

[2012] CSIH 96

XA116/11

XA117/11

OPINION OF THE LORD PRESIDENT

**Lord President**

in the Reference of Devolution Issues by the Sheriff of  
Grampian, Highlands & Islands at Stornoway

**Lord Eassie**

in the cause of

**Lord Malcolm**

PAIRC CROFTERS LIMITED and PAIRC RENEWABLES  
LIMITED

Appellants;

against

THE SCOTTISH MINISTERS

Respondents:

\_\_\_\_\_

**For the appellants: Agnew of Lochnaw QC, Blair: Drummond  
Miller for Anderson Macarthur, Portree**

**For the respondents: Clancy QC, Poole: SGLD**

19 December 2012

### **Introduction**

[1] Pairc Crofters Limited (Pairc Crofters) is heritable proprietor of the Pairc Estate in South East Lewis. Pairc Crofters has leased the estate to Pairc Renewables Limited (Pairc Renewables). The Pairc Trust (the Trust) is a company limited by guarantee which represents the crofting community in Pairc. The Trust has applied to the Scottish Ministers under Part 3 of the Land Reform (Scotland) Act 2003 (the 2003 Act) to exercise a right to buy croft land on the Pairc Estate. It wishes to buy both the interest of Pairc Crofters as owner and the interest of Pairc Renewables as tenant. On 21 March 2011 the Scottish Ministers granted the application. Pairc Crofters and Pairc Renewables appealed by summary application to the sheriff at Stornoway. By interlocutors dated 23 June and 12 October 2011 the sheriff referred to this court two devolution issues arising from the appeal. The Scottish Ministers are convened to the reference as respondents. The Trust has not appeared.

### **The questions referred**

[2] The following are the questions referred:

1 Is Part 3 of the Land Reform (Scotland) Act 2003 (the 2003 Act) incompatible with the appellant's Convention rights under Article 6(1) and/or Article 1 of Protocol 1 (A1P1) and outwith the legislative competence of the Scottish Parliament?

2 Are the Crofting Community Right to Buy (Ballot) (Scotland) Regulations 2004 (the 2004 Regulations) incompatible with the appellant's Convention rights under article 6(1) and/or A1P1 and outwith devolved competence?

### **The 2003 Act, Part 3**

#### ***The right to buy***

[3] The 2003 Act provides a right to buy croft land. Croft land, in general, consists of crofts as defined by section 3 of the Crofters (Scotland) Act 1993 and land over which croft tenants have grazings (2003 Act, s 68). The right to buy may also cover "eligible additional land" held by the croft landowner which is contiguous with the croft land (s 70).

[4] The right to buy also extends to a tenant's interest in a lease over croft land other than a croft tenancy or a tenancy of a dwellinghouse. The purchase of such an interest brings the lease to an end and is, in effect, a resumption of the land (s 69A). This is the provision under which the Trust seeks to purchase the interest of Pairc Renewables. For convenience, I shall refer to a heritable proprietor and to a tenant whose interest can be bought as a "landowner."

#### ***Crofting community body***

[5] The right to buy can be exercised only by a crofting community body (s 73(1)). Such a body must be a company limited by guarantee. Its articles of association must provide *inter alia* that the company can exercise the right to buy under Part 3, that the majority of the members of the company must be members of the crofting community and that such members shall have control of the company (s 71(1)). The Scottish Ministers must confirm that the body's main purpose is consistent with furthering the achievement of sustainable development (s 74(4)).

[6] The Act makes elaborate provision for the membership of the crofting community body. In general, the membership consists of those who are resident on croft land or on land contiguous with it, or are tenants of croft land who live in the locality (s 71(5), (6)). The statutory definition can be varied if, in the opinion of the Scottish Ministers, it is inappropriate (s 71(5)(b)).

#### ***The application and the representations thereon***

[7] The crofting community body must apply to the Scottish Ministers in writing and in the prescribed form for consent to the purchase (s 73(2), (5)). The prescribed form requires the applicant to specify *inter alia* details of the manner in which purchase of the land will further sustainable development and the reasons why the granting of the application would be in the public interest (Crofting Community Body (Prescribed Form of Application and Notice) (Scotland) Regulations 2009 (SSI No 160) (the 2009 Regulations), reg 2, Sch 1, parts 9 and 13). The crofting community body must send a copy of the application to the landowner (s 73(6)(a)) and where there is a lease, as in this case, to the tenant (s 73(6)(aa)).

[8] Section 73 provides *inter alia* as follows:

"(8) On receipt of an application, Ministers shall-

(a) invite-

(i) [the landowners] ...

(ii) the owners of all land contiguous to land which consists of the subjects of the application;

(iii) the Crofters Commission; and

(iv) any other person whom Ministers consider to have an interest in the application,

to send them, so as to be received not later than 60 days after the sending of the invitation, views in writing on the application; and

(b) send a copy of the invitation to the crofting community body...

(10) Ministers shall, as soon as may be after receiving an application, give public notice of it and of the date by which, under subsection (8)(a) above, views are to be received by them and, in that notice, invite persons to send to Ministers, so as to be received by them not later than 60 days after the publication of the notice, views in writing on the application ...

(12) Ministers shall-

(a) send copies of any views they receive under this section to the crofting community body; and

(b) invite it to send them, so as to be received by them not later than 60 days after the sending of that invitation, its responses to these views.

(13) Ministers shall, when considering whether to consent to an application under this section, have regard to all views on it and responses thereto which they have received in answer to invitations under this section."

### ***The granting of consent***

[9] Section 74 provides *inter alia*:

"(1) Ministers shall not consent to an application under section 73 above unless they are satisfied-

(a) that the croft land to which the application relates is eligible croft land ...

(i) that the crofting community body complies with the provisions of section 71 above;

(j) that the exercise by the crofting community body of the right to buy under this Part of this Act is compatible with furthering the achievement of sustainable development ...

(l) that the crofting community so defined are, in relation to the subjects of the application, an appropriate crofting community;

(m) that the crofting community so defined have approved the proposal to exercise the right to buy; and

(n) that it is in the public interest that the right to buy be exercised ...

(2) For the purposes of subsection (1)(n) above, the public interest includes the interest of any sector (however small) of the public which, in the opinion of Ministers, would be affected by the exercise of the right to buy, and such a sector includes a community as defined for the purposes of section 34(1)(a) above and a crofting community as defined for the purposes of section 71(1)(a) above."

[10] The Scottish Ministers may grant consent subject to conditions (s 80).

### ***The ballot***

[11] The crofting community's approval (s 74(1)(m)) is determined by a ballot conducted by the crofting community body. The Community Right to Buy (Ballot) (Scotland) Regulations 2004 (SSI No 228) (the 2004 Regulations) (cf (s 75)) require that the ballot is "secret" and is "conducted in a fair and reasonable manner" (reg 2). The crofting community body must retain all completed voting papers and related documentation so that it is available for inspection by *inter alios* the landowners (reg 8). The Regulations do not give landowners any control over how the ballot is conducted, when it is held, how the ballot question is framed or how the electorate is ascertained.

[12] For the crofting community to approve of the proposal a majority of all community members voting and a majority of croft tenants of the land must vote in favour. The Scottish Ministers have issued Guidance covering the conduct of the ballot (*Crofting Community Right to Buy under Part 3 of the Land Reform (Scotland) Act 2003*, June 2009). The Guidance suggests that a ballot should be supervised by an independent professional person appointed for that purpose, such as a returning officer. The crofting community body followed that guidance in this case.

### ***Reference to the Scottish Land Court***

[13] At any time before the Scottish Ministers have determined the application, the Ministers, a member of the crofting community or a landowner may refer "any question ... relating to the application" to the Scottish Land Court (s 81(1)). Section 81 further provides as follows:

"(3) The Land Court

(a) shall advise Ministers of its finding on any questions so referred; and

(b) may, by order, provide that Ministers may consent to the application only if they impose ... such conditions as the court may specify.

(4) If the Land Court considers any question referred to it under this section to be irrelevant to Ministers' decision on the application to which it relates, it may decide to give no further consideration to the question and find accordingly."

