



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 43
XA70/21

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the special case under section 1(7) of the Scottish Land Court Act 1993

in the application of

MARK PATTINSON

Applicant

against

JOHN MILLER MATHESON

Respondent

Applicant: T Young; Currie Gilmour & Co (for Murchison Law, Inverness)
Respondent: Colquhoun; P Black, Solicitors, Dingwall

23 September 2022

Introduction

[1] The respondent contends that the tenancies of two crofts in Shieldaig were validly transferred to him, following upon the death of his father. The applicant, who is the

landlord, maintains that the tenancies have been terminated and that therefore the entries made by the Crofting Commission in the Crofting Register (nos. C4444 and C4445) in the respondent's name are invalid.

[2] The special case for the opinion of the court concerns the correct interpretation of the statutory provisions which govern the transfer of croft tenancies upon the death of the crofter, *viz*: section 16 of the Succession (Scotland) Act 1964 and section 11 of the Crofters (Scotland) Act 1993. The court requires to address two primary issues. The first is whether the steps taken by the respondent to transfer the tenancies to himself were sufficient in terms of the provisions. The second is whether his failure to transfer the tenancies within 24 months of his father's death meant that he could no longer do so.

Statutory provisions

Succession (Scotland) Act 1964

[3] Section 14(1) of the 1964 Act provides that a deceased person's heritable and moveable estate shall:

"by virtue of confirmation thereto, vest for the purposes of administration in the executor thereby confirmed and shall be administered and disposed of according to law by such executor."

Section 15(2) provides for disposal of heritage by means of a docket on the confirmation.

This acts as a link in the deduction of the title from the deceased.

[4] Section 16(2) permits the executor to transfer an interest in a lease notwithstanding a prohibition on assignation. In the case of a croft, if a transfer is not effected within 24 months of the death, "either the landlord or the executor may, on giving notice ... to the other, terminate the lease ..." (s 16(3A)).

Crofters (Scotland) Act 1993

[5] Section 11(1) of the 1993 Act requires the executor of an intestate deceased crofter to give notice to the landlord of any transfer under section 16(2) “as soon as may be”. If notice is given, the landlord must accept the transferee as tenant and notify the Crofting Commission accordingly. If no notice is received within 24 months, the landlord “shall” notify the Commission (s 11(2)). It is then required to give notice, to the landlord, any confirmed executor and each person who may be able to succeed to the intestate estate, that they propose to terminate the tenancy, declare the croft to be vacant and to invite any representations on what should happen to it (s 11(4)). If, having considered any representations, the Commission is satisfied that a person is entitled to a transfer, in satisfaction of a claim to succeed to the estate, the proposal is not to be implemented (s 11(5)). There are additional provisions in the event that a transfer does not then take place.

Facts

[6] Angus Matheson died on 14 September 2012. He left no will. He was survived by his son, the respondent. At the time of his death, Mr Matheson was the tenant of two crofts. The respondent was the only person entitled to succeed to the crofts in terms of section 2 of the 1964 Act.

[7] On 8 September 2014, the respondent sent a letter to the applicant together with a partially completed Crofting Commission form entitled “Intestate Succession – Transfer by Executor Notice to Landlord(s)”. The letter explained that he was requesting the transfer of the crofts to him following upon the death of his father. He apologised for the delay, stating that he had been unsure of the procedure. The Form gave details of the crofts and the “Deceased Crofter”. It named the respondent as Mr Matheson’s executor, but gave no

further details, because at that stage there had been no confirmation or even any appointment of an executor. Nevertheless, the respondent stated that he was the transferee and he signed the Form as "Executor". He sent a copy to the Commission. It responded by advising him of the steps which he required to take in order to complete the transfer.

Correspondence, which the court has not seen, was exchanged between the respondent and the Commission between 10 November 2014 and 29 March 2017.

