



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 49  
XA113/19

Lord President  
Lord Brodie  
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Special Case stated by the Scottish Land Court

in the appeals by

CROFTERS having rights in the common grazings of: SANDWICKHILL NORTH STREET;  
MELBOST and BRANAHUIE; SANDWICK and SANDWICK EAST STREET; and AIGNISH

Appellants

against

THE CROFTING COMMISSION (COIMISEAN NA CROITEARACHD)

Respondents

and

THE STORNOWAY TRUST

Interested Parties

---

Appellants: J d C Findlay QC, Garrity; Gillespie Macandrew LLP  
Respondents: R D Sutherland; Balfour & Manson LLP  
Interested Parties: Gill; Pinsent Masons (for Anderson MacArthur, Stornoway)

19 August 2020

**Introduction**

[1] This is an appeal by four crofting townships near Stornoway against determinations

by the respondents that their applications for approval of the installation of community-owned wind farms on their respective common grazings were invalid because the proposals would be detrimental to the interests of the landowners, namely the interested parties, in terms of section 50B(2)(b) of the Crofters (Scotland) Act 1993.

[2] The issues are defined by the questions in the special case, *viz*, in summary: (1) is the formal validity of an application for approval under section 50B(6) of the 1993 Act a matter that can be determined by reference to section 50B(2); (2) does such an application require to be determined in accordance with the provisions of section 58A; (3) is a prospective commercial enterprise of the landowner a relevant 'interest' for the purposes of section 50B(2); (4) were the respondents' decisions to allow late objections and representations of the interested parties lawful and in accordance with the 1993 Act; and (5) was there sufficient evidence that the appellants' proposed uses would be detrimental to the interests of the respondent landowner? At the heart of the substantive questions are the respective rights of the landowner of a common grazing and the crofters in relation to the use of the land. That is a matter which is regulated primarily by statute.

### **The Statutory Framework**

[3] Section 50B of the Crofters (Scotland) Act 1993 provides that a crofter, who holds a right in a common grazing, may propose to the relevant grazings committee that a part of the common grazing be used for purposes other than the grazing, peat cutting, other customary uses and woodlands. It is specifically provided that the use proposed must not be such as would be detrimental to the interests of the owner (s 50B(2)). The section was introduced by the Crofting Reform etc. Act 2007 (s 26(2)). Previously, the only other

permitted alternative purpose was woodland (1993 Act s 50) and the landowner's consent was required.

[4] On 22 November 2006, at Stage 2 of the passage the 2007 Bill, the Deputy Minister for Environment and Rural Development (Rhona Brankin MSP) explained to the Environment and Rural Development Committee that:

"There has been considerable misunderstanding of the purpose and implications of the section. In the light of some of the more inaccurate comment, it is not surprising that some owners are concerned. This is not a backdoor route to crofting community control of the owner's interests in common grazings. ... No one will use the provision to build houses or wind farms on grazings, as the owner's rights – including the right to resume – will persist. This is about facilitating new uses that would not be detrimental to existing uses by the graziers or the owner. ... I am in absolutely no doubt that, in deciding whether to approve an application, the commission will be required to satisfy itself that the requirements of that subsection are met."

[5] On 25 January 2007, at Stage 3, a new Deputy Minister (Sarah Boyack MSP) said:

"Proposed new section 50B ... is intended to allow for alternative use by all those who hold grazings shares, either collectively or individually. ... During our stage 2 debates, Rhona Brankin explained why new uses of common grazings would be unlikely to involve physical development... I stress that new section 50B(2) of the 1993 Act will provide that a new use must not be detrimental to the interests of the owner. A use that could result in a loss of value or a need for remediation at the owner's expense would clearly be detrimental and could not be permitted. ..."

[6] The procedure for processing a proposal is that the committee summon a meeting of the crofters for a discussion and a vote (s 50B(3)). Section 50B(4) provides that common grazing regulations shall provide that notice of the meeting is intimated to the landowner, who may give his views on the proposal. If the vote of the crofters is in favour of the proposal, the committee must apply to the respondents for its approval (s 50B(6)).

[7] The application to the respondents is governed by section 58A of the 1993 Act. This too was introduced by the 2007 Act (s 3), but the section applies to approvals or consents not

only of applications for the use of a common grazing for other purposes but also a considerable number of other applications including the exchange, assignation, division and letting of crofts. There must be public notification of the application (s 58A(3)(a)) and it must be intimated to the landowner (s 58A(3)(b)). Within 28 days of public notification, the landowner may object to the proposal (s 58A(3)). The respondents may (s 58A(5A)) accept an objection submitted outwith the 28-day period, if they consider there is “a good reason why the objection is late”. After the expiry of the 28-day period, the respondents must make a decision by granting (with or without conditions) or refusing the application. In doing so, they must (s 58A(7)) have regard to, *inter alia*, the interests of: the estate which comprises the land; the local crofting community; and the public at large. They must take into account any objection made by the landowner and any other matter which they deem relevant.

## **Background**

### *Procedure*

[8] In 2010, the interested parties leased land to a consortium, namely Stornoway Wind Power (SWP), whose shareholders include EDF Energy, for the purpose of developing a 36 turbine windfarm on the common grazings of the appellants and several other townships. In 2012, SWP obtained planning permission for the development. In June 2017, the interested parties applied, under section 19A(1)(a) of the 1993 Act, for consent to use the common grazings for their proposed windfarm. That application is contested and is sisted pending this appeal. The Land Court has determined, by way of a preliminary ruling in that process, that the appellants’ section 50B applications may be relevant to the section 19A application (see s 19A(3)(b)).

[9] Meantime, between June and September 2016, each of the appellants proposed the development of wind turbines on their respective common grazings. These were for: 8 turbines at Melbost; 1 turbine at Sandwickhill; 10 turbines at Sandwick; and 2 turbines at Aignish. The location of the turbines on the appellants' grazings is the same as those of the larger SWP scheme. The interested parties had objected to the Melbost and Aignish proposals on the basis that they would be detrimental to their interests. No objections were tabled with the grazings committees of Sandwickhill or Sandwick. The relevant grazings committees put the appellants' proposals to a vote of the crofters. Between August and October 2016, the crofters voted in favour of the proposals.