### ***Purchase of eligible additional land - without the landowner's consent***

[14] A crofting community body may buy eligible additional land (s 70, *supra*) without the landowner's consent, but only if the Land Court so determines (s 77). The Land Court may authorise the purchase of such additional land only if it is satisfied *inter alia* that the purchase is essential to the development of the crofting community (s 77(3)(a)) and that such development is compatible with furthering the achievement of sustainable development (s 77(3)(b)). If the Land Court considers that the purpose to which the eligible additional land, or any part of it, is proposed to be put can be substantially achieved by imposing conditions upon the title to the land, it may make an order approving the purchase of the land sought to be bought but not the eligible additional land or that part of it (s 77(5)(a)) and providing that the Ministers shall make their consent to the application subject to the imposition of such title conditions as the Land Court considers appropriate on the eligible additional land or that part of it (s 77(5)(b)).

### ***Purchase of eligible additional land - at the landowner's request***

[15] Where the owner of eligible croft land or of eligible additional land requests that eligible additional land or further eligible additional land should be included with the land to be bought, the Ministers may, if they consider that it is in the public interest to do so, make it a condition of their proceeding to consider the application by the community body that the body modifies its application so as to include in the land to be bought that eligible additional land as further such land (s 79(1)). In that event they may, and if required to do so by the landowner, must, refer to the Land Court for its findings in fact in respect of any matter relating to the question of whether the additional land or further additional land should be included with the land to be

bought (s 79(2)). In that event, the Land Court may have regard to any representations made to it by, among others, the landowner (s 79(3)(b)). The Land Court must then report its findings in fact to the Ministers (s 79(4)). The Ministers may not consent to the application before they have received the Land Court's findings in fact and have taken them into account when considering or further considering the application (s 79(5)).

### ***Jurisdiction of the Land Court***

[16] Section 97 provides that:

" ... the Land Court shall have jurisdiction to hear and determine all matters, whether of law or fact, which arise under this Part of this Act and, subject to section 1(7) of the Scottish Land Court Act 1993 (c 45) (referral of question of law to Inner House of the Court of Session), the decision of the Land Court in any case shall be final."

### ***Reasons***

[17] The Scottish Ministers must give reasons for their decision (s 82(1)).

### ***Appeal to the sheriff***

[18] A landowner may appeal by summary application to the sheriff against a decision of the Scottish Ministers to consent to the application (s 91(1)). A member of the crofting community may appeal against a decision to refuse the application (s 91(3)). The appeal lies only on a question of law (s 91(5)). The sheriff must dispose of the appeal by ordering either that the Scottish Ministers' decision should be adhered to or that it should be reversed (s 91(7)). Where the sheriff's order has the effect of granting the application, it may be made subject to any condition that the Ministers could have attached to their decision under section 80 (s 91(9)). An order having that effect must be consistent with any decision or findings of the Land Court under section 77 or section 81 (s 91(10)).

[19] The sheriff's order is final (s 91(8)).

### ***Compensation***

[20] The consideration payable to the landowner is ascertained by valuation by a person appointed by the Scottish Ministers. It consists of a sum representing the open market value of the land acquired, together with compensation for injurious affection and disturbance (s 88(5), (6)). There is a right of appeal on the point to the Scottish Land Court (s 92).

### ***The Convention***

[21] The European Convention provides *inter alia*:

#### ***"Article 6***

##### ***Right to a fair trial***

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

[22] The First Protocol to the Convention provides *inter alia*:

#### ***"Article 1***

##### ***Protection of property***

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. "

### **Convention-related legislation**

[23] The Human Rights Act 1998 provides *inter alia*:

#### *"3 Interpretation of legislation*

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights ...

#### *6 Acts of public authorities*

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ... "

[24] The Scotland Act 1998 provides:

#### *"29 Legislative competence*

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply ...

(d) it is incompatible with any of the Convention rights or with EU law...

#### *57 EU law and Convention rights*

... (2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law ...

#### *101 Interpretation of Acts of the Scottish Parliament etc*

(1) This section applies to-

(a) any provision of an Act of the Scottish Parliament ...

(b) any provision of subordinate legislation made ... or purporting to be made ... by a member of the Scottish Executive, which could be read in such a way as to be outside competence ...

(2) Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly."

[25] There is an overlap between these provisions. They raise what I shall refer to as the interpretive obligation (Human Rights Act 1998, s 3; Scotland Act 1998, s 101) and the public authority restriction (Human Rights Act 1998, s 6; Scotland Act 1998, s 57).

### **The parties' submissions**

### ***For the appellants***

[26] The appellants accept that it was within the competence of the Scottish Parliament to provide for a crofting community right to buy. Their complaint is that the legislation lacks proper safeguards for the landowner's rights in terms of A1P1 and article 6(1). They submit that although A1P1 contains no explicit procedural requirements, the procedure employed must give the proprietor a reasonable opportunity of putting his case to the decision maker (*AGOSI v United Kingdom* (1987) 9 EHRR 1, para [55]).

[27] The appellants submit that applications under the right to buy legislation should be carefully scrutinised; and for three reasons. First, the right to buy amounts to a deprivation of property which is inherently more serious than a deprivation of control of it (*Gillow v United Kingdom* (1985) 7 EHRR CD 292, para [148] (European Commission)). Second, the property will be transferred from one private party to another rather than, as in the paradigm case, from a private party to the state, where the transfer may be assumed to be in the public interest. Third, the fact that A1P1 is engaged is also relevant to the degree of protection required by article 6(1) to secure a fair hearing for the landowner (*Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, Lord Bingham of Cornhill at para [50]).

[28] Looking to these reasons the appellants contend that the legislation has four structural flaws; namely (1) that the 2003 Act and the 2004 Regulations fail to give the landowner any influence over the conduct of the ballot; (2) that the Act does not require the Ministers to have regard to the landowner's interests; (3) that it does not give the landowner an adequate opportunity to put his case to the Scottish Ministers, and (4) that it fails to provide for an independent factual inquiry into matters relevant to certain policy aspects of the application. They contend that it is irrelevant to the landowner's Convention rights that these flaws might be compensated for or mitigated by discretionary acts of the Scottish Ministers.

### ***For the Scottish Ministers***

[29] The Scottish Ministers accept that a determination on an application to buy engages article 6(1) and A1P1. They submit that the legislation does not violate these articles. The process as a whole adequately protects the appellants' rights.

## **Conclusions**

### ***The correct approach***

[30] In my view, the case for the appellants rests on the central proposition that safeguards for the appellants' Convention rights must be explicitly spelled out in the 2003 Act. I do not agree. A provision in the 2003 Act can be held to be outwith legislative competence only if it is incompatible with Convention rights; that is to say, if the observance of its terms must be irreconcilable with such rights. But it may be that the principles of interpretation, or the terms of other legislation, or the principles of the common law may so restrict the possible impact of the Act that it cannot be said to be incompatible with Convention rights. In short, the question of competence, in my view, depends on how the legislation operates in practice and not on how any specific provision may appear if looked at in isolation. The House of Lords took that approach in *R v Shayler* ([2003] 1 AC 247) in holding that the statutory prohibitions of disclosure of information without lawful authority received by virtue of being a member of the security and intelligence services, or a Crown servant (Official Secrets Act 1989, ss 1, 4 (the 1989 Act)), was not inconsistent with the right to freedom of expression under article 11 of the Convention. The court held that if a decision to withhold authority to disclose were to be challenged by judicial review, it would be closely scrutinised by the court because a fundamental right was being interfered with. Therefore the inhibition of free expression imposed by the 1989 Act was proportionate.

### ***The ballot***

[31] The appellants' case on this point was directed to article 6. In my view, the legislative provisions by which a crofting community's approval is to be determined by ballot are compatible with article 6 (1) by

reason of the requirement that the ballot shall be conducted "in a fair and reasonable manner" (2004 Regs, reg 2).

[32] Counsel for the appellants did not suggest that this requirement is any less demanding than would be implied by the Convention. His complaint was that in the absence of more detailed and stringent prescriptions for the conduct of the ballot, it is difficult for the crofting community body to conduct the ballot fairly. The ballot is to be conducted by the body that is seeking a positive result from it. The Regulations leave the crofting community body with a free hand. It is solely responsible for identifying the electorate, for framing the question and for determining the timing of the ballot. The landowner has no right to attend the count. Counsel for the appellants submitted that in these ways the community body can manipulate the ballot to its own advantage. In this case the community body had enclosed partisan campaigning material with the postal ballots, yet the landowners could not canvass on their own behalf since they were not notified of the electorate until after the ballot had been held.

