IN THE SCOTTISH LAND COURT

Council:	Argyll & Bute	Record No:	SLC/81/15
Applicant:	Colin N Kennedy		
Respondent:	Martin Edward Smith	Form:	General (Crofter)
Subjects:	Arinagour, Isle of Coll		

Edinburgh 22 June 2016. The Land Court, having heard the applicant and the solicitor for the respondent in debate, under reference to the appended Note, REFUSE the application as incompetent and ALLOW parties to lodge motions and submissions on expenses within 21 days of intimation of this order.

"RODERICK J MACLEOD" "JOHN A SMITH"

Chairman **Member of Court**

Note:

[1] This is an application by Mr Colin Kennedy for the purchase of 19.43 ha of land at Arinagour on the Island of Coll.

[2] The land in question is part of the Arinagour Common Grazings. It was apportioned for the applicant's exclusive use for a period of 15 years from 31st October 2014, being the date of the relevant apportionment order. In the course of the hearing we were told that the apportionment had now been made permanent.

[3] The apportionment was made by the Crofting Commission in respect of grazings shares held by Mr Kennedy in the common grazings. Although Mr Kennedy has a croft in Arinagour, this apportionment has nothing to do with that croft and is not adjacent or contiguous to it. The apportionment was known, in terms of said apportionment order, as "47(10) Grazings Shares in Arinagour Common Grazings". The numbering refers to sec 47(10) of the Crofters (Scotland) Act 1993 ("the 1993 Act" or "the Act"). Having had the land apportioned to him, Mr Kennedy had it registered in the Crofting Register, under that name and registration number C969, on 26 February 2015. The name has now been changed to Pier View, Arinagour. The registration number remains unchanged.

[4] The application is made under sec 12 of the Act and is opposed as incompetent by the landlord respondent, Mr Martin Edward Smith. The nub of the opposition is that the land in question is not "croft land" within the meaning of sec 12(3) of the Act. We heard parties in debate on that proposition at Edinburgh on 26 May 2016 when the applicant represented himself and Mr Brian Inkster, solicitor, appeared for the respondent.

Legislation (all references are to the 1993 Act)

3 Meaning of croft and crofter

(1) Subject to subsection (2) below and to sec 3ZA(2)(a), in this Act "croft" means—

(a) as from 1st October 1955, every holding (whether occupied by a landholder or not) situated in the crofting counties to which any of the provisions of the Small Landholders (Scotland) Acts 1886 to 1931 relating to landholders applied;

(b) as from 1st October 1955, every holding situated as aforesaid to which section 32 of the Small Landholders (Scotland) Act 1911 applied (statutory small tenants);

(c) as from the date of registration, every holding situated as aforesaid which was constituted a croft by the registration of the tenant thereof as a crofter in the Crofters Holdings Book under section 4 of the 1955 Act;

(d) as from the date of the direction, every holding situated as aforesaid which was constituted a croft by a direction of the Secretary of State under section 2(1) of the 1961 Act;

(e) as from the date of entry, every holding entered in the register of crofts by the Commission in accordance with their decision under section 15(4) of the 1955 Act where—

(i) the decision was notified to the landlord and the tenant of the holding; and

(ii) neither the landlord nor the tenant successfully challenged the decision on an application for a declarator as to the status of the tenant made to the Land Court within 2 months of the giving of such notification.

(2) Subsection (1) above is without prejudice to the effect of—

(a) section 24(1) of this Act and the corresponding provision of the 1955 Act which is repealed by this Act (that is to say section 12(4));

(b) a direction under section 24(2) or (3) of this Act and the corresponding provisions of the 1955 Act which are repealed by this Act (that is to say section 16(7) or (9)).

(3) Subject to sec 3ZA(2)(c) in this Act "crofter" means the tenant of a croft.

(4) For the purposes of this Act—

(a) any right in pasture or grazing land held or to be held by the tenant of a croft, whether alone or in common with others, and

(b) any land comprising any part of a common grazing which has been apportioned for the exclusive use of a crofter under section 52(4) of this Act, and,

(c) any land held runrig which has been apportioned under section 52(8) of this Act,

shall be deemed to form part of the croft.

(5) For the purposes of this Act, where—

(a) a crofter has acquired his entire croft other than any such right or land as is referred to in subsection (4) above; or

(b) any person, not being a crofter, has obtained an apportionment of any land under section 52 of this Act,

then the person referred to in paragraph (a) or (b) above shall be deemed to hold the right or land referred to therein in tenancy until held otherwise and that right or land shall be deemed to be a croft.