[10] The appellants submitted applications for approval of their proposals to the respondents between September 2016 and April 2017. At the time, no official form had been devised and the applications consisted of letters with documents attached. Almost a year went by, during which there was correspondence concerning whether or not the applications, other than Aignish, had been duly notified. They had been advertised in the Stornoway Gazette, but there had been no mention in the advertisement of the right to object, the time in which to object or the body to which objections could be sent. The statutory provision (1993 Act, s 58A(3)(a)) stipulated only that public notification should be made.

[11] It was only in November 2017 that the respondents wrote to the interested parties stating that the notification requirements for all the applications had been met. The interested parties claimed that they had no record of receiving intimation of the applications, albeit that they later acknowledged that they had received that for Sandwickhill. By letter dated 8 January 2018, they wrote to the respondents stating that previously a member of the

respondents' staff had told them that a valid application had not been received, but when it had, the interested parties would be notified. The respondents accepted that this was what had happened. On receipt of confirmation that proper notification had been made, the interested parties sought to lodge objections.

[12] By letter dated 12 March 2018, the respondents granted the interested parties' request to lodge objections. This stated:

"We acknowledge that our letter of 8 November 2017 was the first correspondence which you received from the Commission which confirmed we were in receipt of a valid application. In the circumstances the Commission agree to afford the landlord the opportunity to submit an objection to the section 50B application should they wish to do so."

The Land Court describe what had occurred as follows:

"[80] On any view of things this sequence of events, punctuated, as it was, by such lengthy delays, was highly unsatisfactory. It justifies the mounting exasperation and criticism which is apparent in letters sent from the various committee Clerks to the Commission as time went on... The fact is that the committees had done all that was required of them, and done it timeously, but both the Commission and the Trust seemed to spend a year or more in a fog of uncertainty as to what advertising and intimation of the applications had taken place...".

*The objections and the respondents' decision*

[13] The interested parties maintained before the respondents that the proposals, including that at Aignish, conflicted with the option agreement which they had with SWP. SWP would withdraw from the agreement. This would in turn result in the proposed grid inter-connector from Lewis to the mainland not going ahead. The interested parties would lose the rent which had been agreed with SWP.

[14] The appellants contended that their proposals would pay the same rental income to the interested parties. They doubted whether SWP would obtain a section 19A consent because of uncertainty surrounding the new type of Government subsidy and whether the

Government would approve the inter-connector. The interested parties' scheme faced many hurdles. It had existed for 15 years without implementation while other, community-owned, schemes had gone ahead. Three conditions would protect the interested parties from detriment: payment of equivalent rent to that which would have come from SWP; payment of a minimum of £200,000 per annum to the interested parties; and an offer of a 20% purchase option similar to that which was in the SWP lease.

[15] In their decision letter of 14 September 2018, the respondents noted, in connection with the proper construction of section 50B of the 1993 Act, the remarks (*supra*) which had been made at Stage 2 of the Crofting Reform Bill in 2006. They reasoned that, where a landowner made an objection based upon detriment, they were obliged to consider it in light of the mandatory terms of the section. Although any detriment had to be objective, and not subjective or *de minimis*, the section would apply even when the detriment was relatively minor or small. The respondents were not considering the wider interests of the estate under section 58A.

[16] In respect of all the appellants' proposals, the respondents rejected all but one of the examples of detriment put forward by the interested parties. They continued:

"7. The Commission has considered the submission from the landlord that implementation of the proposed use would prevent the larger Stornoway Wind Farm development from proceeding, and that this would be detrimental to its interests. In this context, the Commission also notes the statement from the landlord... that development would be 'unlikely' to go ahead on a 'piecemeal' basis rather than as one 'cohesive' development. The landlord has informed the Commission that a section 19A Scheme for Development application has been made with the landlord's consent (the Stornoway Wind Farm proposed development) for a development involving the various common grazings... The landlord further states that preventing the Stornoway Wind Farm proposed development from going ahead would be detrimental to its interests by depriving it of the benefits it would receive from the larger Stornoway Wind Farm development set out in the section 19A application. The Commission **accepts** that implementation of the section 50B proposed use would make more difficult, and could prevent, the implementation of

the landlord's own preferred larger Stornoway Wind Farm development, in which the landlord has invested time and resources. The Commission further **accepts** that such an impediment to the implementation of the larger Stornoway Wind Farm development would be detrimental to the interests of the landlord."

On this basis the respondents refused to approve the schemes.

[17] In relation to Aignish they added that:

"4. The Commission accepts that any semi-permanent structure such as a wind turbine, cabling and any substations would likely accede to the land after affixation of any such accessories. The landlord has identified... that there could be liabilities for maintenance of the ... accessories during their lifetime and that there could also be liabilities associated with their removal when they reach the end of their lifespan and the land has to be restored to its original condition. The Commission does however accept that the proposed use would last several decades from construction through to eventual decommissioning, but the term of office of a grazings committee is three years only. The Commission accepts that in the event of a grazings committee falling out of office or being unable (for whatever reason) to meet any of the liabilities associated with the proposed use, any such liabilities would likely fall on the landlord as owner of the land. In light of this, the Commission **accepts** that there would be detriment to the interests of the landlord."

### **The Land Court**

[18] The appellants relied on five grounds of appeal before the Land Court. First, the respondents had not been entitled to determine that the applications were invalid in terms of section 50B(2) of the 1993 Act. Secondly, there had been insufficient evidence of detriment. Thirdly, the objections ought not to have been taken into account because of their lateness. Fourthly, the respondents had failed to take into account the factors listed in section 58A(7) of the 1993 Act. Fifthly, the respondents had failed to exercise their discretion by considering themselves prohibited from addressing the applications under section 58A(7). In the Aignish appeal, it was not contended that the objections had been late. It was argued that the respondents had been wrong to uphold the objection about the potential future liabilities of the interested parties. Accession was not a matter of fact for the

respondents to determine. The respondents' finding of detriment based on future liabilities was irrational because, in the three other appeals, the same complaint had been found not to have been established. The respondents failed to take account of the amendment to the plans for the Aignish scheme which reduced the number of turbines from two to one. This ground was not advanced in oral submissions, but it had not been abandoned.