[33] I agree with the submission for the Ministers that the Convention does not compel the Parliament to provide for any ballot at all as a precondition of the administrative decision of the Ministers. It does not require that any such ballot should be conducted in any particular way. In my view, the ballot is only one element of the procedure by which an application under the 2003 Act is dealt with. The Act and the 2004 Regulations do not have the effect that any ballot will necessarily and inevitably be unfair to the landowner. The 2004 Regulations adequately secure the integrity of the ballot by requiring, for example, that it should be conducted in secret and in a fair and reasonable manner (reg 2). That requirement is supported by the Ministerial Guidance to which I have referred. The appellants accept that in this case the ballot was duly supervised in accordance with it.

[34] In my view, there is no substance in the appellants' complaint. If the crofting community body in the event holds a fair ballot, despite the lack of the explicit safeguards desiderated by the appellants, the landowner has no ground for complaint. If the landowner should consider that the crofting community body has failed to hold a fair ballot, he has a judicial remedy for breach of regulation 2 of the 2004 Regulations (*supra*).

### ***Consideration of the landowner's interests***

[35] The right to buy is not effective merely at the election of the prospective purchaser; but is conditional on the discretionary approval of another authority, namely the Ministers (cf Leasehold Reform Act 1956; *James v United Kingdom* (1986) 8 EHRR 123). Counsel for the appellants therefore submitted that the legislation implied that each application to buy must be considered on its merits by the Scottish Ministers; and that in considering it the Ministers must, to comply with A1P1 strike a balance between the interests of the crofters and those of the landowner.

[36] Instead, he submitted that the criteria for consent set out in section 74 of the 2003 Act relate to questions such as sustainable development and the public interest. They do not refer to the landowner's interests, or to the particular question whether the interference with the landowner's property rights is appropriate or proportionate (*James v United Kingdom, supra*). I do not accept this argument. In my view, the 2003 Act is not based on a policy decision that, on the fulfilment of certain specified criteria, the landowner's interest will be expropriated; or that such an expropriation will *per se* be a justified interference with property rights in the public interest (cf *James v United Kingdom, supra*). On the contrary, the 2003 Act requires that the applicant must in every case satisfy the Ministers that the proposed purchase is in the public interest (s 74(1)(n)).

[37] In making a judgment as to the public interest, the Ministers must act compatibly with A1P1. In assessing the broad overall consideration of the public interest, the Ministers must take account of the interests of persons who may be adversely affected by the decision, such as the landowner. Section 74(2) makes this clear. It provides that the public interest includes the interests of any sector of the public, however small, which in the opinion of the Ministers would be affected by the exercise of the right to buy. That plainly includes the interests of the landowner.

[38] The same principle is established in the case law. In *Conway v Rimmer* ([1968] AC 910), in the context of public interest immunity, the prejudice to the litigant by the withholding of certain documents was recognised to be a facet of the public interest. Lord Reid made the point in the following way:

"It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done" (p 940D).

[39] I am further of the view that the interpretive obligation would also necessitate this construction, and that the public authority restriction would require the Scottish Ministers to make their judgment on an individual application in a manner that was consistent with AIP1.

[40] I conclude therefore that when the Ministers decide where the overall public interest lies, the central consideration will be that of balancing the harm to the landowner against the benefit of the proposal to the wider public, most notably in relation to the strengthening of the crofting economy. When they make that decision, the weight to be given to the landowner's interests is pre-eminently a matter for them. On that point, the landowner's entitlement to compensation may be a material consideration. AIP1 requires only that any assessment of the public interest should not be manifestly unreasonable (*James v United Kingdom, supra*, paras [46], [49]; *Axa General Insurance Ltd, Petr* 2011 SLT 106, paras [33], [125]).

#### ***The landowner's opportunity to put forward his case***

[41] Counsel for the appellants submitted that the landowner is at an unfair disadvantage when he has to respond to the application to buy. He has no prior notice of the approach that the Scottish Ministers will take to questions of sustainable development and public interest. He is not entitled to receive and to respond to the views of other interested parties (s 73(12)). He is not entitled to make representations on the applicant's response before the Ministers make a decision. The landowners in this case had been given such an opportunity; but the omission of it from the requirements of the Act was a structural weakness reflecting the general failure of the legislation properly to secure the landowner's interests.

[42] I do not accept this argument. The specific duties that the Act lays upon the Ministers in their consideration of an application are in a sense minimum requirements. They have other more general duties under administrative law. The representations and views that the Ministers receive may raise factors other than those specified in section 74 or referred to in the application. At common law, any public body that makes a decision affecting an individual must follow the procedure prescribed by statute and must observe such additional procedural safeguards as are necessary to attain fairness (*Lloyd v McMahon* [1987] AC 625, Lord Lloyd of Berwick at pp 702H-703A). A public body may therefore have powers and duties to invite and to consider representations beyond the statutory scheme (*Glasgow City Council v Scottish Information Commissioner* 2010 SC 125, Lord Reed at paras [81]-[82]).

[43] The Act itself gives the landowner adequate means to put forward his case. The crofting community body is obliged by the 2009 Regulations to specify in detail in the application form the manner in which it contends that the purchase of the land will further sustainable development and the reasons why the granting of the application would be in the public interest (2009 Regs, reg 2, Sch 1, parts 9 and 13). On receipt of the application the Ministers are obliged to invite a number of interested parties, including the landowner, to submit their views in writing on the application (s 73(8)(a)). They are also obliged to give public notice of the application and invite views from the public (s 73(10)). The Ministers are then under an express obligation, when considering whether to grant the application, to have regard to all views on it that have been received in answer to these invitations and to the crofting community body's responses to them (s 73(12), (13)).

[44] In the absence of any indication to the contrary from the Ministers, the landowner must, in my view, assume that they will base their decision on the contents of the application and such views as they receive.

He must also assume that the Ministers will assess the specific questions of sustainable development and the public interest on the same basis. That will therefore include the landowner's views if he submits them.

[45] If a new and unexpected factual matter should arise that might be adverse to the landowner's case, the duty to act fairly will require the Ministers to give notice of it to the landowner and to give him an opportunity to make representations. If new matters arise after the submission of the landowner's views, the Scottish Ministers can invite further representations from him. They would be compelled to do so, by reason of the public authority restriction, if a breach of the Convention would otherwise result.

[46] Since the Scottish Ministers are under a common law duty to act fairly, and in any event must exercise any discretion consistently with the landowner's Convention rights, the scheme for consideration of representations set out in the 2003 Act is, in my opinion, compliant with the Convention. If the manner in which the Scottish Ministers invite and consider representations is procedurally unfair, the landowner can appeal on a question of law to the sheriff.

[47] For all of these reasons, I consider that the Act in its operation provides adequate safeguards for the protection of the landowner's Convention rights in this respect.

### ***Scrutiny of the factual basis of the application and the Land Court's jurisdiction***

[48] Counsel for the appellants submitted that the legislation did not comply with A1P1 and article 6 because it failed to provide for adequate and independent scrutiny of the factual basis of the application. The crofting community body had put forward a detailed business plan of which the landowners had submitted detailed criticisms. The plan was crucial to the issues of sustainable development and public interest (s 74(1)(j), (n)). The plan and the landowner's criticisms raised complex issues; yet they were left to the determination of civil servants without there being an independent factual inquiry such as is typical in the law of planning and compulsory acquisition. An appeal to the sheriff on a point of law was an inadequate remedy. The power of the court to interfere with a discretionary judgment was exercisable only on narrow judicial review grounds. This limited form of judicial control was consistent with article 6 only where there had been a quasi-judicial inquiry into the facts (*Bryan v United Kingdom* (1996) 21 EHRR 342; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, etc* [2003] 2 AC 295), or where the dispute concerned the provision of social welfare, eligibility for which depended upon evaluative judgments (*Runa Begum v Tower Hamlets LBC, supra*). Within the latter category the Supreme Court had held that article 6 was not engaged at all (*Ali v Birmingham City Council* [2010] 2 AC 39).