[8] It was only much later, possibly as a result of the Commission's promptings, that the respondent took active steps to complete a transfer. He was appointed as executor-dative on 18 September 2018 and obtained confirmation on 30 November 2018. The main flurry of activity, however, took place in 2019. On 3 June, the respondent, as executor, executed a "Form of Docket" nominating himself as the person entitled to his father's estate. The next day he sent a notice to the Commission advising them that he had: been appointed executor-dative; confirmed to the estate; transferred the tenancies by docket to himself; and given notice of the transfer to the applicant. On 13 June, he executed another docket, purporting to transfer the tenancies to himself again. This was endorsed on the confirmation.

[9] The applicant's law agents wrote to the respondent's agents on 1 July, seeking sight of the confirmation and stating that their client "reserved" his position in relation to the transfer. On 19 August, the Commission informed the respondent that he would become the tenant once the crofts had been registered in the Crofting Register. That registration took place on 8 October. On 11 October, the applicant's agents intimated that their client did not consent to an extension of the 24 month time limit. He was going to take steps to have the crofts declared vacant. On 27 November, his agents served notices purporting to terminate the tenancies with effect from the following day. These notices were intimated to

the Commission on 13 December. The applicant subsequently made two applications to the Land Court, challenging the entries in the Crofting Register.

The Land Court

[10] The Land Court determined that a tenancy did not terminate automatically if it had not been transferred within the 24 months. Rather, it became terminable at the instance of the landlord. Automatic termination was inconsistent with the landlord's right to terminate and with the Commission's right to terminate in certain circumstances (1993 Act, s 11). The respondent's intimation to the applicant was invalid because it had not been given by an executor and had not been preceded by the transfer of the deceased's interest to the respondent. On confirmation in November 2018, the tenancies became vested in the respondent as executor. However, his subsequent 4 June 2019 notices were invalid because they predated the docket transfer which took place 9 days later. The tenancies were terminable by the applicant from 24 months after the death, as they had not been disposed of. The applicant had been entitled to terminate the leases and had done so.

[11] The questions in the special case are:

1. Did the Land Court err in holding that the purported intimation made by the respondent to the applicant on 8 September 2014 was not a valid notice for the purposes of section 11(1) of the Crofters (Scotland) Act 1993?
2. If the answer to question 1 is in the negative, did the Land Court err in holding that the notices served by the respondent's agent on 4 June 2019 were not valid for the foresaid purposes?
3. Did the Land Court err in holding that it remained open to the respondent to confirm to and/or transfer under section 16(2) of the 1964 Act his late father's interest in the tenancies of said crofts after the period of 24 months referred to in sections 16(3)(b) and (3A) of the 1964 Act and section 11(2) of the 1993 Act had expired without a valid transfer of the interest having taken place?

4. In the whole circumstances did the Land Court err in holding that the respondent is not the tenant of said crofts?

Submissions

Respondent

[12] Transferring a tenancy of a croft upon the death of the tenant was a two-stage process (*McGrath v Nelson* 2011 SLT 107 at para [41]). First, any transfer must take place under section 16 of the 1964 Act. One way of bringing about a transfer was to docket the confirmation (*ibid* at para [40]). The alternative was a common law assignation, which did not require any special form of words or action (Rankine: *Leases* (3rd ed) at 181; Requirements of Writing (Scotland) Act 1995, s 1(2)). Secondly, the particulars of the transferee must be notified to the landlord, who must accept the transferee as tenant (1993 Act, s 11(1)).

[13] The respondent's actions, in signing and intimating the 2014 notice to the applicant, had transferred the crofts. If writing were required, the wording in the declaration signed at the end of the 2014 Commission Form constituted assignation. Between the intimation of the 2014 notice and the confirmation, the 2014 notice was invalid because the respondent had not obtained confirmation. The grant of confirmation on 30 November 2018 cured that invalidity (*Garvie's Trs v Garvie's Tutors* 1975 SLT 94). If the invalidity of the 2014 notice was not cured by the confirmation, the respondent's actions in 2019, following confirmation, were sufficient to effect a transfer. The 2019 notice was valid intimation for the purposes of section 11(1).