[19] On the first ground, the Land Court determined that the respondents had not erred in treating the matter of detriment as a preliminary point. Section 50B(2) expressly provided that a proposal, which was detrimental to the interests of the landowner, was not valid. It was not a proposal that grazings committees were entitled to submit to the respondents for approval. Grazings committees' functions were administrative and facilitative, not quasi-judicial. Permitting a committee to determine validity was to confer on the crofters' vote the "Midas touch of rendering valid a proposal which up until then may have been invalid". As distinct from the committees, the respondents were an objective, statutorily constituted, regulatory body which performed a quasi-judicial function. Grazings committees were not at arm's length from the crofters.

[20] There would be no point in section 50B(2) prohibiting proposals which were detrimental to the landowner's interests, if detriment were to be dealt with only in the general balancing exercise under section 58A(7). The prohibition in section 50B(2) showed that Parliament had intended it as a threshold or gateway condition of validity; separate from section 58A(7). Resort to Parliamentary material was permissible only if there were ambiguity. If there was, the statement at stage 2 of the Bill (*supra*) could be relied upon. It accorded with the Land Court's interpretation. The express provision, which protected the interests of the landowner and the absence of powers to compel the landowner to facilitate

the proposed development, showed that what was envisaged was consensual development or at least that which made no great inroads into the landowner's interests. It was not that landowners had a "trump card" to be played at any time; the detriment was for landowners to prove.

[21] The detriment had to be real and not spurious. Detriment need not always render an application invalid. Minimal levels of detriment would be best as part of the balancing exercise in section 58A(7) which left room for at least a *de minimis* exception. The level of detriment found by the respondents was significant and substantial. Detriment might depend on the attitude of the landowner. There would be cases, such as the present, where detriment would go to validity. There would be others where the landowner would be content to allow detriment to be taken into account as part of the balancing exercise.

[22] On the second ground, the respondents had not erred on whether there would be detriment. The interested parties' and the appellants' schemes could not both go ahead. The appellants' plans were not just potentially detrimental, they were potentially fatal to the interested parties' plans. Approval of the appellants' applications would be "an immediate, present detriment". At the time of the respondents' decisions, years of preparation and planning had gone into the wind farm project, including the commencement of the lease in 2010, the obtaining of planning consent in 2012 and the lodging of the application under section 19A in 2017. The plans constituted an interest to defend, in terms of protecting the progress and investment already made.

[23] On the third ground, the appellants were challenging the respondents' exercise of their discretion to receive the late objections. There had initially been uncertainty, which was shared by the respondents and the interested parties, about whether valid applications

had been received. After that had been resolved, there continued to be doubt about whether there had been proper intimation to the interested parties.

[24] The question was whether the respondents had something which they could reasonably consider to be a good reason for the objections being late. The respondents had led the interested parties to understand that they need not respond to the applications until all doubts about their validity had been removed. This was an assurance that the objections would be received. That wrongly fettered their discretion. However, whereas it would always be prejudicial to those in the position of the appellants to give their opponents “a second bite at the cherry”, the interested parties had “gained nothing more in the way of advantage in this case”. The circumstances had not changed during the year-long delay. The delay did not weaken the appellants’ position. The Land Court continued:

“Although [the respondents’] thinking on this is not spelt out in any of the correspondence we have seen, we can well understand that the importance of the issues in this case might well be regarded as outweighing prejudice of that sort. Accordingly it cannot be said that the [respondents] exercised their discretion under subsec 85(*sic* 58)A(5A) in an unreasonable fashion. The result is that the [interested parties’] objections were competently before the [respondents] and the [respondents] were entitled to take them into account.”

[25] On the fourth ground, consideration of the factors listed in section 58A(7) could not arise once the respondents had determined that the applications were invalid. The respondents were not required to carry out a comparison of the two sets of schemes. It was not for the respondents to decide what was in the landowner’s interests. That was for the interested parties to do. The respondents did appear to have failed to consider whether to attach conditions to the approval. However, given that the projects could not co-exist, it was difficult to see how mitigating conditions could be attached.

[26] On the fifth ground, the respondents had not been exercising, or failing to exercise, a discretion by not proceeding to a balancing exercise under section 58A(7). They had, rather, found as a matter of fact that the proposed use of the land would be detrimental to the interested parties' interests.

[27] The ground of appeal going to the finding of detriment in respect of Aignish was, standing the Land Court's findings on detriment, which were common to the four appeals, "neither here nor there." The amendment to the planning application had been submitted after the respondents' decision on the Aignish application. If the SWP scheme did not go ahead, or if it went ahead on the basis of amended plans which allowed it and the Aignish proposal to co-exist, the matter could be revisited by the parties.

## **Submissions**

### *Appellants*

[28] In relation to question 1, the appellants essentially repeated the central argument which had formed the first ground of appeal to the Land Court. They submitted that the formal validity of an application for approval did not fall to be determined under section 50B(2). All applications fell to be decided according to the factors in section 58A(1). Section 58A(2) required applications to be in a form specified by the respondents. Section 50B(2) was of no relevance to the form or content of an application to the respondents. Section 50B's purpose was to permit diversification of crofting activities with a view to sustainable development. Windfarm development was such an activity. Section 50B provided a process whereby a proposal could be put to the relevant grazings committee. If those entitled to vote at the grazings committee determined in favour, the

committee was obliged to apply to the respondents for approval. The crofters' decision under section 50B(6) was the end-point of that initial process. Section 58A provided the framework for approval. That exercise involved balancing the interests of those parties concerned in the grazing and the consideration of the imposition of conditions. It did not permit the respondents to have regard to the detriment of only one party.