[49] Counsel for the appellants submitted that, in any event, the landowner's right, exercisable at any time before the Scottish Ministers make a decision on the application, to refer any question relating to it to the Land Court was an inadequate safeguard. By implication, the Land Court's jurisdiction did not extend to issues of sustainable development or the public interest, which involved matters of political policy and discretion. Section 77 required the Land Court to consider the issue of sustainable development in the context of an application to purchase additional land; but this unusual approach had been adopted because the crofting community had no direct connection with such land. Section 77 was no guide to the operation of section 81. Nor could the Land Court determine factual issues that might inform the Ministers' assessment of those matters, since pure questions of fact and questions of Ministerial expediency were inextricably linked. This pointed to the need for an independent factual inquiry. This had been demonstrated by the cursory way in which the Ministers had rejected the landowners' criticisms of the business plan.

[50] Counsel for the Ministers concurred with counsel for the appellants in submitting that the Land Court does not have jurisdiction under section 81 to make findings concerning sustainable development or the public interest. He submitted that these matters involve questions of politics, policy or expediency that are reserved to a democratically accountable decision-maker. They cannot be entrusted to a judicial body without encroachment on the constitutional principle of separation of powers (*Alconbury, supra*, Lord Hoffman at para [117]), that being a principle from which the Parliament is presumed not to have departed except by the clearest words. Counsel for the Ministers also agreed with counsel for the appellants that the Land Court's

duty to consider sustainable development in section 77 is an exceptional case. The absence of a factual inquiry into these matters is not consistent with article 6. There is no requirement for independent scrutiny of factual representations made in support of the application (*Runa Begum v Tower Hamlets LBC*, *supra*).

[51] Counsel for the Ministers submitted, in the alternative, that if the Convention required such independent scrutiny, that could be obtained by a reference to the Land Court. The interpretive obligation would require section 81 to be read as empowering the Land Court to make factual findings relevant to the Minister's assessment of sustainable development and the public interest. But the ultimate questions of whether the development was compatible with furthering sustainable development and whether it was in the public interest was one for the Scottish Ministers, and not for a judicial body.

[52] The question whether the 2003 Act is incompatible with appellants' Convention rights by reason of a lack of an independent factual inquiry depends on the logically prior question as to the nature of the inquiry for which the Act provides. That question is to be determined, in the first instance, by the ordinary canons of statutory construction, failing which by resort to the interpretive obligation (*ANS v ML* [2012] UKSC 30, Lord Reed at para [15]).

[53] In my opinion, the legislation provides for an adequate level of scrutiny of the factual issues that an application under section 73 may raise. It does so in three separate ways, namely in the requirement of the details that the applicant must provide in the prescribed form of application; in the requirement that the Ministers must invite views on the proposal from interested parties, including the landlord, and from the public; and from the right given to any interested party, again including the landlord, to refer any question relating to the application to the Land Court. I have already referred to the first two of these.

[54] Section 81 provides that the persons specified in subsection (1), who include the landowner, may at any time before the Ministers make their decision on the application, refer to the Land Court "any question ... relating to the application," other than specified exceptions that are not material to this case. Since it is essential that the Ministers must be satisfied *inter alia* that the exercise of the right to buy is "compatible with furthering the achievement of sustainable development" (s 74(1)(j)) and that "it is in the public interest that the right to buy should be exercised" (s 74(1)(n)), these are plainly questions "relating to the application" (s 81(1)). In dealing with such a reference the Land Court has jurisdiction to determine all matters of law or fact (s 97).

#### *Definition of sustainable development and public interest*

[55] Before I come to the question whether sustainable development and public interest are issues with which the Land Court is competent to deal, I should first deal with a preliminary objection raised by counsel for the appellants to the effect that the terms sustainable development and public interest are too vague to have legal force and are therefore, as counsel put it, "not law."

[56] In my view, the expression sustainable development is in common parlance in matters relating to the use and development of land. It is an expression that would be readily understood by the legislators, the Ministers and the Land Court. I see no reason why the owner of land that is subject to an application to buy under Part 3 of the Act would be unable to mount an effective defence to the application on this ground.

[57] Likewise, I consider that there is nothing in the submission that the expression "public interest" lacks any legal force. The public interest is a concept that is to be found throughout the statute book. There is no need for a general definition of it. It is for the Land Court and the Ministers to assess the public interest on the facts and circumstances of the case. A general statutory definition of the public interest, if one could be devised, would be unhelpful, in my view. As it is, I consider that section 74(2) (*supra*) makes it sufficiently clear that in the context of an application under section 73 the assessment of the public interest involves the balancing of the objectives of the application with the interests of any sector of the public which in the opinion of the Ministers would be affected by the exercise of the right to buy.

### *Jurisdiction of the Land Court*

[58] I do not accept the submission made by counsel for both parties that in a reference to it under section 81 of the 2003 Act, the Land Court has no competence to consider the questions of sustainable development and public interest. Their common standpoint, as I understand it, is that despite the inter-relationship of sections 74(1) and 81(1), nevertheless such matters are by their nature matters that are solely for consideration by the Ministers under section 74.

### *Sustainable development*

[59] I fail to see how the Parliament can have withheld from the Land Court any jurisdiction in relation to the question of sustainable development under section 81 when it has directed the Land Court to consider the same question under section 77. The differences in the scope and wording of the two sections on this point are, in my view, immaterial.

[60] In any event, the question of sustainable development involves factual issues relating to the environment and to crofting agriculture. These issues are pre-eminently issues for the special expertise of the Land Court. A conclusion of the Land Court on that matter will provide informed advice when the Ministers consider whether they are satisfied that the matter specified in section 74(1)(j) has been established.

[61] That, in my opinion, is why the Ministers themselves are entitled before reaching their decision, to refer the issue to the Land Court.

### *Public interest*

[62] Counsel for the parties suggested that the question where the public interest lies raises questions of policy and politics and not of fact; and is therefore uniquely a matter for the Ministers.

[63] I do not agree. The question of where the public interest lies is not solely a matter for Ministerial decision. Such a question can in appropriate circumstances lie within the jurisdiction of statutory bodies and courts. In particular, in the area of crofting legislation, the Crofters Commission has the duty in determining whether to constitute a new croft, to have regard *inter alia* to the public interest (Crofters (Scotland) Act 1993 (the 1993 Act), s 3A(8)(b)). More importantly, in an application by a landlord for authority to resume a croft or part of a croft, the Land Court has power to authorise the resumption if it is satisfied that the resumption is for a reasonable purpose having relation *inter alia* to the public interest (1993 Act, s 20(1); *eg Morrison v Maclachlan* 1965 SLCR App 95). A reference to the Land Court under section 81 of the question of the public interest may well raise specialist factual issues that lie within the Land Court's expertise.

[64] In any event, if we could not decide this question on ordinary principles of statutory interpretation, the interpretative obligation would enable us to hold that if a breach of article 6 would otherwise result, section 81 was to be read as conferring jurisdiction on the Land Court to determine the ultimate questions of sustainable development and the public interest.

### *The effect of the Land Court's consideration*

[65] It is important to bear in mind that section 81 does not give the Land Court jurisdiction to make the decision that has to be made under either section 74(1)(j) or section 74(1)(n). It is a reference to be carried out before the Ministers' decision is made. The outcome of it will, like the invited views under section 73, form part of the material from which the Ministers will draw their conclusions and make their decision.

[66] All that the Land Court has to do under section 81 is to consider the question referred to it (s 81(2)) and, with one exception, to advise the Ministers of its finding on the question (s 81(3)(a)). The exception is where the Land Court may, by order, to provide that the Ministers may consent to the application only if they impose certain specified conditions (s 81(3)(b)).

[67] I infer from this that where the Land Court merely advises the Ministers under section 81(3)(a) of its finding on the question referred to it, the Ministers have a duty to take the finding into account when making their decision, but are not to be bound by it. That, I think, meets the concern expressed by counsel for the Ministers that the legislation should not be construed as transferring the decision on such a question to a judicial body. It is also an answer to the submission for the appellants that the landowner's interests are not adequately safeguarded because the decision of the Ministers on the application is made without an independent factual inquiry.

### **Conclusion**

[68] In my opinion, the relevant legislative provisions and the principles of administrative law, considered as a whole, offer a level of protection equal to or surpassing that which, on any view, is required by the Convention.

