A Survey of Rural Law Developments in Scotland in April and May 2011 By Robert Sutherland, Terra Firma Chambers

This article is part of an ongoing series noting developments in a number of subject areas affecting rural legal practice. Due to the Scottish Parliament election there were few developments to report in April so no separate April 2011 article was prepared. This article also notes a number of earlier cases from the Scottish Land Court which have only recently come to the author's attention. The coverage includes several agricultural support payments appeals, crofting cases and a decision of the Information Rights Chamber of the First Tier Tribunal.

Agricultural Holdings

In ***The Governors of Robb's Trust v Edwards*, SLC/159/10, 10 January 2011** an Arbiter asked the Scottish Land Court whether: (1) having been appointed on 24 May 2001 to determine the rent for a farm, was he still entitled to issue an award notwithstanding that the legislative provisions concerning arbitrations (Section 61 and Schedule 7 of the Agricultural Holdings (Scotland) Act 1991) had been repealed, and the basis for the determination of rent (Section 13 of the 1991 Act) had been amended?; (2) notwithstanding that he had formed the view that the rent properly payable should be £11,377, was he restricted to fix the rent with the range of £6,500 (as proposed by the tenant) and £8,700 (as proposed by the landlord). The Court answered both questions in the affirmative.

In ***Trustees under Deed of Trust for Mrs Maxwell-Stuart v Douglas*, SLC/13/05, 3 February 2011** the applicant had served a notice of dissolution of a limited partnership tenant, and the general partner had served a notice under Section 72(6) of the Agricultural Holdings (Scotland) Act 2003 saying that he intended to become the tenant under the lease in his own right. The landlord applied to the Scottish Land Court under Section 72(8) of the 2003 Act for an order Section 72(6) did not apply. During the course of the proceedings the applicant amended the pleadings to argue as an alternative that the notice of dissolution of the limited partnership was invalid as the duration of the tenancy had previously been extended by a formal agreement signed by both parties, but that the termination notice had not taken account of this and had been served against an earlier (incorrect) date. On that basis the applicant argued that the notice of termination of the limited partnership was invalid and of no effect, and therefore the respondent was not entitled to rely on Section 72(6). A hearing was held on the relevancy of the landlord's alternative case. The Court held that the provisions in Section 72(3)(a) of the 2003 Act concerning the purported termination of a tenancy as a consequence of a notice of dissolution of the limited partnership applied only where the notice of dissolution was itself valid and effective. The effect of the Court's decision is that further procedure will be required to determine, amongst other matters, whether or not the duration of the lease had been extended as the landlord had averred.

The Scottish Government's **Consultation on Agricultural Holdings (Amendment) (Scotland) Bill**) closes on **30 June 2011**. The consultation document is available at http://www.scotland.gov.uk/Resource/Doc/346213/0115223.pdf.

Agricultural Support

In ***Sinclair v The Scottish Ministers,* SLC/88/08, 2 February 2011** the Scottish Land Court refused an appeal against a decision to refuse the appellant's application in 2005 for consolidation of payment entitlements out of the National Reserve. The appeal proceeded on the basis that there was an unexplained discrepancy between the extent of a field which was shown as the maximum area eligible for payment entitlements in one column of the form, and a smaller extent which had been written onto the form in another column showing the area to be used as the basis of the claim. It was said that the discrepancy between the two columns and the lack of explanation for this difference amounted to an 'obvious error' which the applicant should have been allowed to amend. The Court held that although there was no explanation of the reason why a smaller area had been entered onto the form as the extent of the area for which entitlement was being claimed, there was no requirement for that difference to be explained on the form and that the difference did not amount to an 'obvious error'.

In ***Oosterhof v The Scottish Ministers,* SLC/69/10, 11 February 2011** a cow was found to be missing when farmers carried out a count of their stock. No further steps were taken to trace the missing animal, nor were the British Cattle Movement Service notified. At a subsequent official inspection some 3 months later a stock count found that one animal was missing, and it was disclosed that an animal had been missing when the farmers had undertaken their own previous count. The farmers appealed against a decision to withhold 3% of all of the farmers support payments for 2009 as a cross-compliance penalty for failing to report the death of a cow within seven days of (presumed) date of death. The Court held that the inspector was entitled to treat the case as one involving a dead animal and that on the facts the inspector was entitled to treat the date of the farmers own stock count as the date of death. The failure to report the death was properly treated as having 'off farm' effects because it meant that the cattle register records were inaccurate. That breach was however 'rectifiable', rather than 'permanent' as the inspector had decided. There was no requirement to provide the farmers with a copy of the control report which the respondents were required to produce for the purposes of Article 48 of Regulation (EC) 796/2004. The fact that the guidance on the application of penalties was revised and applied to inspections carried out before the publication of the revised guidance did not vitiate the decision. The application of a 3% penalty was not in itself disproportionate. The Court expressed some concern about the respondents approach to aspects of the Payment Reduction Matrix, but nonetheless applied the Scottish Payment Reduction Matrix for 1st time Negligent Breaches so as to alter the amount of reduction from 3% to 1%.

In ***Gladwin v The Scottish Ministers,* SLC/81/10, 5 May 2011** the Scottish Ministers had previously accepted that the effects of an Environmentally Sensitive Area scheme on a farmers sheep production meant that in determining reference amounts under for claims under the Sheep Annual Premium Scheme the farmer could use a reference period of 1997-1999 in place of the usual period of 2000-2002. The Ministers decided however that they were required to determine the appropriate reference period separately for each production support scheme which meant that different reference periods applied to different schemes. The farmer said that the 1997-1999 reference period should also be used to determine reference amounts for his claims under the Beef Special Premium Scheme and the Suckler Cow Premium Scheme. The Court held that it was minded to make a determination that separate reference periods are appropriate for each different production based scheme, but that it would delay making a formal order so as to allow parties to consider whether or not the

Court should make a reference to the European Court of Justice. A proof before answer would be required to determine whether or not cattle production in 2002 had been affected by his earlier participation in the ESA scheme.