[29] There was no right of appeal against the decision of the grazings committee (*sic*). The only remedy would be a petition for judicial review. The respondents were a creature of statute. They had to act within the 1993 Act (*Garvie's Trustees v Still* 1972 SLT 29 at 36; *McCreight v West Lothian Council* 2009 SC 258, at para [18]; *R(V) v Asylum and Immigration Tribunal* [2009] EWHC 1902 (Admin), at paras 22-35; and *Chief Constable of Nottinghamshire Police v Nottingham Magistrates' Court* [2009] EWHC 3182 (Admin), at paras 33-36). They had no power to second-guess a decision of a grazings committee (*sic*). The respondents' decision effectively provided the landowner with an extra-statutory veto. The issue of detriment involved a judgment on the merits and would depend on evidence. If the Land Court were correct, a valid decision of the grazings committee (*sic*) could become invalid subsequently. It could not have been the intention of Parliament to provide the respondents with powers of summary dismissal of an application or to provide the landowner with a veto. All that the respondents needed to satisfy themselves about, in terms of prior procedure, was that the application by the grazings committee satisfied the correct procedural requirements. The reference to conferring a "Midas" touch was misplaced, to an extent pejorative, and was taken too far. There would be no gold for the applicant unless the respondents were satisfied under section 58A.

[30] On question 2, the respondents required to determine an application in accordance with section 58A of the 1993 Act. This was supported by the express terms of sections 50B(6), 58A(1) and 58A(7). The respondents were not empowered to act as an appellate body in relation to a decision of a grazings committee (*sic*) which was made in accordance with the provisions of section 50B.

[31] On question 3, Parliament could not have intended that each individual crofter was expected, at the stage of making a proposal, to have in-depth knowledge of the financial or commercial interests of the landowner such that he could assess whether his proposal would cause detriment to those interests. The proper interpretation of section 50B(2)(b) was that “the interests of the owner” did not extend beyond: (a) the rights reserved to the landowner in terms of para 11 of Schedule 2 of the 1993 Act (eg mining and quarrying, creation of roads, inspection, hunting, shooting and fishing); and (b) any extant right obtained under section 19A of the 1993 Act. As a result of the rights of the crofters, a landowner had no right to development, unless and until he received consent under section 19A. The respondents did not have any such consent. The respondents erred in considering that the interested parties’ speculative involvement with the SWP scheme constituted an “interest”.

[32] On question 4, whilst the respondents had a discretion to allow a late objection, they had no proper basis upon which to do so. In three of the four applications, the interested parties were allowed to put in very late objections, despite it being clear that the applications had been timeously intimated and advertised. The only reasons for so doing related to the actions of the respondents. No excuse, and no evidence for any excuse, had been provided for the delay that led to the 28 day statutory time limit expiring. The excuse advanced was that the respondents had given the interested parties to understand that they need not

respond to the applications until all doubts as to their validity had been removed. There was no consideration of the interested parties' own actions in stating that they had not received the applications, when they had. There was no consideration of any impact on the applicants. The interested parties had gained an advantage. They were allowed to lodge objections and raise the issue of detriment. The Land Court founded on the importance of the issues at stake, but that was not a reason advanced by the interested parties. There was no indication that the respondents had approached the matter other than solely through the lens of the interested parties.

[33] On question 5, the appellants proceeded on the hypothesis that the respondents were entitled to make a determination on each application by reference to section 50B(2). The appellants had made four separate applications for approval; one for each common grazing. Each application was for approval of a different number of turbines. Even assuming that the interested parties' development was an "interest", the respondents did not have sufficient evidence of detriment. All that it had was an unspecified and unquantified assertion. For example, in the application by Sandwickhill, there was no evidence on how a single turbine would be detrimental. On the Aignish application, the respondents upheld the claim of detriment on the basis of reinstatement liabilities. There was no evidence of either: (a) the likelihood of success or failure of the appellants' proposals; or (b) any liabilities that might arise. There was no assessment of what net benefit might accrue to the interested parties, were those circumstances to arise. The respondents erred in holding, without evidence, that each separate application by the four committees would automatically result in quantifiable detriment. The need for a proper consideration of the evidence demonstrated why a summary rejection process was both inadequate and unlawful.

### *Respondents*

[34] On question 1, the respondents maintained that the issue was whether the respondents were entitled to consider the validity of a proposal under section 50B as a preliminary matter and to refuse to consider the merits. The words should be given their ordinary meaning unless that resulted in an absurd, repugnant or inconsistent result (Craies: *Legislation* (11<sup>th</sup> ed), paras 17.1.1 to 17.1.11). A particular provision had to be construed in the context of the legislation as a whole. If the legislation was ambiguous, assistance could be sought from a clear ministerial statement (*ibid* para 20.1.20).

[35] The right of a crofter in respect of the common grazing was one of pasturage, rather than tenancy (*Ross v Graesser*, 1962 SC 66). The crofter had a right to use the common grazing for cutting and stacking peats and other customary activities (*Mackay v Pickles* 1977 SLCR App 42; *MacDougall v Secretary of State for Scotland* 1993 SLCR 126). The 1993 Act supplemented these uses and attempted to balance the interests of crofters and the landowners. Since 1991, grazings committees could use part of the grazing as woodlands (see now 1993 Act, ss 48 and 50). Consent of the owner was required (*ibid*). Section 50B provided that a crofter could propose other purposes subject to the rights and interests of the landowner. The consent of the landowner was not required.

[36] Section 19A allowed a landowner to apply for consent to a scheme of development. He required to satisfy the Land Court that there was a "reasonable purpose" to the development. Such a purpose included the generation of energy (1993 Act, s 20(3)(a)(viii)). Where a landowner proposed a wind power project, the crofters were compensated and entitled to a share in any increase in the value of the land. There was no equivalent in section 50B. When the 1993 Act was amended by the 2007 Act, it would have been

anomalous for Parliament to have made provisions for compensation to crofters in respect of the loss of the common grazing, and to provide them with a share in the financial benefit accruing to the landlord, without making similar provisions for compensation to a landowner when the common grazing was to be used for a materially different purpose without the owner's consent.

[37] The language of section 50B(2) was both mandatory and clear. The ordinary meaning of "detrimental" was diminishing or damaging. The ordinary meaning of "interests" was that a person had an advantage, concern, benefit or claim. If a proposal was for a use which was not already permitted, and it was detrimental to any interest of an owner, it was not within the scheme of the Act. The consequences of any proposal which interfered with the owner's interest should be in line with the activities permitted by the common law. They ought to result in *de minimis* interference with the rights of the landowners, and therefore capable of being implemented without a detailed examination of what conditions would be necessary. If the provisions of section 50B were ambiguous, it would be relevant to consider the ministerial statements that the provision was not a backdoor route to crofting community control of the owner's interest in the common grazing land. If crofting communities wanted to have control of common grazing, their only option was to buy the owner's interest. The appellants' interpretation was inconsistent with the property rights of the owner under Article 1 of Protocol 1 of the European Convention on Human Rights.

