrangement involving the crofter comes to an end. The crofter is no

longer anyone's tenant but he continues to be entitled to occupy the land forming his croft. He has full rights as owner and as occupier. It is sometimes said that he becomes his own landlord. That is an arrangement inconsistent with the continuation in force of an interposed lease. However, that is not the same as saying that interposed leases are not valid in the crofting context: it merely means that they are subject to the right of the individual crofter to purchase his croft and must give way to that right when it is exercised. The result is not termination of the entire interposed lease but merely what might be described in Sir Crispin's word as a "statutory resumption" of the croft in question from that lease.

[150] The situation in a community buy-out is different. There is no necessary interference with existing leases. That is because the crofting community body is not a party to any existing lease in the same way as an individual crofter is tenant of his croft. All that is happening is that the crofting community body is becoming the new landowner. Secondly, the crofting community body is not acquiring vacant possession of the land in the same way as an individual crofter who continues to have possession of his croft land. Possession of the land will always be in the hands of the individual crofters whose leases continue to burden the title of the landowner and the interest of any interposed tenant. As we see it, therefore, there is not the same essential inconsistency between exercise of the community right to buy and the existence of an interposed lease as there is between the existence of such a lease and the exercise of the individual right to buy. Thirdly, although the present leases are ones which the crofting community body wish to have set aside and although it is difficult to envisage a situation in which such a body would wish an interposed lease over inbye land (and we are, of course, talking only of inbye land and apportionments) to remain in place, there may nevertheless be such leases in other cases. A lease at full rack rent might be positively beneficial if rental values had dropped. On the other side of the coin, the existence of a lease might materially reduce the price to be paid for the land. That might suit a community body if it had no immediate development plans for a particular area leased. In other words, in the case of a community buy-out, there is not the same clear need for an interposed lease to fly off immediately the right to buy is exercised, as there is on exercise of the individual crofter's right to buy his land. The inference which is irresistible in

relation to the individual right under the Crofters Acts simply does not arise under the 2003 Act.

[151] For all of these reasons we are not persuaded that the exercise of the community right to buy results in a resumption of the land in question from an interposed lease in the same way as happens when an individual croft is bought. The difficulties which might arise from the continued existence of an interposed lease have now been recognised and addressed by the provisions of section 69A which came into force on 25 June 2007.

[152] We conclude, therefore, that the nature and extent of the interests which may be acquired by crofting community bodies under the 2003 Act are the heritable proprietorship of the eligible croft land subject to all existing burdens and rights in favour of third parties. In the present case these burdens and rights would include the leases in favour of PRL and SSEG. In short, the crofting community body simply comes in place of the previous landowner inheriting the same rights and burdens as he possessed or was subject to as owner of the land in question. The price that body will pay will be a reflection of these limited rights.

(iii) Whether the lochs and water courses are included within the scope of common grazings for the purposes of section 68 of the 2003 Act

[153] This question was addressed as raising an issue of law. Before dealing with the detail of the argument, however, we think it right to say that there may well be circumstances in which the question will be one of fact. As will be seen, we consider that the legal question is answered by saying that the grazing rights of crofters in a common grazings include a right for stock to use water courses and lochs. Animals will do so for drinking or cooling and perhaps for other purposes such as avoiding insects. Accordingly, such waters may well be part of the land used as common grazings. However, there may equally well be circumstances where particular lochs or water courses have not been treated as included within the grazings and are not regarded as part of them. Some waters may be impossible for stock to use. In the present case the application refers to various lochs as "leased". The application appears to raise a doubt as to whether these lochs are part of the grazings but no

further detail is provided. If the history demonstrates that crofters have not regarded their stock as free to use the lochs in question we do not think it possible to say, as a matter of law, that the lochs are part of the "eligible croft land" as defined by section 68. Our subsequent discussion assumes circumstances where the waters in question lie within an area regarded as common grazings, where stock has been free to enter the water and where crofters have traditionally had no reason to think the waters were not simply part of the grazings. If a factual issue is raised in relation to any particular water, further factors may be relevant. But we take these assumptions as sufficient for present purposes.