On 27 April 2011 the Shetlands Islands Broadcasting Company reported that the European Commission is to consider a new inspection regime for support schemes such as Single Farm Payment and Less Favoured Area Support Scheme claimed by crofters and farmers in Shetland.

Animal Health

In ***R (on the application of K and AC Jackson & Son) v Department for the Environment, Food and Rural Affairs*, [2011] EWHC 956 (Admin), J McCombe, 14 April 2011** the department issued a slaughter notice of a pedigree bull which had tested positive for bovine tuberculosis (bTB). Two blood samples taken from the bull had been mixed on site to form one sample. That was contrary to the department's published policy which requested that this should not done because of the risk of contamination of the samples. The court held that public might reasonably expect that an instruction not to mix samples would be observed unless there was good reason to the contrary. The mixing of the samples and the failure to conduct a re-test did not meet the requirements of good administration. A precautionary policy of slaughtering animals which had tested positive was not applicable in the present case as the policy did not address the question of what was to happen if the procedures for carrying out the test had not been followed or the testing processes was flawed. The tests for bTB were of limited sensitivity, which implied that there were several infected animals in the United Kingdom and elsewhere whose conditions had not been detected. That indicated that the consequences of not slaughtering a single animal known to be positive, in the unusual circumstances of the case, had not been shown to be as disastrous as the hyperbole of the department’s submissions suggested. Accordingly the slaughter notice would be quashed.

Crofting

In ***Nevis Estates Limited v Cameron*, SLC/142/99, 1 February 2011** the Scottish Land Court considered both an application by the landlord to resume various parcels of land forming parts of a croft for the general purpose of preserving and regenerating woodland, and the crofting tenant’s application to purchase the whole croft. The tenant’s application was opposed on the ground that this would be substantially detrimental to the interests and sound management of the landlord’s estate. The Court authorised the resumption of the whole woodland and some additional areas (but not all parts that the landlord had sought to resume)

In ***South Uist Estates Limited v Crofters in the common grazings of Snishival*, SLC/113/09, 3 February 2011** the landlords of a crofting estate applied for an order to determine the boundaries of Snishival Common Grazings and the boundaries of a particular croft. The land which was the subject of the application had previously been apportioned by the Crofters Commission, but the applicants did not accept that the land was subject to crofting tenure. The respondent disputed that the Court had the jurisdiction to determine the application. The Court held that the determination of croft and common grazings boundaries fell within the Court’s remit and not that of the Crofters Commission. The Court also applied Rule 38 of the Scottish Land Court Rules 1992 so as to amend the term of the order applied for with a view to identifying the true issue between the parties.

In ***Mackenzie v Crofters Commission*, SLC/80/10, 16 March 2011** there was an appeal by way of stated case against a decision not to make an apportionment of part of the Achiltibuie Common Grazings. The Commission had refused the application, expressly finding that there other areas which would be suitable and adequate for the appellant's crofting purposes. The Court did not accept that any of the grounds of appeal (no proper factual basis; irrelevant considerations; failure to take account of relevant evidence; an unreasonable decision) were well founded and it refused the appeal. Commenting on wider issues, the Court expressed the view that when applications were made for apportionment, the fact of making an application did not create any particular rights for the applicant. Nor did the Crofters Commission have to carry out a fine balancing exercise. They were entitled to exercise a very broad discretion. They were required to take into consideration objections from another shareholder in the common grazings.

Environmental Information

In 2008 a trial crop of oil seed rape had been contaminated by the inclusion of genetically modified seed. The Department for the Environment, Food and Rural Affairs refused to disclose the six digit National Grid reference of the field involved. In ***G.M. Freeze v The Information Commissioner*, EA/2010/0112, 8 March 2011** the Information Rights Chamber of the First Tier Tribunal decided that it was not necessary for the purpose of pursuing a legitimate interest under Condition 6 of Schedule 2 to the Environmental Information Regulations 2004 for that information to be disclosed. It was agreed that the grid reference information amounted to personal data for the purposes of the Data Protection Act, 1998 and that it was 'environmental information' as defined in Regulation 2(1) of the 2004 Regulations. The Tribunal also held that the contamination of the trial seed by the GM seed was not an 'emission'.

Nature Conservation

The **Wildlife and Natural Environment (Scotland) Act 2011** was granted Royal Assent on 7 April 2011. A summary of the main areas affected by the Act were noted in the March Update.

Land Reform

It has been announced that the landlord of the Pairc estate on Lewis, the subject of the first contested buyout attempt by a crofting community under the Land Reform (Scotland) Act 2003, is to appeal the Environment Minister's decision approving the takeover to the sheriff at Stornoway. He is also seeking a judicial review of the legislation itself.

Waste

In ***PF (Hamilton) v* Sharples, Hamilton Sheriff Court, 25 May 2011** a businesswoman was fined £300 for waste offences after she had failed to remove controlled waste from a site in Quarter, near Larkhall, despite being required to do so by an enforcement notice served by SEPA. The site never held a waste management licence, nor any exemption from the requirement to hold one. Despite verbal and written advice and being sent warning letters no action was taken. SEPA officers subsequently hand-delivered an enforcement notice on 10 December 2008, requiring the removal of all the controlled waste on the site by 31 January

2009. The waste included soils, brick, rubble, stone, wood, plastic, metals, glass, paper, cardboard, gas bottles, motor vehicles and oil.