3ZA Registered crofts

(1) This section applies where a holding situated—

(a) in the crofting counties; or

(b) as is mentioned in section 3A(1)(b),

is registered in the Crofting Register.

(2) For the purposes of this Act—

(a) the holding is, from the date of registration, a croft;

(b) the land which comprises the croft (including any right or land mentioned in section 3(4)) is determined by the description of that land in the registration schedule of the croft; and

(c) from the date of registration, any person for the time being entered in the registration schedule of the croft as the tenant of the croft is a crofter.

(3) Section 3 (other than subsection (2)) does not apply.

(4) Section 3(2) applies to subsection (2)(a) of this section as it applies to subsection (1) of section 3.

(5) Nothing in this section affects whether, before the date of registration, the holding was a croft or any person was the tenant of it.

12 General provision

(1) A crofter may, failing agreement with the landlord as to the acquisition by the crofter of croft land tenanted by him, apply to the Land Court for an order authorising him to make such acquisition.

(2) A crofter shall be entitled to a conveyance of the site of the dwelling-house on or pertaining to the croft tenanted by him, and a cottar shall be entitled to a conveyance of the site of the dwelling-house on or pertaining to his subject, and the crofter or cottar may, failing agreement with the landlord, apply to the Land Court for an order requiring the landlord to grant such a conveyance.

(3) In this Act "croft land" includes any land being part of a croft, other than—

(a) the site of the dwelling-house on or pertaining to the croft;

(b) any land, comprising any part of a common grazing, unless the land has been apportioned under section 52(4) of this Act and—

(i) is adjacent or contiguous to any other part of the croft; or

(ii) consists of arable machair;

(c) any right to mines, metals or minerals or salmon fishings (not being salmon fishings in Orkney or Shetland) pertaining to the croft.

47 Appointment, etc of grazings committee or grazing constable

…. …

(10) For the purposes of the application of this Act to common grazings, any reference therein to a crofter shall include a reference to any person who, not being a crofter, is entitled to share in a common grazing along with crofters.

52 Miscellaneous provisions as to common grazings, as to land held runrig, and as to use by crofters of peat bogs, etc

… …

(4) The Commission may, on the application of any person who holds a right in a common grazing, and after consultation with the grazings committee, apportion a part of the common grazings (including the site of the dwellinghouse of the crofter so applying if situated on the common grazing), other than a part on which the grazings committee have planted trees and which they are using as woodlands under section 48(4) of this Act, for the exclusive use of the applicant.

61 Interpretation

(1) In this Act, unless the context otherwise requires—

… …

"croft" –

(a) in relation to a croft other than one registered in the Crofting Register, has the meaning given by section 3;

(b) in relation to a croft registered in the that register, has the meaning given by section 3ZA(2)(a);

"crofter" –

(a) in relation to a croft other than one registered in the Crofting Register, has the meaning given by section 3;
(b) in relation to a croft registered in that register, has the meaning given by section 3ZA(2)(c);

… …

"croft land" has the meaning assigned to it by section 12(3) of this Act;

Cases

Anderson v Houston	1991 SLCR 11
Bowman v Guthrie	1997 SLCR 40
Brown v Jackson	RN/SLC/100/10 decision 24.11.10
Crofters Commission Reference	2012 SLCR 159
Lamont v Kennedy	2010 SLCR 76
MacArthur v Trustees of the Tenth Duke of Argyll & Ors	2000 SLCR 94
MacDonald v Hilleary	1992 SLCR 51
MacMillan v MacKenzie	1993 SCLR 46
Willemse v French	[2011] CSOH 51

Submissions

For the respondent

[5] Because the debate proceeded on a challenge to the competency of the application, we set out the respondent's submissions first.

[6] In short the respondent's position was that sec 12 permits the purchase by a crofter of land which comprises (or has comprised) part of a common grazings only where (a) it has been apportioned under sec 52(4) of the Act and (b) it is adjacent or contiguous to another part of the applicant's croft or consists of arable machair. No apportionment which was not adjacent or contiguous as aforesaid or was not arable machair could be the subject of an application under sec 12. For that proposition, reference was made to the cases of *MacMillan v MacKenzie* and *Bowman v Guthrie*. *Bowman v Guthrie* had been correctly decided, nothing in subsequent legislative changes altered that and this case mirrored *Bowman.* Neither the registration requirements introduced by the Crofting Reform (Scotland) Act 2010 ("the 2010

Act") nor any other change had amended section 12 and it continued to be the case that it simply made no provision for the purchase of an apportioned area of a common grazing which was not adjacent or contiguous as aforesaid and did not consist of arable machair. That had been recognised as an anomaly in *MacMillan v MacKenzie*, where reference had been made (at page 54) to the possible need for legislative reform. But no such reform had taken place.