[38] The respondents were required to carry out a balancing exercise in relation to all of the relevant factors specified within section 58A(7). By contrast, section 50B(2)(b) was concerned only with the detriment to the interests of the owner. The test was not the same.

There was no balancing of interests. Where a proposal was not valid for the purposes of section 50B(2), the fact that an invalid proposal had been supported by a vote did not preclude the respondents from considering its validity. It would be ridiculous for the respondents to consider the merits of a proposal when the proposal was invalid.

[39] The appellants' argument, that if the majority of shareholders voted to support an invalid proposal, the only remedy would be by judicial review, was erroneous.

Section 58A(4)(a) did not limit the nature of an objection. There was no reason to believe that Parliament intended to exclude an owner from objecting to the validity of the proposal under section 58A(4)(a). As the remedy of judicial review was not available where there was an alternative remedy, there was no reason for the court to exercise its supervisory jurisdiction. Judicial review was not an appropriate form of remedy. The body which was best placed to make the determination was the respondents.

[40] Question 2 raised the same issues as question 1. Where there was no issue about the validity of a proposal, the respondents were not required under section 58A to make a decision on the merits. The respondents were entitled to consider the validity of the proposal as a preliminary matter.

[41] On question 3, the Land Court decided that the appellants' proposals would make the implementation of the larger SWP scheme, in which the interested parties had invested time and resources, more difficult and could prevent it from taking place. Such an impediment would be detrimental to the interests of the landowner. The SWP scheme was a project which was obviously an interest that the landowner had both as the owner of the common grazing and as a part-owner of SWP. The appellants' proposals were intended as an alternative. Having regard to the meaning of interests and detrimental in section 50B(2),

the respondents and the Land Court were correct to find that the interested parties did have a relevant interest.

[42] On question 4, the respondents had a discretion to consider a late objection. Until November 2017 the respondents had been uncertain of whether three of the appellants had properly advertised their applications. There was also uncertainty on whether the interested parties had been given proper notification. The Land Court's reference to the interested parties being given a second bite at the cherry was an inappropriate analogy. The interested parties did not submit objections on two occasions. The interested parties did not gain an advantage, nor had the position of the appellants been weakened.

[43] On question 5, for the reasons already stated in relation to the question 3, the Land Court was correct to find that the interested parties had an existing interest and that the proposals would be detrimental to that interest.

### *Interested Parties*

[44] The interested parties observed that the questions were essentially those which had been proposed by the appellants in the draft special case. The first, second and third questions (at least) were tendentious and irrelevant. They did not properly reflect the terms or reasoning of the Land Court. Any answer to those questions would not give rise to any requirement for the Land Court "to bring its decisions ... into conformity with the opinion" (Rules of the Scottish Land Court Order 2014, rule 87(2)).

[45] Question 1 was irrelevant because the Land Court made no decision about the formalities of a section 50B(6) application. Its decision related to the substantive requirement, which was imposed by section 50B(2), for the respondents to determine detriment as a preliminary point of validity. The appellants' position would produce an

artificial and undesirable result. It would require the respondents to process an application which was invalid. It was not open to a crofter to propose that all or part of the common grazing be used for a purpose that was detrimental. It must be a part of the approval process that the respondents satisfy themselves that they had a valid proposal. The function of a grazings committee was administrative and facilitative rather than quasi-judicial. By including the prohibition of detriment, the Parliament intended it to be a threshold or gateway condition of validity; separate from section 58A(7). Although section 50B provided a vehicle for crofters to propose additional uses, the provision which protected the interests of the landowner, showed that what was envisaged was development which made no great inroads on the landowner's interests. Although the Land Court's interpretation of sections 50B and section 58A did not require any resort to Parliamentary material, it accorded with the ministerial statements

[46] In so far as it went, question 2 was uncontroversial. Any requirement under the 1993 Act to obtain the approval of the respondents was subject to section 58A. This question was irrelevant because the Land Court made no decision to the contrary. It accepted that, if the respondents found that an application was valid, it had to apply the provisions of section 58A. The respondents were not entitled to approve applications which they believed to be invalid. A finding of detriment at the outset prevented the respondents getting as far as section 58A(7).

[47] Question 3 was tendentious in its narrow framing of the particular interests of the interested parties. A lease had been entered into in 2010, planning consent had been obtained in 2012 and a section 19A application had been lodged in 2017. The SWP scheme and the appellants' proposals could not both go ahead. The interested parties had expended

significant time and money in progressing the SWP scheme. If the appellants' applications were to be approved, that expenditure would be irrecoverable. It was misleading to frame the interested parties' interests as merely a prospective commercial enterprise. The term "interests" was wide and should be construed accordingly to include both current and future interests, extending to both the value of the land and the owner's rights to use and develop the land.

[48] On question 4, the appellants were attempting to re-open a discretionary decision to accept the interested parties' objections late. However unsatisfactory the circumstances, the question was whether the respondents had something which they could reasonably consider to be a good reason. It could not be said that the respondents had exercised their discretion unlawfully. The good reason was that the respondents had led the interested parties to understand that they need not respond to the applications until all doubts about their validity had been removed. The delay did not give the interested parties any advantage or weaken the appellants' position.

[49] On question 5, determination of the weight to be given to evidence was for the respondents' discretion. The respondents had been entitled to come to their conclusion on detriment. The interested parties' position, that the use of each of the relevant common grazings by the crofters would give rise to detriment, had been obvious to all parties from the outset. As a result, the respondents had been given lengthy and detailed representations addressing that question. The submissions of the interested parties provided an adequate basis for the respondents' findings (*MacDougall v The Crofting Commission* 2016 SLCR 109, at para 23). The respondents were not required to have regard to the interests of the crofting community and the sustainable development of that community as material considerations.

