

Explanatory Summary for assistance of press

The Scottish Land Court has now issued its decision on the validity of interposed leases in crofting and certain other questions referred to it by the Scottish Ministers and the landlords of Pairc Estate, Lewis. The decision follows a hearing held in Edinburgh in June of this year and arises out of the application by the crofting community of Pairc, Pairc Trust Limited, to buy part of the Pairc Estate under the provisions of the Land Reform (Scotland) Act 2003.

The speciality of the case was that in 2004, following the passage of the 2003 Act, the landlords, a company known as Pairc Crofters Limited (which, despite its name, does not in any way represent or comprise of crofters on the Estate) had granted a lease over the whole Estate to a related company called Pairc Renewables Limited who had in turn granted a sub-lease over part of the Estate to SSE Generation Limited. This sub-lease was to allow SSEG to build a windfarm on the common grazings. In terms of the sub-lease a rent based on the installed capacity of the windfarm was to be payable to Pairc Renewables Ltd but only a relatively nominal sum of £1,000 per annum was to be passed further up the line in terms of the head-lease between themselves and Pairc Crofters Ltd. The result of that arrangement, if valid, would be that if Pairc Trust Ltd bought the common grazings they would stand to get only this nominal rent rather than the, presumably considerably larger, sum to be paid by SSEG to Pairc Renewables although, correspondingly, they would have had to pay substantially less for the land.

Although the problem posed by such leases in crofting community buy-out cases has now been resolved in as much as an amendment to the 2003 Act introduced as part of the Crofting Reform etc Act 2007 allows crofting community bodies to buy out any lease granted by the landlord, Scottish Ministers felt it important to obtain a ruling from the Court, which has jurisdiction to give such rulings in terms of the 2003 Act, as to their validity and also on the question of what, exactly, such bodies could buy in terms of the 2003 Act.

The Land Court has now decided that such leases are valid in the crofting context. In coming to that decision the Court found **[paragraphs 116 to 122]** that although the introduction of interposed leases into Scots Law by the Land Tenure Reform (Scotland) Act 1974 had been intended to solve a problem in the commercial leasing situation there was nothing in the language of that Act which disappplied it to crofting and no inconsistency between such leases and the provisions of crofting legislation - such as the individual crofter's right to be buy his croft introduced in 1976 - such as to enable the Court to conclude that interposed leases are not valid in the crofting context. In relation to common grazings the Court makes the point **[para 113]** that the lease by a proprietor of common grazings is not an interposed lease at all since crofters' rights to common grazings do not amount to a lease of the land; they are in the nature of grazing rights and, in some cases, rights to take peat, rights falling short of full tenancy. However the Court points out in its judgement **[para 113]** that any lease of common grazings is always subject to these rights and physical occupation of any part of the common grazings by a developer is only possible on resumption of the crofters' rights over the areas concerned and payment of half the development value in terms of section 21 of the Crofters (Scotland) Act 1993.

In coming to its decision the Court **[paras 125-137]** rejected an argument that any lease of croft land required the consent of the Crofters Commission in terms of section 23(3) of the 1993 Act, holding that that section applies only to vacant crofts. Since section 23(3) did not apply, any regulation or control of the granting of leases such as the present ones would require legislation **[para 133]**.

As to what a crofting community body can buy, the issue was whether a community buy-out put an end to all third party rights over the land in question, which may include not only leases granted but also servitudes such as servitudes of access. The Court **[paras 138-152]** held that the purpose and effect of the 2003 Act was simply to put the crofting community body in place of the previous proprietor as owner of the land in question and that they therefore took the land not only with all the rights but also subject to all the burdens attached to it, just as it had been held by the previous owner. Nothing in the 2003 Act warranted a wider or more far-reaching approach.

However, the Court also rejected **[paras 153-166]** an argument by Paic Crofters Limited that the lochs and watercourses on a common grazings are not “eligible croft land” within the meaning of the 2003 Act and cannot, therefore, be bought as part of a community buy-out. Such an interpretation, the Court said, was at odds with how the term “common grazing” was commonly understood and would lead to results unlikely to have been intended by Parliament **[para 157]**. Lochs and water courses were an integral, indeed necessary, part of common grazings and, although in some cases whether a particular body of water was part of a common grazing would be a question of fact, subject to such exceptions, as a matter of law “eligible croft land” included bodies of water on the common grazing and would pass to the crofting community body on completion of a buy-out.

NOTE TO EDITORS

The attached judgement is lengthy. It may assist if we explain that much of it (paragraphs 6 to 105) is taken up with setting out the arguments presented to the Court at the June hearing. The Court’s discussion of these arguments and the reasoning leading to its decision are found at paragraphs 106 to 167. The paragraph numbers inserted above refer to the relevant parts of that section of the judgement.