[154] Both paragraphs (b) and (c)(i) of section 68(2) deal with land in which the tenant of a croft has grazing rights. Paragraph (b) includes in the definition of eligible croft land "any land in which a tenant of a croft, whether alone or in common with others, has a right of pasture or grazing", while paragraph (c)(i) refers to any land "comprising any part of a common grazing held by a tenant of a croft;…which has not been apportioned for the exclusive use of a tenant of a croft…".

[155] The distinction between the two is, we think, that (b) is intended to apply to a situation where there are grazing rights, whether held by a single crofter or shared with others, but the area in question is not part of a recognised common grazing; an example was *Macdonald v Prentices Trs.* On the other hand, (c)(i) applies to common grazings in the well known and understood sense of land on which the crofters of a township, or perhaps several townships, have rights to graze their stock usually in accordance with agreed rules and regulations. The area of land subject to the present application falls into the latter category and it is therefore paragraph (c) which applies.

[156] The terms "common grazing" and "common grazings" (we use them interchangeably in this Note) are not defined in legislation. Sir Crispin's argument, was, in essence, that they comprise only land over which animals graze. Although "land" was to be understood to include land covered by water, animals do not graze on water and, accordingly, lochs and water courses were not to be regarded as part of "land comprising any part of a common grazing" for the purposes of section 68. The result is that they are not covered by the buy-out provisions and, unless the existing

owner is willing to sell or this Court authorises acquisition under section 77, they cannot be bought by a crofting community body. He contended that this reflected the scheme of Part 3 of the 2003 Act generally.

[157] We think this approach too narrow. It does not take account of what is normally understood by the terms "common grazing" or "common grazings"and the rights of crofters in them which plainly goes beyond mere "grazing". It would produce results that are unlikely to have been intended by Parliament.

[158] We have no doubt that, as commonly used and understood, the terms "common grazing" or "common grazings" are apt to include the whole area within what might be called their outer perimeters. We are satisfied that Parliament intended such a meaning in section 68(2)(c). As we have said there may be areas within that perimeter which have never been regarded as part of the grazings. But subject to any speciality in a particular case, we are entirely satisfied that "common grazings" would normally be understood to include lochans and water courses within the common grazing area. We are satisfied that that merely reflects the reality that most common grazings have such waters on them. These are an integral, indeed essential, part of stock grazing.

[159] Given that the term "common grazing" is, in common parlance, taken to include areas covered by water and that water is such an integral part of any grazing activity, we are satisfied that had it been the intention of Parliament to exclude water areas from the right to buy, this would have been expressly stated rather than left to inference derived from a narrow view of what is meant by "grazing". In short, on the ordinary meaning of the words we consider that common grazings include the waters lying within them.

[160] We think that consistent with the approach which Sir Crispin took as underlying the scheme of the Act. In his submission the approach of section 68 was to confine eligible croft land to land in which crofters have rights. Nothing in what we have said is inconsistent with that approach because the rights with which we are concerned include the right to water the stock in such water as there is on the grazings. Sir Crispin described that as an "incidental right", but it is a right

nevertheless and we see no conceptual difficulty in treating a right to buy land on which animals graze as including areas of land covered by water in which they stand or from which they drink.

[161] When considering the intention of Parliament, regard must be had to the whole provisions as enacted. We have considered in particular the provisions of section 68(2)(d) where the definition of "eligible croft land" includes "salmon fishings in inland waters within or contiguous to,…land referred to in paragraphs (a) to (c) above". This provision has the effect of applying the label "croft land" to certain heritable subjects which plainly would not otherwise be so described. Salmon fishings will commonly be the most valuable rights in a river. They have status as a separate and distinct interest in land. Crofters have, at present, no rights in relation to such fishings. This provision clearly demonstrates the intention of Parliament to give the community wide rights. Indeed, where the fishings are not "within" existing croft land the crofting body has been given a right to acquire a valuable asset which is not in any sense subject to existing crofting rights provided it is contiguous to land subject to these rights. It may be noted that there is nothing in this provision which would allow the contiguous waters themselves to be regarded as "eligible croft land". If the solum of the water itself is to be acquired, this will have to be as "eligible additional land" in terms of section 70. In short, this provision has the effect in that some salmon fishings may be included as "croft land" when the actual water is not.