[7] This was a "deemed croft" in terms of sec 3(5)(b), as had also been the case in *Bowman.* In that case it had been said (at page 46) that something could not be adjacent to itself. The position here was the same. Nor could it be adjacent to an incorporeal right, such as a grazing right; *MacMillan v MacKenzie* at pages 52-53. That case also recognised (at page 51) that the provisions of sec 1 of the Crofting Reform (Scotland) Act 1976 (the fore-runner of sec 12 of the 1993 Act) did not enable a crofter to acquire his croft as such, only croft *land*.

[8] Mr Inkster referred to *Lamont v Kennedy* at para [32] where it had been said that the effect of a provision that apportioned land was deemed to be a croft meant that "it must be treated as part of the croft *except where there is clear statutory authority for treating it in some different way*" [emphasis added]. That had been followed immediately by the following:

> "[33] One example of a statutory provision which requires apportioned land to be treated differently from other parts of the croft relates to the right to buy. The crofter only has a right to buy land apportioned to him or her if it is adjacent to the rest of the croft. Where there are provisions which expressly or by clear implication limit the scope of a 'deemed' provision we must give effect to them."

[9] With reference to the applicant's anticipated line of argument, whatever the effect of sec 3ZA was it had no bearing on sec 12(3), which remained unamended. We were looking at the right to buy croft *land*, not a croft. The effect of sec 3ZA may have been to convert a deemed croft into a croft but the fact was that it had been an apportionment and it remained an apportionment for the purposes of sec 12(3). Parliament had not intended sec 3ZA as a way of circumventing or circumscribing the exceptions contained in sec 12(3). An apportionment which was not adjacent or contiguous to another part of the croft remained excluded.

For the applicant

[10] Mr Kennedy confirmed that, although originally granted for a 15 year term, his apportionment had now been made permanent. That was shown on the latest registration schedule from the Crofting Register, a copy of which he produced, but he was still awaiting confirmation of the change from the Crofting Commission. Given his position as Convener of the Commission he did not think it right to interfere with the Commission's processes in order to request confirmation of this change in the status of the apportionment for the purposes of today's hearing but he expected to have confirmation imminently.

[11] Mr Kennedy then turned to his substantive submissions. This apportionment had been granted under sec 52(4) of the 1993 Act. That Act had been amended by the 2010 Act, sec 22 of which introduced "Consequential amendments of the 1993 Act". According to the Collins Dictionary, "consequential" meant "as a result of" and "amend" meant "to improve or alter". It introduced sec 3ZA into the 1993 Act. That section referred to a "holding". "Holding" involved land. This section brought clarity as to what was a croft. Were the land with which this application was concerned not registered it would still be a "deemed croft". But by virtue of registration it had become a croft. It met all the requirements of sec 3ZA,

[12] It was important to realise that this apportionment had its origins in sec 47(10) of the Act and that it was a sec 3(5)(b) case rather than a sec 3(4) one. Section 47(10) provided that, in relation to common grazings, any reference to a crofter included a reference to any person who, though not a crofter, was entitled to share in a common grazing along with crofters. He was such a person. His grazing rights had never been attached to a croft. As such a person he had obtained an apportionment under sec 52(4). At that point, therefore, he had become a person, not being a crofter, who had obtained an apportionment under sec 52 and, therefore, the tenant of a deemed croft in terms of sec 3(5)(b) of the Act. That deemed croft had become a croft by virtue of sec 3ZA.

[13] The legislation on which *MacMillan* and *Bowman* had been decided had been superseded. He was making no submission as to whether or not these cases had been correctly decided; that didn't matter because the law had changed. Registration now turned a deemed croft into a croft. But even if matters had never progressed beyond the "deemed croft" stage, his argument should succeed because the deeming provision superseded all

other definitions. Giving the deeming provision its full and proper effect would allow for the purchase of the croft. That it was deemed to be a croft meant that it had to be treated as held in tenancy for all relevant purposes arising out of the Act; *Lamont v Kennedy.* Helpful guidance on the effect of a deeming provision had also been given in the *Crofters Commission Reference* ("*The Reference*") where the Court had said that had *MacMillan* and *Bowman* been decided after the 2010 reforms and after the status of "deemed croft" had been fully analysed by the Court in *The Reference*, they would have been decided differently.