### **Disposal**

[69] I propose to your Lordships that we should answer both questions referred to us in the negative.

**FIRST DIVISION, INNER HOUSE,  
COURT OF SESSION**

**[2012] CSIH 96**

**XA116/11**

**XA117/11**

**OPINION OF LORD EASSIE**

**Lord President**

in the Reference of Devolution Issues by the Sheriff of  
Grampian, Highlands & Islands at Stornoway

**Lord Eassie**

in the cause of

**Lord Malcolm**

**PAIRC CROFTERS LIMITED and PAIRC RENEWABLES  
LIMITED**

Appellants;

against

**THE SCOTTISH MINISTERS**

Respondents:

\_\_\_\_\_

**For the appellants: Agnew of Lochnaw QC, Blair: Drummond  
Miller for Anderson Macarthur, Portree**

**For the respondents: Clancy QC, Poole: SGLD**

19 December 2012

[70] Along with your Lordship in the Chair and Lord Malcolm, I also consider that both of the questions posed in this reference under paragraph 7 of schedule 6 to the Scotland Act 1998 should be answered in the negative.

[71] The second question relates to the compatibility of the 2004 Regulations on the conduct of ballots with the provisions of the Convention. Counsel for the appellants advanced a number of criticisms of some of the provisions in the Regulations which are summarised by your Lordship in the Chair. Put shortly, it was contended that the provisions had the potential to allow the community body to gain some electoral advantage. However, in my view, the contention that the Regulations are on that account incompatible with the Convention is unfounded. In the first place, I do not find in the Convention any requirement that an administrative, ministerial decision involving the transfer of property from a private party to a community body must be preceded by any ballot. But perhaps more importantly, as your Lordship points out, regulation 2 of the 2004 Regulations stipulates that the ballot must be conducted in a fair and reasonable manner. Accordingly, if the community body does not conduct the ballot in a fair and reasonable manner, it will be in breach of regulation 2 and the landowner can take appropriate steps by complaint to the Scottish Ministers or by judicial remedy. Since the granting of consent by the Ministers thus proceeds upon the basis that the ballot must be conducted fairly and reasonably it cannot be said that procedure is, as respects the ballot, incompatible with the articles of the Convention which the appellants invoke, particularly article 6.

[72] As regards the first of the questions in the reference, counsel for the appellants criticised the structure of the legislation in Part 3 of the 2003 Act in, among others, the respect that section 74, which sets out the criteria for consent by Ministers, did not list in terms the interests of the landowner, but applied the criterion of the public interest. For the reasons given by the other members of the Bench, I agree that this point is also unsound. The interests of the landowner are, in my view a relevant factor to be weighed in an assessment of the public interest and balanced against other factors. It may be added that under s 73 (13) the Ministers are required to have regard to the views and comments submitted by *inter alios* the landowner. A further, loosely related criticism advanced on behalf of the appellants was directed to the absence from the legislation of any requirement on the Ministers to afford to the landowner an opportunity of commenting on the responses of the community body to the representations made by the landowner. Again for the reasons expressed by your Lordships, I agree that this argument lacks substance. The legislation does not inhibit the performance by the Ministers of their duty to act fairly and consistently with the Convention. If the comments of the community body raise new matter, or indeed any matter, calling for further comment from the landowner, the Ministers can, of course, invite a reply from the landowner.

[73] A central part of the contention of the appellants that the legislation was not compatible with the Convention, particularly article 6, was a submission that the procedures did not make provision for inquiry into the facts in a public forum. Thus in the present case there had been no inquiry into the community body's business plan, and the extensive objections to it which had been raised by the appellants. The appeal to the sheriff against the granting of consent which was provided in s 91 of the 2003 Act was confined to an appeal on a point of law and therefore, it was submitted, was insufficient to meet the "curative jurisdiction" principle whereby administrative procedures might be Convention compatible. Counsel for the appellants eventually recognised the existence of the wide jurisdiction, including full power of factual investigation, conferred on the Scottish Land Court by s 81 of the 2003 Act. However, counsel for the appellants submitted that the Land Court could not decide on the matters mentioned in s 74 (1) (j) of the 2003 Act (compatibility with furthering sustainable development) or s 74 (1)(n) of that Act (public interest). Ultimately a similar submission respecting those perceived limitations on the extent of the jurisdiction of the Land Court was made on behalf of the Scottish Ministers.

[74] The provisions of s 81 (1) confer on *inter alios* the landowner the power to refer for consideration by the Land Court "...any question (other than a question which Ministers may, or may be required to, refer under section 77(1) or 79(2) above) relating to the application". The two exceptions mentioned in the parentheses concern acquisition of additional land and are not material for present purposes. There is no other provision in the legislative text excepting questions relating to compatibility with sustainable development or public

interest from reference to the Land Court. As I understood it, the basis upon which counsel submitted that those questions were so excluded from consideration by the Land Court was that they involved matters of policy, which would not normally be justiciable.

[75] However, the basis so advanced for the submission is, to my mind, largely undermined by the fact that the Parliament in s 77(3) plainly provides for compatibility with furthering the achievement of sustainable development being determined by the Land Court and I do not find anything in the context of s 77 for regarding the Land Court as exercising a jurisdiction, as regards sustainable development issues, under s 77 which is different in any material way from the jurisdiction conferred by s 81. Moreover, as Lord Malcolm points out, in Part 2 of the 2003 Act, dealing with the right to buy conferred on rural communities, the Parliament employed similarly worded criteria of compatibility with furthering the achievement of sustainable development and of public interest and enacted a full right of appeal to the sheriff by way of summary application.. It may also be noted that during the Parliamentary passage of the Bill which became the 2003 Act, the Deputy Minister for Environment and Rural Affairs (Mr Allan Wilson) advised members that the aim of not including any definition of sustainable development in the legislation was to avoid restricting the courts' interpretation of sustainable development (see Scottish Parliament Official Report, Justice 2, Columns 1960 -1965, 29 October 2002)[1].

[76] While, solely as regards textual indications in the 2003 Act, the position respecting public interest might be thought less clear, courts are on occasion called upon to consider matters of where the public interest may lie. For example, judicial examination of whether a deprivation of property breaches AIP1 may require consideration of the public interest. More particularly, as your Lordship in the chair points out, the crofting legislation contains a number of instances in which the Land Court is enjoined to have regard to the public interest in determining the matter before it. Issues relating to the public interest arising on an application by a crofting community body under the 2003 Act are likely to include matters within the expertise of the Land Court as a specialist tribunal.

[77] It is also to be borne in mind that the powers conferred on the Land Court on a reference under s 81 are those of making findings and reporting these to the Ministers, or of requiring that any grant of consent be subject to a condition or conditions. The Land Court does not determine the application made by the crofting community body and whether it receives consent remains with the Ministers.

[78] For these reasons, I for my part, am not persuaded that the submission of both counsel to the effect that the jurisdiction of the Land Court under s 81 is restricted in the way contended is sound. Accordingly I consider that the jurisdiction conferred upon the Land Court is sufficiently ample to satisfy any requirement under article 6 for a "curative jurisdiction".

**FIRST DIVISION, INNER HOUSE,  
COURT OF SESSION**

**Lord President**

[2012] CSIH 96

XA116/11

**Lord Eassie**

XA117/11

**Lord Malcolm**

OPINION OF LORD MALCOLM

in the Reference of Devolution Issues by the Sheriff of  
Grampian, Highlands & Islands at Stornoway

in the cause of

PAIRC CROFTERS LIMITED and PAIRC RENEWABLES  
LIMITED

Appellants;

against

THE SCOTTISH MINISTERS

Respondents:

---

**For the appellants: Agnew of Lochnaw QC, Blair: Drummond  
Miller for Anderson Macarthur, Portree**

**For the respondents: Clancy QC, Poole: SGLD**

19 December 2012

[79] The appellants are Pairc Crofters Limited and Pairc Renewables Limited, both with a registered office in Portree, Isle of Skye. The former is the proprietor and the latter a tenant of croft lands on the Pairc Estate in south-east Lewis. In February 2010 a body known as The Pairc Trust submitted an application to the Scottish Ministers for consent to a crofting community buy out of croft lands on the estate, all under and in terms of section 73 of the Land Reform (Scotland) Act 2003. The appellants tendered a number of representations in opposition to the proposed buy out, including challenges to the factual basis of parts of the application. On 21 March 2011 the Scottish Ministers granted consent to the buy out. This obliged the appellants to transfer their respective interests in the land to the trust on various conditions, all as set out in the Act. An appeal was lodged in the Sheriff Court by way of summary application in terms of section 91. The Scottish Ministers are the respondents in that application. The sheriff has made a request to the Court of Session for a preliminary ruling on a devolution issue raised by the appellants. In particular, the following questions are referred:

1. Is Part 3 of the Land Reform (Scotland) Act 2003 incompatible with the appellants' Convention rights under article 6(1) and/or article 1, protocol 1, and outwith the legislative competence of the Scottish Parliament?