The merits of the appellants' proposals were irrelevant. The respondents were not required to carry out a comparison of the two sets of schemes. The only question was whether what was proposed constituted a detriment. The respondents were not required to take account of the possibility of attaching conditions to any approval. Given that the two schemes could not co-exist, a condition attached to any approval would not be capable of mitigating its effect on the interested parties' interests. Even an alleviated detriment was still a detriment.

## **Decision**

### ***Questions 1 and 2***

[50] The subject matter of this appeal draws into sharp focus the rights of a landowner and those of the crofter in the use of a common grazing. The context, of what is ultimately a straightforward question of statutory interpretation, is to be found in the protections afforded to crofters in the Crofters Holdings (Scotland) Act 1886 and the gradual extension of crofters' rights in the legislation which has followed. Central to the main issue is the approach of the 1886 reform. The Act was, of course, intended to address the crofting communities' extreme concern about, *inter alia*, being dispossessed by the landowners, who sought to use the land, including both the crofts and the common grazings, for other purposes which they perceived to be more economically advantageous to their estates. The crofters' direct actions, in relation to the evictions which were being carried out, was, in part, to occupy the land which they regarded as their heritage. The 1886 Act's approach, which continues into the modern era, was nevertheless to continue to regard the crofter as a tenant of the landowner and even then only of his in-by-croft land, albeit with grazing rights in the

out-bye township area. The landowner remained, and remains, the proprietor of the grazing land and landlord of the crofter in relation to the croft itself.

[51] The 1886 Act (s 1) described a crofter as the tenant of his holding. This remains the case. He is the tenant of his croft in terms of the Crofters (Scotland) Act 1993 (s 3(3)). The essence of the relationship is thus defined, with the landlord being the owner of the holding and the crofter, as tenant, being given certain statutory rights, notably, in the 1886 Act, security of tenure, a fair rent and compensation for improvements. "Holding" was defined in the 1886 Act (s 34) as any piece of arable or pasture land held by the crofter, including his house, but not any garden ground. This definition remains relevant (1993 Act, s 3(1)). The 1886 Act made no mention of the common grazing. A holding or croft is to be understood as the relatively small area of ground, upon which the croft house usually sits, which is used for the growing of crops and hay or keeping the beasts in-bye (cf, however, *Ross v Graesser* 1962 SC 66, Lord Sorn at 76).

[52] There was no doubt that, despite the absence of any specific mention of it in the 1886 Act, a crofter had the right to graze his beasts on the out-bye land of the township. The absence of a reference to the common grazing was remedied shortly after the principal Act by the Crofters Common Grazings Regulation Act 1891. This provided (s 2; now the 1993 Act, s 47) for the appointment of a grazings committee which could regulate the use of the grazing as between the relative crofters. There was no question of the committee having any role in the regulation of uses as between the landowner and the crofter.

[53] It was only with the passing of the Small Landholders (Scotland) Act 1911 that a crofter (in that Act termed a "landholder") was given (s 10(1)) a statutory right to make use of the holding for purposes which were subsidiary or auxiliary to cultivation, but even then

only, in the event of a dispute with the landowner, with the consent of the Land Court.

Consent would be forthcoming if the usage was “reasonable and not inconsistent with the cultivation of the holding”. The use envisaged was on the in-bye land of the croft and not on the common grazing.

[54] The Crofters (Scotland) Act 1955 in part consolidated the previous legislation. It again defined (s 3) “crofter” as the tenant of a croft. The croft was the holding and, “For the purposes of this Act”, the right in the common grazing was “deemed to form part of the croft” (*ibid* s 3(4)); see now the 1993 Act, s 3(4)). In the special case of *Ross v Graesser* (*supra*) it was made clear that, notwithstanding the terms of the 1955 Act, a common grazing did not form part of a croft in the sense of the crofter having a title, tenancy or other real right in the common grazing land. The right was an incorporeal one; an “ancillary right outside the croft which constitutes a pertinent of it” (*ibid* LP (Clyde) at 74). In *Crofters Commission v Arran* 1997 SLT (Land Ct) 22 the court was content (at 23) to adopt the statement in Walker: *Principles* (3d ed, III, 132) that “A right of common grazing is not a right of property but a right, of the nature of a servitude...”.

[55] The Crofters (Scotland) Act 1961 added another dimension by providing (s 5) that the crofter could erect buildings or other structures on his croft, such as were reasonably required in connection with any “subsidiary or auxiliary occupation” and which would “not interfere substantially with the use of the croft as an agricultural subject”. The right was to build on the in-bye land and not on the common grazing. This is in keeping with the subsequent right to acquire ownership of “the site of the dwelling-house on or pertaining to his subject”, including garden ground, which was introduced by the Crofting Reform (Scotland) Act 1976 (s 1; now the 1993 Act, s 12). There is no right to acquire any part of the

common grazing, although such a right may be bought or otherwise obtained (eg *Halistra Common Grazings Trustees v Lambert* 1997 SLT (Land Court) 7).

[56] The next advance came with the Crofter Forestry (Scotland) Act 1991 (s 1), which amended the 1955 Act to enable the grazings committees to authorise the planting of trees on the common grazing and to use that part as woodlands. Critically, in relation to this historical analysis, in order to do so, they required to obtain not only the approval of the respondents but also the consent of the landowner. The landowner retained a right of veto. That remained the case when the 1993 Act consolidated the previously extant legislation (1993 Act, s 50(1)(b)).

[57] Another innovation, which is not without significance in relation to what the appellants are trying to achieve, was the Land Reform (Scotland) Act 2003. It enabled (s 73) a crofting community body, with consent of the Scottish Ministers, to buy "eligible croft land". This includes (s 68) not only the crofts themselves but any part of the common grazing (s 68(2)(c)(i)). The test is whether the acquisition is in the public interest (s 74(1)(n)). It is this Act which enables a community to acquire especially the common grazings and thus to introduce what they regard as appropriate, and perhaps progressive, land uses, including those which may not be in keeping with the preservation of the grazings either for purely agricultural purposes (for the benefit of any active crofters) or primarily for traditional hunting, shooting and fishing as organised by the owner of these rights.