[14] Be all of that as it may, we now had certainty by virtue of the registration provisions. A registered croft was "beyond reproach". Apportionment followed by registration converted the grazing right into a proprietary right: it was no longer a pertinent of an in-bye croft, it was a croft in its own right and the tenant became the tenant of the person who owned the common grazings. It was incumbent on these parties then to enter into a landlord and tenant relationship.

[15] Turning to the provisions of sec 12, the area in question here was clearly a croft (by virtue of registration as aforesaid) and the tenant was entitled to apply to the Court for authority to acquire the croft land tenanted by him. This case was fairly and squarely within sec 12(1)

[16] Turning to sec 12(3), Mr Kennedy said he had no concluded view as to what purpose was behind it. There was a time when it had been thought that a grazing right could not be bought along with the rest of a croft but *The Reference* had decided it could. It would be very odd, therefore, if you could buy the right but you couldn't buy an apportionment based on that right. To be able to buy the right but not the apportionment was an absurd result. It had been thought (for example, in *MacMillan v MacKenzie*) that the reason behind sec 12(3) was to prevent a patchwork of apportionments being bought within a common grazing, thereby fragmenting it. But the same result could be achieved by the Commission being careful as to where it granted apportionments.

[17] If the tenant of a croft comprising an apportionment could not buy it he could not become an owner occupier crofter in terms of sec 19B of the Act. In a sec 3(4)(b) situation and where the apportionment was not adjacent or contiguous with the rest of the croft this

would mean that the tenant could not become an owner occupier crofter even if he bought his in-bye land because it was a requirement of sec 19B(2) that he must be the owner of "a croft", that is to say, a whole croft. That, in turn, could lead to the croft being regarded as vacant and bring the provisions of sec 23 into play. Parliament could not have intended to exclude the tenant of apportioned land which was not adjacent or contiguous to another part of the croft to be excluded from owner occupier crofter status. Instead the position was that such a tenant could buy his whole croft, including the apportionment, and thereby free himself of the risks of sec 23.

[18] On apportionment the rights a crofter had against his original landlord (the landlord of the croft, as distinct from the land owner of the common grazings) were converted into proprietary rights such that a landlord and tenant relationship was created between the owner of the common grazings and the crofter. What you then had was a croft and not a pertinent of a croft.

[19] Mr Kennedy repeatedly emphasised that it was sec 3ZA that governed the position. That was his "overwhelming submission". In terms of the Crofting Register the holding with which we were concerned was a croft and one could not go beyond the Crofting Register any more than one could go behind the Land Register, something Lord Tyre had warned against in *Willemse v French*. That would be to undermine, overturn and defeat the purpose of the Register.

[20] Mr Kennedy then took us through a number of passages from *The Reference* for the following additional propositions:

(i) para [21] – that sec 3(5) constituted the rights and land to which it referred as new independent crofts.

(ii) para [23] – that a grazing share which has not been purchased along with the rest of the croft is to be treated as a separate, independent croft.

(iii) para [24] – that the intention of Parliament, when enacting the Crofting Reform Act 1976, had been to treat the share or land referred to in sec 3(5) as a croft in its own right.

(iv) para [26] – that, pursuant on that intention, grazing shares in tenancy had to be treated as crofts as far as it was possible to do so without absurd results;

(v) para [29] - that Parliament had intended an apportioned area to be capable of purchase on its own.

(vi) para [37] – that the express deeming provision of sec 3(5) does not necessarily mean that where reference is made, elsewhere in the Act, to a part of a croft that part is not to be treated as a croft.

(vii) para [38] – that the Act allows for new crofts to be created by way of apportionment but it is not necessary that an independent grazing share has the label "croft" before it can be regarded as subject to the controlling and regulatory provisions of the Act.

(viii) para [47] – that Parliament may have taken the view that a grazing share, once detached from the in-bye croft, was to be treated as the equivalent of a share in a tenancy of the common grazings.

(ix) para [51] – that when grazing rights have been the subject of apportionment, the effect is to convert them into full crofting rights.

(x) para [53] – that the owner of land over which a crofter has rights pertaining to his croft can be compelled to grant a title to the crofter.

(xi) para [54] – that apportionments, having been created by Act of Parliament, it has been possible, by and large, to give effect to the supposed intention of Parliament because there are full statutory provisions dealing with them, including, it was submitted, the right-to-buy provisions.

(xii) para [58] – that although the issue of construction of sec 12(3)(b) had never arisen sharply for construction before, it could not, on any view of the matter, be said that the provision expressly excludes grazing rights.