2 Are the Crofting Community Right to Buy (Ballot) (Scotland) Regulations 2004 incompatible with the appellants' Convention rights under article 6(1) and/or article 1, protocol 1, and outwith devolved competence?

[80] So far as the first question is concerned, the appellants' outline submissions set out two main complaints:

(1) there is no independent mechanism for an investigation into a landowner's criticisms of the factual basis of a crofting community body's case.

(2) the criteria in section 74 of the Act do not specifically mention the interests of the landowner.

[81] The legislative competence of a crofting community buy out is not in dispute. The main factual dispute relates to the applicants' business plan for the land. The appellants have raised a large number of queries and objections to the terms of that plan. They are dissatisfied with the Ministers' decision letter, especially with regard to the way in which it dealt with the issues in dispute concerning the plan. The appellants' outline submissions state that there is:

"a structural failure of the 2003 Act which makes no provision for holding an inquiry in relation to the facts and policy, in appropriate circumstances, where a reporter can advise and inform Scottish Ministers before they make their decision" (paragraph 33).

"In general crofting community applications are more likely to be characterised by sharp issues of fact in relation to whether or not the application supports sustainable development or at least the facts are a large part of what these cases are likely to be about" (paragraph 34).

The appellants contend that a proposed buy out cannot be challenged in an effective manner without an inquiry into the relevant facts.

### **The 2003 Act**

[82] While the attack relates to part 3 of the Act, it is helpful to notice the provisions in part 2, which confer on rural communities a right to buy land in which they can demonstrate a connection. The right to buy arises in relation to land in which a community has, through a community body, registered an interest, but only when it is offered for sale. By contrast, a crofting community's right to buy under part 3 can arise when the landowner has no desire to sell.

[83] There are similarities, but also important differences between the two statutory regimes. Common to both is the emphasis on "sustainable development" and "the public interest" (the latter echoing the terms of article 1, protocol 1). There are differences in respect of the potential involvement of the court system. In part 2, section 61 allows an owner of land to appeal to the sheriff by way of summary application against a decision to register a community interest or to grant consent to a purchase. Other parties, including a community body, are given similar rights of appeal.

[84] An appeal under section 61 is not limited to issues of law nor to traditional judicial review principles. The sheriff can hear and decide an appeal in relation to matters of fact and/or the applicability of the relevant statutory criteria (which are much the same as those arising in part 3). For example, with reference to the terms of section 51(3)(c) and (d), the sheriff has a jurisdiction to decide whether the proposals are compatible with "furthering the achievement of sustainable development" and whether the purchase of the land "is in the public interest". The annotator in Current Law Statutes comments that evidence may be led before the sheriff in support of a claim that an order should not have been made because it is not in the public interest, "although there may be an argument that whether or not something is in the public interest is a matter for the discretion of Ministers and that the courts should be slow to interfere with such a decision."

### **Part 3 -the crofting community right to buy**

[85 ] Under section 73 a crofting community's right to buy can be exercised only with the consent of Scottish Ministers after written application. The content of the application is prescribed by subsection 5, and includes information as to the proposed use, development and management of the subjects, and the extent to which they would "consist of or support the sustainable use or development of the subjects...". A copy of the application is sent to the owner of the land. Ministers must invite written views from, amongst others, the owner. There is provision for public notice of the application and of the date by which views thereon will be received, which must then be forwarded to the crofting community body for its response. Scottish Ministers must have regard to all views received (subsection 13).

[86] Section 74 sets out the criteria for consent, which include the following:

- (j) exercise of the right to buy is compatible with furthering the achievement of sustainable development.
- (k) sufficient croft land is being acquired to allow the exploitation of any salmon fishing, mineral rights, or sporting interests being bought.

(l) in relation to the subjects of the application, the purchasers are an appropriate crofting community.

(m) the members of the crofting community have approved the proposal.

(n) it is in the public interest that the right to buy be exercised.

Section 74(2) provides that "the public interest includes the interest of any sector (however small) of the public which, in the opinion of Ministers, would be affected by the exercise of the right to buy..." Section 75 provides for a ballot to indicate approval for the purposes of section 74(1)(m). The ballot must be conducted as prescribed by regulations. If not so conducted, the right to buy is extinguished.

[87] Section 77 deals with a proposed purchase of eligible additional land without the consent of the owner. Ministers must refer the question of whether the additional land may be bought to the Land Court. The Land Court can allow the purchase, but only if satisfied that:

(a) the purchase is essential to the development of the crofting community.

(b) such development is compatible with furthering the achievement of sustainable development.

(c) the purpose to which the land would be put cannot reasonably be achieved by other means within the powers of the court.

(d) the purchase will not seriously jeopardise the continued use and management of any remaining land.

The Land Court is given power to direct that Ministers shall, under section 80, make their consent to the application subject to such conditions on the title to the land as the Land Court may specify.

[88] Section 77(5) provides that if the Land Court considers that:

"the purpose to which eligible additional land, or any part of it, is proposed to be put can be substantially achieved by imposing conditions upon the title to that land, it may make an order -

(a) approving the purchase of the land sought to be bought but not the eligible additional land or that part of it; and

(b) providing that Ministers shall, under section 80 below, make their consent to the application subject to the imposition of such title conditions as the court considers appropriate on the eligible additional land or, as the case may be, that part of it."

While the matter is not entirely clear, on one view the effect of this provision is to endow the Land Court with power to allow the proposed buy out, but excluding the additional land, thereby leaving little, if anything, to the discretion of Ministers.

[89] Section 79 deals with additional land included at the request of the owner. Ministers may refer to the Land Court, or shall refer to the Land Court if required by the owner of land, for its findings in fact in respect of any matter relating to whether the additional land should be included in the purchase. Ministers must take the court's findings into account when considering the application. They can make it a condition that the purchase includes the additional land. The Land Court is not given a jurisdiction to approve or reject a request by the owner that further land should be included, but only to make relevant findings in fact. That said, no doubt it would be difficult for Ministers to set aside findings in fact which clearly pointed one way or the other. The Land Court's findings could include conclusions related to whether the inclusion of the additional land did or did not contribute to the sustainability of the proposed buy out, and also as to any impact on the public interest requirement (whether positive or negative).

[90] Under section 80 Ministers may make their consent to an application subject to conditions.

[91] Section 81 is an important provision. It provides that at any time before Ministers reach a decision on an application, a wide variety of people, including Ministers; any person who is a member of the crofting community; and any person who has an interest in the land, may refer to the Land Court "any question (other than a question which Ministers may, or may be required to, refer under section 77(1) or 79(2) above) relating to the application". In considering any such question the Land Court may have regard to any representations made to it, including from any person who, in the opinion of the Land Court, appears to have an interest. The Land Court must advise Ministers of its findings and may, by order, provide that Ministers may consent to the application only if they impose such conditions as the court may specify. The Land Court is not required to consider any question which it regards as irrelevant to the decision on the application.

[92] Under section 82 Ministers shall give written notice of their decision upon an application, and their reasons for it, to, amongst others, the crofting community body and the owner of the land.

[93] Where consent is given to an application which involves a lease by the purchasers to the owner of sporting interests on the land, section 83 provides that Ministers must refer to the Land Court the determination of the appropriate terms and conditions for such a lease. If subsequently the purchasers fail to grant a lease, the Land Court may authorise its principal clerk to adjust, execute and deliver the lease as if it had been granted by the crofting community body. Under section 86(6) the Land Court has a similar jurisdiction in relation to the transfer of the land to the purchasers if the owner fails to execute and deliver the necessary deeds.