[14] Section 16(3)(b) and (3A) of the 1964 Act granted landlords and executors a power to terminate a lease which had not been competently transferred within 24 months. However, the fact that the landlord or executor had to take action to bring the lease to an end was incompatible with the argument that summary termination took place after 24 months. The

implication of the use of “may” was that the landlord and the executor could each decide not to terminate. Until the lease was terminated, it remained in effect and part of the deceased’s estate (1964 Act, s 14(1)). The *dicta* regarding section 16(3) in *Rotherwick’s Trs v Hope* 1975 SLT 187 (at 189), *Gifford v Buchanan* 1983 SLT 613 and *Morrison-Low v Paterson* 1985 SC (HL) 49 (at 79) were *obiter* and ought not to be followed.

Applicant

[15] To transfer a croft tenancy under section 16, three stages had to be completed within 24 months. First, the executor had to confirm to the deceased’s interest in the croft. Secondly, the executor had to transfer the interest. That could be by conventional assignation or by docket on the confirmation in a specified form (1964 Act, s 15(2) and Sch 1). Thirdly, notice of the transfer had to be given to the landlord (1993 Act, s 11(1)). A well-established line of authority emphasised the importance of the 24 month time limit (*Rotherwick’s Trs v Hope*; *Gifford v Buchanan*; *Morrison-Low v Paterson*; *Sproat v South West Services (Galloway)*, 9 November 2000, unreported, paras [19] – [22]; *McGrath v Nelson*). Stage 3 could not occur until stages 1 and 2 had been completed.

[16] The 2014 notice was invalid. At the time it was sent, the respondent had not completed stages 1 or 2. Even if a subsequent confirmation could validate an earlier transfer, there were still insuperable problems. No confirmation had been granted within the 24 months. The principle in *Garvie’s Trs v Garvie’s Tutors* could not cure the fact that stage 3 had been attempted prior to stages 1 and 2. The tenancies had been validly terminated by the applicant by 27 November 2019. The 2019 notice was issued before stage 2 had been completed. The respondent did not purport to transfer the crofts until 9 days later.

[17] In many cases, a failure to confirm to, and to transfer, an interest in a tenancy within the 24 month time limit would result in automatic termination (*Rotherwick's Trs v Hope* at 189 - 190; *Morrison-Low v Paterson* at 76). That was consistent with the general purpose of section 16; a reasonable time limit should be set for the beneficiaries to take up the tenancy. The landlord was entitled to know what claims of succession to the lease were to be made (*Rotherwick's Trs* at 189). A lease running year-to-year on tacit relocation could not validly be renewed in circumstances where the tenant had died and nobody had confirmed to his interest in the tenancy (*Rotherwick's Trs*; *Wilson v Stewart* (1853) 16 D 106). Section 16 did not apply where confirmation had not been granted.

Decision

[18] Section 16 of the Succession (Scotland) Act 1964 provides the mechanism by which an interest in a croft can be transferred upon the crofter's death. "Interest" is defined as "any interest ... which is comprised in the estate of a deceased person and has accordingly vested in the deceased's executor by virtue of section 14" (s 16(1)). When the tenant dies, the croft tenancy will vest in the executor upon the grant of confirmation (s 14(1)). In consequence section 16 cannot operate without an executor who has confirmed to the tenant's interest. Until confirmation is granted, the intestate estate is in statutory limbo. The landlord cannot give the executor notice to terminate, if there is no executor. However, confirmation, once granted, has retrospective effect to the date of death. Transfers executed by the executor prior to the grant of confirmation will be validated (*Garvie's Trs v Garvie's Tutors* 1975 SLT 94, Lord Thomson at 96 - 97).

[19] The executor has 24 months from the date of death (s 16(3A)) within which to transfer the tenancy to a beneficiary, after which, the landlord "may" terminate the lease

(s 16(3)). Critically for this case, there is no time limit during which the interest must be transferred. Rather, the 24 month period is a protective one. It simply allows the executor time to carry out the necessary steps to confirm to the estate and to transfer the interest without the threat of termination.