[58] The Crofting Reform etc Act 2007 made further provision in relation to common grazings. It did so, first (s 26), by amending section 50 of the 1993 Act to restrict the landowner's right to refuse consent to the use of the common grazing for woodlands to certain specific grounds. These grounds included that use for woodlands would adversely

affect the landowner's rights under schedule 2 of the 1993 Act. These are the rights, *inter alia*, to mine and quarry, to construct roads and to hunt, shoot and fish. Other grounds are that the woodlands would be detrimental to the sound management of the estate or cause the landowner undue hardship. The significance of the progress of the legislation in this area is that it continues to recognise the fundamental principle that the landowner remains the person who has title to the common grazing land, albeit subject to the crofters' rights to graze. Subject to certain further statutory provisions introduced by the 2007 Act (*infra*), the landowner has the right to prevent the crofters from introducing different uses.

[59] Secondly, the 2007 Act (s 30) amended the 1993 Act by introducing section 19A, which permitted the landowner to present schemes for the development of the common grazing; that is to use it for purposes inconsistent with grazing. Such a scheme requires the consent of the Land Court. That consent will depend (s 19A(2)) upon whether the development: is for a reasonable purpose; is not unfair; provides compensation to the crofters as if the land had been resumed; and benefits the community financially. The existence of a scheme of compensation, when the crofters' rights are being interfered with, is significant when it comes to analysing the provisions which enable the crofters to propose their own alternative uses.

[60] Thirdly, in part 4, which is dedicated specifically to common grazings, the 2007 Act introduced (s 26(2)) section 50B of the 1993 Act, which is headed "Use of common grazing for other purposes". As distinct from section 19A, this deals with how a crofter might propose to use the grazing for a purpose other than the customary ones (eg peats, 1993 Act, s 52(9)) or woodlands. The terms of this provision are clear. In terms of section 50B(2)(b) "the use proposed must not be such as would be detrimental to... the interests of the

owner". That is a prerequisite of any proposal by a crofter. It follows that, if there is detriment to the landowner, the proposal cannot subsequently be approved for implementation, as it requires to be, by the respondents (s 50B(6)).

[61] Section 50B(2) is a stand alone provision. Its application is not dependent upon any decision of the grazings committee. Although a committee would be unwise to proceed with a proposal, which is manifestly detrimental to the interests of the owner, since it would thereby be contrary to the statutory provision, it is not specifically tasked with determining that matter. It is not, of course, the committee which votes on the proposal but the crofters themselves. Whether it is all the crofters as a group who are making the proposal, or a single crofter who is seeking the approval of his fellow common graziers, the question of detriment to the landowner cannot be definitively answered by the crofters' vote. If it were otherwise, they would each be *auctor in rem suam* (a judge in their own cause).

[62] As distinct from the 2007 amendments, which are specific to the common grazings' regime in the 1993 Act, the 2007 Act introduced (in Part 1, s 3) a quite separate provision (s 58A) which lists factors (s 58A(7)(a)-(h)) which the respondents must take into account when dealing with a wide variety of applications for their approval or consent under the 1993 Act. It is important to note that section 58A(1) states that it is "subject to any express provision made by this Act in respect of any category of case". Although that proviso may have been unnecessary, given the normal tenets of statutory interpretation, it makes it clear that the requirement for the respondents to take into account the listed factors is subject to any express provision relating to specific applications. Such a provision is contained in section 50B(2) which, as already noted in relation to the common grazings, requires that any proposed use should not be detrimental to the interests of the landowner. In that way, a

lack of detriment is a prerequisite to approval. If the landowner demonstrates detriment, the proposal must fail, even if it is in the interests of the crofting community and the public at large and would contribute to sustainable development. In these circumstances, in the event of an objection based on detriment, the respondents are entitled to assess that matter before the application proceeds further. If Parliament had intended that all applications were to be dealt with by carrying out the balancing exercise, which is anticipated by the list of factors in section 58A(7), there would have been no need to introduce, in the same amending legislation, section 50B(2).

[63] Although there is no ambiguity in the legislation, had here been any doubt, the ministerial statements (*supra*) make it clear that the absence of detriment to the landowner is a necessary condition for approval. In particular, at Stage 2 of the passage of the relative Bill, it was made clear that the new provision was not a “backdoor route to crofting community control over the owner’s interests in common grazings”. The provision, it was specifically said, could not be used to build wind farms on grazings, if the landowner objected. Yet that is precisely what is contemplated in the appellants’ applications. The ministerial statements at Stage 3 were in similar terms; explaining “why new uses of common grazings would be unlikely to involve physical development” and that any new use must not be detrimental to the interests of the landowner.

[64] The existence of detriment is not something which goes to the formal validity of the application. That validity will depend upon whether, at the date when it is lodged with the respondents, an application is in proper form. There was nothing wrong with the appellants’ applications in terms of their validity at the time when they were submitted. They simply failed because the landowner demonstrated detriment. The answer to

question 1 may therefore strictly be in the negative, but that is qualified by repeating that, where an objection based on detriment is received, the respondents are entitled to determine that as a preliminary issue and to refuse to approve the application, if that detriment is established. The answer to question 2 is also in the negative. Proceeding to consider the listed factors under section 58A(7), once a finding of detriment is made, could serve no useful purpose. It follows that the court agrees with the Land Court that the respondents did not err in any respect in the procedure which they adopted.

### *Questions 3 and 5*

[65] Whether a proposal constitutes a detriment to the interests of a landowner is a matter of fact which is primarily for the respondents to determine. This court cannot interfere with a decision of fact, particularly one made by a specialist tribunal such as the respondents, unless it can be demonstrated that the tribunal has erred, not in its assessment of fact, but in law. An error of law occurs when:

“the tribunal of original jurisdiction has either misdirected itself in law, entertained the wrong issue, or proceeded upon a misapprehension or misconstruction of the evidence, or taken into account matters which were irrelevant to its decision, or has reached a decision so extravagant that no reasonable tribunal properly directing itself on the law could have arrived at... It is of no consequence that the appellate... tribunal or court would itself have reached a different conclusion on the evidence. If there is evidence to support the decision of the tribunal of first instance then in the absence of a misdirection in law... that is an end of the matter” (*Melon v Hector Powe* 1980 SC 188, LP (Emslie) at 198).