[94] Section 88 deals with the assessment of the value of croft land etc. For present purposes it is unnecessary to narrate the detail of this procedure, the end result of which should be that the landowner receives the open market value of the land acquired, any depreciation in the value of other land or interest caused by the transfer, and the amount attributable to any disturbance arising from the transfer.

[95] Section 91 deals with appeals. Amongst others, the owner of the land may, by summary application, appeal to the sheriff against a decision to consent to the application. The applicant crofting community body has a similar right in respect of a decision to refuse the application. Appeals may be made only on a question of law. The sheriff shall order that the decision be adhered to or reversed. Such an order is declared to be final (although judicial review would be open). If confirming a decision to grant, or reversing a refusal, the sheriff's order may be made subject to any condition which Ministers could have attached under section 80, so long as they are consistent with any decision or findings of the Land Court under section 77 or 81.

[96] Section 92 allows for appeals to the Land Court in respect of the valuation of the land.

### **General observations on the statutory scheme**

[97] In respect of part 2 buy outs, by way of a summary application under section 61 the sheriff is given a wide appellate jurisdiction to deal with all aspects of a decision by Scottish Ministers, including on issues of fact; compatibility with sustainable development; and whether a buy out is in the public interest. Against this background, it is difficult to justify a narrow construction of the Land Court's powers in part 3 of the Act by reference to an argument that Parliament must have intended that the consideration of issues such as the public interest and compliance with sustainable development should be reserved to the sole jurisdiction of the Scottish Ministers.

[98] Under part 2 of the Act the judiciary can play a role only by way of determining an appeal taken after a decision by Ministers. There is no provision for any form of pre-decision inquiry by a court or any other body. By contrast, under part 3 the Land Court has a varied and extensive pre-decision jurisdiction. This might be explicable on the basis that part 2 involves, in effect, a right of pre-emption (the right is triggered only if the owner wishes to sell the subjects), whereas part 3 can lead to the compulsory deprivation of a right of property against an unwilling proprietor (albeit with full compensation). It is reasonable to suppose that, in such circumstances, Parliament was mindful of the requirements of the Convention and that, in large measure, this motivated the involvement of the Land Court in so much of part 3. Approval of a crofting

community buy out is far removed from the schemes of regulation or social welfare discussed by Lord Hoffmann in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 (see paragraphs 42/3). A buy out can involve the compulsory purchase of a large part of a landed estate. Article 1 protocol 1 is engaged. This is not a classic exercise of administrative discretion of the kind which permits a limited involvement of the courts. It is entirely understandable that Parliament would be anxious that the judicial branch of government should play a primary role, at least if and when any interested party so wished. Given the subject matter, few would quarrel with the choice of the Land Court.

[99] On the face of it, in section 81 Parliament has given the Land Court power to investigate and adjudicate upon a wide range of issues relating to crofting community buy outs, all before the ministerial decision is taken. The owner of the land, and a range of other persons (including Ministers), may require a reference to the Land Court on "any question relating to the application". Counsel on both sides urged a restrictive interpretation of the scope of section 81; in particular one which would prevent the Land Court from considering matters such as sustainability and the public interest. The appellants contend that the suggested restrictive interpretation renders the legislation non-compliant with ECHR. However section 3 of the Human Rights Act 1988 requires the opposite approach, namely that, so far as possible, the 2003 Act is to be construed in a manner which is compatible with the Convention. In any event, and even leaving aside section 3, the normal rule would be to apply the broad and unqualified words used in section 81 in accordance with their ordinary meaning.

[100] In essence, the appellants contend that sustainability and the public interest must be deemed to be non-justiciable, and thus, if Parliament had decided otherwise, it would have set this out in clear and specific language. However, counsel offered no persuasive justification for the proposition that such matters are beyond the competence of the Land Court.

[101] The proposition is all the more unconvincing given the nature and scope of the powers given to the Land Court in section 77. Granted that section 77 arises only when there is a question as to the purchase of eligible additional land without the owner's consent; but there is no good reason to ignore the wide jurisdiction given to the Land Court in other provisions when determining the scope of its powers under section 81. In the context of the full terms of the legislation, including the jurisdiction given to the sheriff in part 2, it is apparent that Parliament did not intend the courts to play the limited role suggested by counsel for both parties. If Parliament can settle a jurisdiction on the sheriff to investigate the facts and determine where the public interest lies, why not also upon the Land Court? It is a specialist tribunal in relation to crofting matters. Its expertise is implicitly recognised in section 97 of the Act. Views may differ on whether it is appropriate to grant judicial bodies such a jurisdiction. However that is a separate issue from an interpretation of the intention of Parliament as revealed by the terms of the legislation.

[102] The appellants complain of an alleged absence of any opportunity for an independent person or body to adjudicate upon disputed questions of fact, including the validity or otherwise of the applicants' business plan. On any view, such an opportunity is afforded by section 81.

### **The appellants' case based on article 1, protocol 1**

[103] So far as article 1, protocol 1 is concerned, the relevant considerations in respect of a complaint of legislative non-compliance were outlined by the Strasbourg court in *James and others v The United Kingdom* (1986) 8 EHRR 123. The case concerned provisions in the Leasehold Reform Act 1967 which conferred upon certain tenants a right to purchase the freehold of the leased property. The applicants' complaint was directed against the terms and conditions of the legislation. It was submitted that the Act did not allow for discretionary and variable implementation according to the particular circumstances of each individual case. The court did not examine the legislation in the abstract, but with reference to the circumstances of the cases before it as illustrative of the impact of the new law. There was a submission that the purpose and effect of the legislation could never satisfy the public interest test. However it was held that the taking of property in pursuance of a policy calculated to enhance social justice within the community can be described as being in the public interest (paragraph 41). The purpose of article 1, protocol 1 is "primarily to guard against the

arbitrary confiscation of property" (paragraph 42). In the present case it was accepted that part 3 of the 2003 Act was implemented in pursuance of legitimate public interest policies.

[104] In *James* it was stated that, in addition to a legitimate aim "in the public interest", there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised." There must be a "fair balance" struck between the demands of the general interest of the community and the protection of an individual's fundamental rights, to ensure that no person has to shoulder "an individual and excessive burden". The appellants have focused their attack on this aspect of the requirements of the Convention. In *James* the court stressed that the means chosen to pursue the desired aim must not be "so inappropriate or disproportionate as to take the legislature's decision outside the margin of appreciation". The measures taken must be "both appropriate for achieving (the) aim and not disproportionate thereto" (paragraph 50).

[105] When, as here, the legislation affords reasonable compensation for the deprivation, this will go a considerable distance towards satisfying the requirement for a fair balance and the avoidance of a disproportionate burden upon the owner of the relevant land. The appellants submit that, nonetheless, part 3 of the Act is non-compliant in respect that no, or at least inadequate weight is placed upon the fundamental rights of the landowner. In particular there is no specific reference to those rights in the section 74 criteria.

[106] In the present case there is no suggestion that the interests of the appellants as owners of the land in question were in fact ignored or set aside. As mentioned by the court in *James*, the compatibility of legislation will not be viewed in the abstract, but rather with regard to the individual case as an exemplar of the statute in operation. The Scottish Ministers are obliged to act in conformity with the Convention. In my view there is no good reason to suppose that the legislation will be interpreted and applied on the basis that the rights and interests of the landowner need not be given appropriate weight when deciding whether to grant consent. The landowner is entitled to make representations and express views on the application, all of which the Ministers are bound to take into account (section 73(13)). In any event, section 74(2) makes it clear that all interests of any sector "however small" of the public which would be affected by the exercise of the right to buy must be taken into account.

[107] The criteria set down in section 74 are only minimum requirements for the grant of consent. They do not exclude consideration of other relevant considerations, such as any disproportionate or excessive burden upon an individual landowner. The appellants' counsel hypothesised a case where a beneficent landowner was financing major developments of benefit to the community. There is nothing in the Act which requires the Scottish Ministers to ignore such factors. In any event they would be relevant to the public interest test. I reject the submission that the relevant provisions are non-compliant with article 1, protocol 1.