[162] Accordingly, the existence of this provision can be taken to support the argument that express provision is needed to include rights in water. On the other hand, paragraph (d) also refers to salmon fishings "within" the lands otherwise defined and subject to crofting rights. This is quite consistent with such waters being part of the common grazings. The main intention of paragraph (d) may have been to make it clear that, in addition to acquiring the solum, a crofting community body can acquire salmon fishing rights. Sir Crispin's argument would lead to the conclusion that a crofting community body could buy salmon fishings within a common grazing area under the provisions of section 68 but could not acquire other fishing rights - generally thought of as less valuable - except as eligible additional land and with the specific consent of this Court under section 77. It seems unlikely that such a result was intended. But we consider that because of the different implications of "within"

and ”contiguous”, it is not possible to take from this provision any direct inference, one way or the other, as to the scope of paragraph (c).

[163] More generally, Sir Crispin’s position would produce another result which we think is unlikely to have been intended; it would leave the original landowner with a network of rights of ownership and access extending across the area being acquired by the community body. This would seriously impede the ability to control use. The purpose of the legislation, as we understand it, was to allow crofting communities to take over the ownership of the land pertaining to their communities. The intent was to free the land from control of use by the original owner. A narrow approach was said to be justified by the consideration that this was an expropriatory provision. We do not overlook that factor although its weight is reduced by the consideration that it is an expropriation for value. In any event we cannot let such consideration stand against the clear intention of Parliament: see observations of Longmore LJ in *Slamon v Planchon* (at page 416). As we have seen in relation to the salmon fishings, there is no doubt that Parliament intended the provisions to be expropriatory and recognised that they extended to heritable subjects not in any way subject to existing crofting rights. We do not accept that Parliament intended the sort of fractured ownership of areas of land which Sir Crispin’s approach would envisage.

[164] With regard to Sir Crispin’s treatment of whether areas covered by water on inbye croft land are eligible croft land, it is enough to say is that the foregoing observations apply with at least the same force to that question bearing in mind that the rights of crofters are not restricted in any way by reference to grazing of stock. However, it can be expected that in most cases this will be a question of fact. In the case of inbye ground, less will be left to inference. Parties will normally have a pretty good idea of where the boundaries lie and whether particular waters are included. If they have been treated as part of the croft, waters lying within the boundary of a croft will be part of the croft, but there may well be circumstances - such as those found in *Barr v McLeod* - where a particular stretch of water - and indeed the banks - had never been thought to be part of the croft.

[165] We answer the question before us in the affirmative. Subject to the need to deal with the matter as a question of fact in the first instance, lochs and water courses

within common grazings fall to be treated as eligible croft land under section 68 and, therefore, land which a crofting community body can apply for consent to buy under section 73.

[166] In arriving at that conclusion we have not had to rely on the common law on ownership of water and water courses to any extent. It does not appear to us that it would have assisted. The common law can be displaced by the terms of title deeds and there is no doubt that it would have been perfectly possible for statutory provisions to divorce ownership of the solum of lochs and water courses on common grazings from ownership of the surrounding land.

Summary

[167]We accordingly answer the questions as follows:

Whether, in the absence of the consent of the Crofters Commission in terms of section 23(3) of the Crofters (Scotland) Act 1993 ("the 1993 Act") said leases are valid or void?: This provision does not apply to leases of common grazings nor to an interposed lease of a croft estate and accordingly absence of consent does not invalidate such leases.

If they are valid, what are the nature and extent of the interests which may be acquired by PTL under section 73 of the 2003 Act?: The PTL will, in effect, stand in the present shoes of the PCL and hold the various properties subject to the real rights of third parties such as crofters, interposed lessees and any other lessees.

Whether the lochs and water courses lying within the general geographical area of the common grazings sought to be acquired by PTL are "eligible croft land" in terms of section 68 of the 2003 Act? Subject to any relevant history as to the status of any particular stretch of water, lochs and watercourses lying within a geographical area known as common grazings, will fall to be treated as eligible croft land within the meaning of the section.

Expenses

[168] We have allowed twenty-one days for any motions on expenses.