[66] The material before the respondents demonstrated that the interested parties' scheme was one which involved some 36 turbines at locations which included the 21 on the appellants' common grazings. The interested parties had spent some considerable time in advancing this scheme, including entering into contracts (notably a lease) with third parties,

applying for planning permission and making an application for a section 19A consent relative to the grazings. In the event of obtaining the relevant permission and consent, the interested parties would have the ability to construct a wind farm which they might anticipate would generate significant electricity and, in all probability, a substantial profit, at least if the inter-connector is ever built across the Minch. The interested parties have, therefore, a real and substantial commercial development in prospect. This is an “interest” for the purposes of section 50B(2) of the 1993 Act. Question 3 falls to be answered in the affirmative.

[67] The respondents held that implementation of the appellants’ proposals “would make more difficult, and could prevent, the implementation of the landlord’s own preferred ... development”. As the Land Court put it, and as may seem obvious, the interested parties’ scheme and the appellants’ proposals cannot both go ahead simultaneously. If the appellants’ proposals, or one or other of them, were to be approved, that would be relevant, in the sense of being detrimental, to the interested parties’ section 19A application for consent. The fact, that the appellants have offered to abide by conditions to be attached to any approval of their proposals, does not detract from the detriment to be attached to them in that, if they were implemented, the interested parties’ larger scheme would be seriously jeopardised. Although financial offers may have been made by the appellants, their effectiveness would depend on a number of variables. They could not be effectively guaranteed. The reality would be that the blocking of the larger scheme would remove from the interested parties the ability to control their own development. In these circumstances, the respondents were entitled to conclude that such an impediment to the implementation of

the larger scheme would be detrimental to the interests of the landowner. No error of law is identifiable.

[68] Although the issue was raised only in the Aignish application, it is difficult to conceive how the construction of large physical structures on the common grazings could not be to the detriment of the landowner's interest in circumstances in which he has no control over their operation. Returning to the ministerial statements, it was not anticipated that section 50B purposes would be likely to involve "physical development"; yet that is what is contemplated in the appellants' applications. The statements contemplated detriment as a result of the "need for remediation". It is of no moment that the respondents did not cover this matter in the non-Aignish proposals, given the principal reason for refusal of approval. Similarly, in the context of this objection, it matters little whether the proposal is for one or two turbines. These are very substantial physical structures.

[69] As has been emphasised already, the landowners are the persons who have title to the land and, subject to the protection of the crofters' interest in common grazing and the necessity now of a section 19A consent, they have the principal right to decide how the land should be used and what structures should be built upon it. The appellants have, under the Crofting Acts, very little by way of legal right to use the common grazing for non-agricultural purposes. This is so albeit that they may propose such purposes and, if they do not involve detriment, may have them approved. There was no significant dispute about the information presented to the respondents concerning the parties' respective scheme and proposals. On the basis of that material, the respondents were entitled to find detriment established. It would only be on the basis that there was no material upon which that finding could have been made that the court could intervene. No "evidence" in the pure

sense is needed. Question 5 is answered in the affirmative, except in so far as it refers to the applications being “invalid”.

#### *Question 4*

[70] The respondents are entitled to receive late objections in terms of section 58A(5A), if they consider that there is “a good reason why the objection is late. The determination of whether there is a good reason is a matter for the exercise of a discretionary judgment by the first instance tribunal. Interference by a court in such a decision is only merited upon the restricted grounds of:

“a material error of law going to the root of the question for determination..., [taking] into account irrelevant consideration or [failing] to take account of relevant and material considerations... no proper basis in fact to support it...[or] it...is so unreasonable that no reasonable [tribunal] could have reached...it” (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347).

[71] The grounds advanced fall far short of meeting this test. There is no reason to suppose that the respondents were unaware of the need to find good reason for allowing the late objections. There is no basis for the appellants’ contention that the respondents had not considered the impact on the appellants. The respondents accepted that they themselves had led the interested parties into thinking that they need not lodge objections as they had considered (perhaps wrongly) that no valid applications had yet been made. Irrespective of what other reasons for allowing the objections late may have been, and what grounds for refusing to do so were proffered, the respondents’ actions amply justified the exercise of a discretion to allow the objections to be heard.

[72] The frustrations of the appellants, in relation to the respondents’ inability to progress the applications expeditiously, is understandable and was highlighted by the Land Court.

Nevertheless, as the Land Court held, in so far as it was necessary for the respondents to consider the merits of the applications, the interested parties gained no significant advantage and the appellants suffered no material disadvantage on the merits as a result of allowing the objections to be lodged late. The facts for determination remained unchanged. It would have been indeed surprising if the respondents had declined to hear all parties with an interest in these merits and even more so when they were aware that the interested parties had intended to intervene and object at some appropriate point. Question 4 is answered in the affirmative.

### **Postscript**

[73] As a postscript, it could be said that this case does identify general concerns about the development of what might be underused croft land, including common grazing. The needs of the crofting communities are not identical to those in the late Victorian era. As with other applications to the respondents, it could be left to them to decide upon the appropriateness of the development, having regard to everyone's interests, in terms of the factors in section 58A(7) of the 1993 Act. That is not permitted under the current legislation. Such a legislative development would require section 50B(2)(b) to be repealed. Since the landowners' property rights would almost inevitably be interfered with by the superimposition of an alternative development, the need, in terms of Article 1 Protocol 1 to the European Convention (the right to peaceful enjoyment of possessions), for the incorporation in any amending legislation of a scheme for compensating the landowner for any loss would become apparent.

[74] The questions are answered as follows:

1. Strictly, no. Section 50B(2) is not about the validity of an application.

However, where an objection based on detriment is received, the respondents are entitled to determine that matter as a preliminary issue and to refuse to approve an application, if that detriment is established;

2. No. Proceeding to consider the listed factors under section 58A(7), once a finding of detriment is made, would serve no useful purpose. The respondents did not err in the procedure which they adopted;

3. Yes.

4. Yes.

5. Yes, except in so far as it refers to the applications being "invalid".