### **The appellants' case based on article 6**

[108] The other main ground upon which it is contended that the requisite fair balance is not achieved involves a substantial overlap with the submissions on article 1, protocol 1. The respondents accept that article 6 is engaged. The appellants claim non-compliance with its requirements. It was submitted that there is a need for a pre-decision procedure involving something akin to an inquiry before a reporter, similar to that involved in many planning decisions, at which issues of fact, public policy and discretion could be fully investigated and thereafter appropriate advice tendered to the Ministers. In the absence of any such procedure it was claimed that the legislation does not allow for the necessary independent scrutiny of the factual basis for any subsequent consent.

[109] In this context it is relevant to note the earlier discussion of the role given to the Land Court. During the submissions there was much discussion of the so called "curative jurisdiction" of the court, concentrating mainly on cases such as *R v Secretary of State for the Environment, Transport and the Regions, ex p Alconbury Developments Ltd and Others* [2003] 2 AC 295 and *Bryan v United Kingdom* (1996) 21 EHRR 342. Those decisions confirm that where civil rights are involved there must be adequate procedural safeguards, including a right of "effective access" to a court. What amounts to effective access, or, as it is

sometimes put, "full jurisdiction", will depend upon the circumstances of the particular case and the nature of the decision. When the ultimate outcome is heavily dependent upon the resolution of issues of fact, as opposed to a routine exercise of administrative discretion based upon a set policy applied to largely uncontentious circumstances, a greater intensity of judicial scrutiny is likely to be required. In such cases the emphasis is less on respect for the operation of the democratic will exercised by the appointed decision maker, and more on ensuring independent scrutiny of the fact finding exercise. This is consistent with the aim of guarding against the arbitrary exercise of state power.

[110] The nub of the appellants' complaint is that a right of appeal to the sheriff on a question of law only, and any subsequent option to raise judicial review proceedings in the Court of Session, are insufficient to amount to "effective access to the court", especially if regard is had to the nature of disputes likely to arise under part 3 of the 2003 Act. However this submission ignores the wide pre-decision jurisdiction given to the Land Court, all as discussed earlier. In support of his submission, counsel for the appellants concentrated on the suggested narrow scope of any opportunity to refer questions to the Land Court. For the reasons given earlier, in my view this is an erroneous interpretation of the relevant provisions. While the opportunity afforded by section 81 for access to the Land Court on "any question relating to the application" before the decision is taken may well be unusual, it renders otiose much of the discussion on the sufficiency of the review offered by section 91. An effective curative jurisdiction is required only so far as is necessary to cure a perceived lack of independence at first instance. This potential problem does not arise under part 3, since the decision-making process is not the sole preserve of the executive arm of government. There is ample scope for independent judicial scrutiny of the relevant facts and the likely consequences of a buy out, and also of any countervailing factors, such as the impact on the landowner. It is unnecessary to impose a further requirement along the lines of an inquiry before a reporter. The legislation provides sufficient procedural safeguards and opportunities for judicial control to protect against an arbitrary and unfair exercise of state power. For whatever reason, the appellants chose not to take advantage of these procedures, but that has no bearing on the validity of the legislation.

### **Legal certainty**

[111] The appellants' note of arguments (chapter 10) contains a submission that the concepts of "sustainable development" and "the public interest" are too vague and uncertain to amount to law, and thus the general requirement of legal certainty is thwarted. It is contended that no opponent of a proposed buy out can respond in a meaningful manner when the Ministers' approach to these criteria is unpredictable.

[112] At its broadest, sustainable development has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (Brundtland Commission, 1987). In the planning sphere the concept of sustainable development is well established and, among others, covers the following factors:

- Protection and enhancement of the natural environment and the cultural heritage.
- Promotion of rural development, regeneration and recreational opportunities; and the development of mixed communities.
- The efficient use of land, buildings and infrastructure.

An applicant body is expressly required to address the issue of sustainable development. The owner has an opportunity to respond. In the context of a crofting community buy out there is no good reason to suppose that a landowner will be unable to address sustainability issues in a proper and sufficient manner, nor that they will be beyond the competence and understanding of the Land Court.

[113] As to the public interest test, this is an express requirement of article 1, protocol 1. Where the public interest lies in any particular case will depend upon the precise facts and circumstances. However the underlying aims of parts 2 and 3 of the 2003 Act are not difficult to identify and understand. The public interest test will be addressed by an applicant. The owner has the right to respond. If, in the circumstances of any case, a landowner is surprised and disadvantaged by unexpected reasons given for a consent, this can be

the subject of an appeal under section 91; though it is reasonable to expect that Scottish Ministers will act in a fair and reasonable manner.

[114] There is no good reason to strike down the legislation because a court is being asked to address whether a proposal is in the public interest. The Strasbourg jurisprudence does not insist that all laws must be defined with absolute precision, with no room for judgment, interpretation or discretion.

### **The complaint as to the rules concerning the ballot**

[115] The second question referred to the court (quoted earlier) challenges the legality of the provisions governing the balloting of a crofting community in respect of a proposed buy out. The appellants have various complaints as to the detail of the requirements. It is not necessary to recount them in detail. In summary, it is said that compliance with the rules does not guarantee a fair ballot, for example, the applicants have responsibility for the terms of the question put to the community, and for the conduct of the subsequent ballot. There is a conflict of interest. There is no requirement for proper records, nor for the proper checking of the identity of a voter. The landowner is given no right to canvas the voters, nor to be present at the count. The express requirement that the ballot is conducted in a "fair and reasonable manner" is said to be a wholly inadequate safeguard.

[116] While no doubt a ballot of the crofting community might comply with the rules, yet also be unfair and unreasonable - for the purposes of an attack on the legality of the Act and the Regulations, in my view it is important to note that a ballot can both comply with the specific requirements laid down by the legislative rules and be conducted in a fair and reasonable manner. In other words, compliance with the Act and the Regulations does not involve any necessary invalidity or unfairness, and there is nothing to stop additional measures being identified and carried out should they be necessary or appropriate.

[117] The ballot is not determinative of civil rights etc. It is merely a necessary step in the procedure towards the ultimate decision. It will always be possible to suggest additional procedural requirements, but in my view that does not render the existing framework non-compliant with either article 6 or article 1 protocol 1. It is unrealistic and disproportionate to expect safeguards appropriate to a general election or some equivalent.

[118] Whether a ballot is or is not fair and reasonable will depend upon the particular facts of each case. One cannot look at the statutory scheme and automatically conclude that it will result in unfair/unreasonable ballots. It may or it may not - depending upon the circumstances and the conduct of the particular ballot. Any concerns in this regard can be raised with the Ministers or the Land Court in advance of a decision. The court can be asked to stop a ballot by way of interdict. After a decision, any allegation of significant unfairness in respect of a ballot can be raised with the sheriff under section 91.

[119] The appellants' counsel complained that a crofting community body might set an unfair question. Equally it might set a fair question. In the former case remedies are available. There is no necessary unfairness, nor any fundamental flaw in the rules. In any particular case there is nothing to prevent compliance with the rules of natural justice.

[120] The overriding requirement is that the ballot is conducted in a fair and reasonable manner. The Ministers must be so satisfied. If there is a concern in this regard, it is justiciable under sections 81 and 91. As to the complaint regarding canvassing - there is no prohibition on canvassing/persuasion by the landowner. A landowner is likely to have little difficulty in identifying the relevant constituency.

[121] Similar remarks can be made in respect of the complaint of inequality of arms - which is largely based upon the absence of any express requirement that the landowner is appraised of all the views sent to Scottish Ministers in favour of a buy out. If it is necessary to inform the landowner of any representations in order to give him a reasonable opportunity to make his case, this can be done. In the present case the views of interested parties were forwarded to the landowner for any comment. Once again the statutory framework does not compel a non-compliant procedure. Section 73 gives the landowner a full opportunity to make his case.

## **Disposal**

[122] For the reasons given above, I am of the opinion that both of the questions referred to this court should be answered in the negative.

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[1] "Any definition in the bill would restrict the courts' interpretation of the meaning of sustainable development" (Mr Wilson, Col 1960).

"A legal challenge might arise, but the courts will be in a better position than we are to determine whether a development in a certain locality and circumstances contravenes the principle of sustainable development."  
(Mr Wilson, Col 1964)