(xiii) para [59] – that in sec 12(3) the draftsman had required to use a word other than "croft" because that was defined in terms of a holding in sec 3, so he had

used "croft land" and "land", as a matter of statutory interpretation, could include rights which run with the land.

(xiv) para [60] – that unless there was something in the context of sec 12 to exclude it, the foregoing definition of land must apply. Far from excluding it, sec 12 entitled the crofter to seek to acquire the "croft land tenanted by him". "Croft land" meant "any land being part of a croft" and by virtue of sec 3(4) grazing rights were plainly part of the croft to which they attached and therefore the crofter was entitled to seek to acquire them.

(xv) para [61] – that, as to whether grazing rights came within the exception of "any land, comprising any part of a common grazing", "land" would again require to be read as including rights in or over land.

(xvi) para [63] – that, since a crofter was very clearly given the right to buy his apportionment, it was not easy to see what policy would prevent him from buying his grazing rights.

(xvii) para [64] – that the fact that it may be impossible, in conveyancing terms, to acquire title to a grazing share on its own (and not as a pertinent of a croft) did not prove that Parliament had not intended that crofters could buy their grazing shares.

[21] Against that background it was Mr Kennedy's submission that Parliament had intended that a crofter be able to buy his apportionment. At all events, someone who, like himself, had acquired the grazing rights in respect of which an apportionment had been granted other than as part of a croft tenancy, and, therefore, came within sec 3(5)(b) rather than sec 3(4)(b) was entitled to buy his apportionment. That was because sec 12(3)(b) only applied to apportionments covered by sec 3(4)(b). It could not possibly apply to sec 3(5)(b) because there was no other part of the croft to which such an apportionment could be adjacent or contiguous. The court pointed out that on this interpretation the only crofters who would not be able to buy their apportionments would be crofters whose apportionments formed part of their crofts but were not adjacent or contiguous to any other

part of the croft. Was that not a curious result? In Mr Kennedy's submission the answer was for those crofters to have their apportionments registered in the Crofting Register, at which point they would become crofts in their own right and sec 12(3) would no longer apply.

[22] Although not part of his substantive argument, Mr Kennedy submitted that his approach would provide a very nice remedy for the situation where a crofter had erroneously carried out some development on land which was part of a common grazing. The crofter could first obtain an apportionment of that land, then acquire title to it and then resume the area of the development.

[23] Returning to the main thrust of his submissions, *MacMillan* and *Bowman* were out of line; cases before (*MacDonald v Hilleary*) and after (*Lamont* and *The Reference*) were to the opposite effect. It also had to be remembered that *Bowman* had started life as a sec 3(4) situation, so could not be relied upon as an authority for today's purposes. In any event sec 3ZA trumped everything else.

[24] *Lamont* supported the following propositions:

(i) para [32] – that a crofter could buy the whole bundle of rights associated with ownership or tenancy.

(ii) para [33] – that the effect of a deeming provision could not be lightly disregarded.

(iii) para [34] – that when land was apportioned to someone who had no croft, the effect of the statutory provisions was to make him tenant of the apportioned land and to make that land a croft. (It should be noted that what the Court was doing at this point was describing what had been said in *MacMillan v MacKenzie*.)

(iv) para [38] – that land could not be part of a croft and simultaneously part of a common grazings. In the present case we were dealing not with part of a croft but with a croft. When the land was apportioned its owner must become the landlord.

(v) para [38] – that there was a distinction between sec 3(4) and sec 3(5) and that the Court had recognised *Bowman* as a sec 3(4)(b) case.

(vi) para [50] – that, where there was a conflict between the right to buy provisions and other provisions, the right to buy provisions must prevail.

[25] Reference was then made to *Brown v Jackson* and *MacArthur v Trustees of the Duke of Argyll.* In the former the Court had terminated the tenancy of a deemed croft, thereby treating it the same as any other croft. In the latter the Court had expressly held that an apportionment was a croft in terms of the 1993 Act, not just a deemed croft.

[26] Reference was then made to the misunderstanding there had been at the time of *The Reference* as to the wording with which sec 12(3) of the Act had in fact been enacted. It is referred to at para [64] of *The Reference*. It was thought that the subsection as enacted had included a para (ii) reading "comprises the whole croft, other than any right in pasture or grazing which has not been so apportioned" and that the reference to arable machair should be numbered (iii). As the Court observed at para [64] this additional sub-paragraph would almost certainly have led to *Bowman v Guthrie* being decided differently. However, it soon afterwards became clear that this additional provision had not in fact been enacted. An error slip accompanies the online version of the Act on the government's legislation website although what it says is, in effect, that there is no error in the printed version. Accordingly the wording quoted above is the wording of the provision as enacted.