[20] *Rotherwick's Trs v Hope* 1975 SLT 187 is distinguishable; the critical feature there being that there had been no confirmation of an executor (see Lord Robertson at 189 - 190). *McGrath v Nelson* 2011 SLT 107 is equally distinguishable; it having been decided upon a view, perhaps somewhat narrow, that the wording in the relevant letter did not amount to a transfer of the croft (see Lady Dorrian at para [44]). In *Gifford v Buchanan* 1983 SLT 613 the landlords had given notice to terminate in advance of the application by the executors for an extension of the period within which a transfer could be made (see LJC (Wheatley) at 614, cf Lord Robertson at 616 adhering to his opinion in *Rotherwicks' Trs v Hope*). The issue of whether a lease could be transferred after the statutory period in section 16(3) was not contested in *Morrison-Low v Paterson* 1985 SC (HL) 49 (see Lord Keith at 76 citing *Rotherwick's Trs v Hope*).

[21] A confirmed executor has the power to circumvent any prohibition on the assignation of a tenant's interest by transferring the interest to a person entitled to inherit on intestacy (1964 Act, s 16(2)). Transfer under section 16 is distinct from *inter vivos* assignation, which can only be effected in accordance with section 8 of the Crofters (Scotland) Act 1993 and requires the consent of the Commission (s 8(1)). It is an implied condition that a crofter will not purport to assign his tenancy except in accordance with that provision (1993 Act, Sch 2(2)). In contrast, section 16 places no formal requirements on the mode of transfer of an interest.

[22] Confirmation was not granted until over 24 months had passed since Mr Matheson's death. The landlord had the right thereafter to give notice of termination to the executor. That would have been effective to terminate the lease, had it been done whilst the interest remained vested in the executor. It may be that, following the principle in *Garvie's Trs*, a notice given to the respondent whilst he was an unconfirmed executor would have been validated by confirmation. However, that did not happen.

[23] Section 11 only applies if there has been a transfer under section 16(2). That can only occur once an executor has been confirmed. Section 11(2) obliges the executor to notify the landlord of any transfer under section 16(2) "as soon as may be". Once that notification occurs, the landlord must accept the transferee as the tenant (s 11(1)). If there is no such notification within three months of the death, the landlord has a duty to commence the procedure under section 11 by informing the Commission "forthwith" that no notice has been received (section 11(2)). It will then notify persons who might wish to succeed to the intestate estate and have the tenancy transferred to them (s 11(4)). The Commission can nominate a relative and intimate that to the landlord. If there is no nomination, the croft will be declared vacant (s 11(8)). Attempting to rely solely on section 16 by-passes the Commission's ability to control the succession. It would enable the landlord to nominate his own tenant instead of the deceased's relatives succeeding. This is contrary to the spirit of the crofting legislation; a pillar of which is to ensure that a crofter can secure succession to the family croft "without any expense or process of law" (see *MacIver v MacIver* 1909 SC 639, Lord McLaren at 644). That is so even if the respondent here could have progressed matters in a more timely manner.

[24] The respondent's letter of 8 September 2014 to the applicant together with the accompanying Form would have been sufficient, had he been confirmed as executor at that

stage, to transfer the interest to him as an individual from the deceased's estate. That act took place within the 24 month period. The subsequent grant of confirmation in 2018 retrospectively validated the transfer. There remains a dispute on whether the applicant received the 2014 documentation. Assuming that it is proved that he did, all necessary steps had been taken to transfer the crofts under section 16 of the 1964 Act and section 11 of the 1993 Act. Even if the 2014 documentation had been in some way deficient, the respondent's actions in 2019 in completing and intimating the further documentation and endorsing a docket on the confirmation were sufficient to effect the transfer. The inconsistencies in dates are of no moment. By the date of the applicant's notice of termination, the tenancy was no longer vested in the respondent *qua* executor. The notice was therefore ineffective.

[25] The court will accordingly answer questions 1 and 4 in the affirmative and question 3 in the negative. In view of the affirmative answer given to question 1, question 2 strictly does not arise; had it done the court would have answered it in the affirmative.