[27] In Mr Kennedy's submission the reason this provision had been removed from the Bill before enactment was that it had been realised that there was no need for it. It had been realised that the deeming provision of sec 3(5) was wide enough to cover this situation. There was therefore no need to go any further. The use of the words "until held otherwise" in sec 3(5) showed that Parliament had realised that the provisions of sec 12 applied to deemed crofts. Once bought under sec 12 the deemed tenancy would be terminated.

[28] The registration provisions introduced since *MacMillan v MacKenzie* was decided were now definitive as to what land comprised the croft, who was tenant and who was landlord. Registration of the croft in this case had survived the nine month appeal period without

challenge. It could not be doubted, therefore, that the land was a croft. The land which was the subject of the application fell "fair and square" within the provisions of sec 12(1). Section 12(3)(b) did not apply to it. Whatever proportion of the grazing rights were converted into apportionment – whether 1% or 100% - the apportionment was deemed to be a croft in its own right and, as such, it could not be adjacent or contiguous to any another part of itself. Whatever doubts there may have been about these matters in the past they were now resolved by the registration effects of sec 3ZA.

[29] It was also the case that if a deemed croft was to be treated differently from a conventional croft in the Crofting Register that would be discriminatory and potentially contrary to Article 14 of the European Convention on Human Rights. Section 3 of the Human Rights Act 1998 provided that legislation had to be read in such a way as to respect human rights. Reference was made to *Clift v UK*.

[30] Finally, if the Court was minded to grant the application it should order that title be granted in the space of six to eight weeks; *Anderson v Houston*. Mr Kennedy said that he had suffered long delays in getting a title in a previous case in this court and eight weeks was a reasonable period for the conclusion of the necessary formalities.

Mr Inkster in response

[31] Mr Inkster began by commenting on the question whether the apportionment was temporary or permanent. His firm had been in correspondence with the Crofting Commission on 23 February 2016 suggesting that the apportionment should not be made permanent and today was the first he had heard to the effect that that had happened.

[32] Turning to the main issue in the case, Mr Kennedy had said that a deemed croft fitted fairly and squarely within sec 12(1) of the Act. But subsec (1) did not stand alone. It had to be read along with subsec (3). Mr Kennedy had suggested that registration in the Crofting Register was the cure to the problem identified in *Bowman v Guthrie* but it was not. If that had been the intention of Parliament subsec (3) would have been amended by the 2010 Act but it had not been.

[33] An apportionment remained an apportionment notwithstanding registration. The fact that it was an apportionment was recorded in the entry in the Register.

[34] The purpose of subsec (3) had been identified in *Bowman v Guthrie*. It had been to avoid a patchwork of land in different ownership being created within a common grazings. The right to buy was confined to land near existing in-bye croft land. That underlying purpose remained valid today.

[35] Mr Kennedy had been wrong to suggest that the Court in *The Reference* had decided that it was competent, under sec 12, to buy the grazing right along with the croft. In practice it sometimes did happen, by agreement, but in the majority of cases the share was not bought along with the in-bye croft land, with the result there were two crofts: the in-bye croft held in owner-occupancy and the deemed croft comprising the grazing share, held in tenancy. It had not yet been decided that a grazing share was included within what a crofter was entitled to apply to the Court for authorisation to acquire in terms of sec 12, so it was not true to say that one could buy the grazing share but not an apportionment.

[36] The definition of "croft" in sec 61 was not in point for present purposes: what mattered was the definition of the croft land which could be purchased in sec 12(3).

[37] Lord Tyre's judgement in *Willemse* had to do with the Land Register and predated the Land Registration etc (Scotland) Act 2012. In the state of the law pertaining to the Land Register at that time the Keeper had what was called the "Midas touch", so that entries in the Land Register were conclusive. It was also the case that not all the rights one (a conveyancer) needed to look at were recorded in the Land Register. One sometimes had to look at ancillary documentation. So it was sometimes the case that one had to go beyond the terms of a Land Certificate. So far as the Crofting Register was concerned, it did not record all rights pertaining to crofts. For instance, grazing shares which had not become deemed crofts (in other words shares still attached to conventional crofts) did not appear in the Register. To find out about them one had to go to the Register of Crofts kept by the Crofting Commission.

[38] Although para 29 of *The Reference* said that it was clear that there was an intention that an apportioned area was to be capable of purchase on its own, that passage did not consider the terms of sec 12(3) and the position was a good deal more complex than could be summarised in a single sentence.

[39] Mr Kennedy had suggested that without being able to buy one's whole croft a crofter could not become an owner occupier crofter under sec 19B. That was not so: one could become the owner occupier crofter of the croft and remain tenant of the deemed croft comprising the grazing shares.

[40] As for apportionment followed by purchase followed by resumption being a mechanism for regularising erroneous development onto common grazing, that was unnecessary. The same end could be achieved simply by purchase of the land in question from the owner followed by resumption. (Or, more typically in our experience, resumption by the landowner followed by a sale.)

[41] There was likewise no substance in Mr Kennedy's ECHR point. The Crofting Register identified crofts which were apportionments as apportionments so it was not a case of making distinctions between people who were entitled to be treated the same. In so far as crofts created as a result of apportionment were treated differently from other crofts, there were reasons for that: the difference in treatment was justifiable.

Mr Kennedy in response

[42] Mr Kennedy made reference to the process involved in registering an apportionment in the Crofting Register. His apportionment had been granted with conditions. The requirement to register the apportionment in the Crofting Register was a fundamental requirement. The registration process itself involved a sequence of events including intimation to the land owner and neighbours, notices in the press and in prominent places and so on. Had there been any question of the land not being a croft it would have come to light in the course of that process. When the registration certificate had been issued, on 26 February 2016, it described the land as a permanent apportionment. He had not thought it his place to try to change that. The application for registration had been made by the

Commission (the Commission being responsible for registrations affecting common grazings). They had reviewed matters once he had satisfied the conditions on which the apportionment had been granted and had made it permanent. But the content of the Register itself was sufficient to show conclusively that the apportionment was permanent.

[43] There was a distinction between the way in which a croft which was an apportionment under sec 3(4)(b), on the one hand, and an apportionment under sec 3(5), on the other, were shown in the Register. The former were shown separately from the crofts to which they pertained; the latter were shown edged in red as crofts in their own right. But it was not the case that there were two different types of croft on the Register, crofts which had been apportionments and crofts which had not. Inclusion in the Register made them the same. They were all crofts. The ECHR point therefore had merit: people in the same situation (tenants of crofts) were being treated differently and for no good reason.

[44] The Crofting Register may not have fixed all ills but it had, in Mr Kennedy's submission, gone a good way to providing certainty and clarity in a number of areas and one of those was as to what a crofter was entitled to buy. Returning to sec 12, the starting point was that it dealt with a tenanted croft and a landlord. But there could also be a third party, where the land comprising the apportionment was in different ownership from the in-bye croft. The registration schedule brought clarity as to what the tenant was entitled to purchase and he was entitled to purchase a registered apportionment regardless of the fact that it was in different ownership from the rest of the croft.

[45] Mr Kennedy adhered to points he had made earlier; in particular his submission that the Court had, in the *Reference*, decided that a crofter was entitled to purchase grazings shares, that a tenant who had not bought his whole croft could not become an owner occupier crofter and that apportionment followed by acquisition and resumption was a mechanism for regularising the position where a development by a shareholder had encroached on the common grazing.

[46] He summarised his position again: apportionment required registration, what was registered was a croft, registration determined the extent and status of that croft, including the extent of the croft land tenanted by the crofter under sec 12(1), and was conclusive of the

matter in the same way as an entry in the Land Register had been held to be conclusive by Lord Tyre. How, he asked, could land be within a croft and yet not be croft land?

Mr Inkster again

[47] In a brief final contribution Mr Inkster made two points. First, as to whether the apportionment in this case had been made permanent, he flagged up that if the case went any further it would be important to have the correct position established. Secondly, sec 3ZA(5) provided that nothing in that section was to affect whether, before the date of registration, the holding was a croft or any person was the tenant of it. So registration did not change the history and subsec (5) invited one to look behind the registration certificate.

DECISION

[48] Mr Kennedy's argument was ingenious and not without a certain logic. But the problem it cannot evade and fails to deal with satisfactorily is the terms of sec 12(3) of the Act, which remain unamended by the 2010 Act. As has been seen, the submissions here were fairly wide-ranging and touched on several other aspects of crofting law. But the central questions are, (a) whether the introduction of the Crofting Register has changed the law in this area and (b) if it has not, whether *MacMillan v MacKenzie* and *Bowman v Guthrie* were correctly decided, given the fuller discussion of deemed crofts in *The Reference* and *Lamont v Kennedy*.

[49] Mr Kennedy is absolutely right to say that certainty and clarity are a large part of the purpose of the Crofting Register. One might even say that that is the whole point of having an official, map-based, government-backed register. But the uncertainties aimed at are uncertainties as to croft boundaries, who is landlord and who is tenant. Croft boundaries are often very imprecise and a significant amount of this Court's work has to do with boundary disputes. The Register of Crofts, which the Crofting Commission has been obliged to maintain since 1955, is not map based and has frequently been found to be in error as to croft acreages. It is, we think, fairly clear that one of the purposes of the new Register was to bring these uncertainties to an end. But we are not aware of any suggestion that it was part of the policy behind the 2010 Act to change the law on croft purchase.

Accordingly nothing in sec 3ZA nor in the provisions of the 2010 Act itself purports to change sec 12. It remains unchanged.

[50] Given the absence of an express pointer in that direction, Mr Kennedy had to argue that it was a matter of logical inference that the scope of sec 12 had been changed. If the Crofting Register is conclusive as to the land which comprises a registered croft, which it is in terms of sec 3ZA(2)(b) of the Act, that must be true for the purposes of sec 12(1) as it is for any other purpose, sec 12(1) referring, as it does, to "the acquisition by the crofter of croft land tenanted by him". That is true and but for subsec (3) would be the end of the matter.

[51] But there is a subsection (3) and it imports into sec 12 its own definition of "croft land" or, at any rate, qualifies what would otherwise be included in that term. It makes no reference to sec 3ZA or to any effect of registration. It reads as it read before sec 3ZA was enacted. It is clear, therefore, that Parliament intended the same exclusions to continue to apply under the new registration regime. Accordingly we reject any notion that the 2010 Act impliedly amended sec 12(3) and it certainly does not do so expressly. Accordingly Mr Kennedy's argument fails in so far as based on the new registration provisions.

[52] That leaves the question whether *MacMillan v MacKenzie* was correctly decided. We refer to that case particularly because, as Mr Kennedy pointed out, *Bowman v Guthrie* was a case in which the apportionment arose from grazing rights which were pertinents of a croft: it was a sec 3(4) case rather than a sec 3(5) one. Mr Kennedy's remaining argument is, to a large extent, based on that distinction.

[53] Although he said relatively little about it, Mr Kennedy did not ignore sec 12(3). It obviously means something and in Mr Kennedy's submission it is limited, on its terms, to apportionments under sec 3(4)(b). He says "on its terms" because it speaks of the apportionment being adjacent and contiguous to "any other part of the croft". We agree with Mr Kennedy that it is clearly a sec 3(4)(b) situation which is being contemplated here. It cannot apply to sec 3(5)(b) because, in that situation, there is no other part of the croft to which the apportionment can be adjacent or contiguous.

[54] Where does that leave sec 3(5) cases? There are two possibilities. One – the one Mr Kennedy favours – is that these are free-standing crofts comprising croft land within the meaning of sec 12(1) which evade the scope of the exclusion altogether and which unquestionably come within the right to buy. The other is that sec 3(5) apportionments are excluded altogether and can never be the subject of an application for authority to acquire to this court under sec 12(1).

[55] We have no doubt that the latter interpretation is correct. That is, firstly and primarily, because of the words "any land comprising any part of a common grazing". These words clearly have the effect of excluding land forming part of a common grazings from the right to buy. That exclusion is then qualified. In order to be included in the definition of croft land the land must have been apportioned under sec 52(4) of the Act and must be adjacent or contiguous to another part of the croft. That can only mean the croft to which the apportionment pertains (as a result of having been granted in respect of grazing shares pertaining to that croft). So, as a straightforward matter of interpretation, the qualification on the exclusion contained in subsec (3) does not include free-standing apportionments.

[56] Secondly, given that the intention of the subsection was evidently to exclude common grazings from the right to buy, subject to limited exceptions for apportionments close to in-bye croft land, it would make a nonsense of that intention if the acquisition of free-standing apportionments was allowed wherever they may be on the common grazings. In *MacMillan v MacKenzie* the purpose behind the exclusion was identified as being to avoid "[t]he haphazard fragmentation of ownership [which] might render the management of common grazing land difficult" (page 52). No one has suggested that to be wrong nor any alternative rationale. We respectfully agree with the court in *MacMillan v MacKenzie* on that point, as well as on their substantive decision.

[57] Thirdly, in *MacMillan* the court noted (at page 53) that "the purpose of the subsection would not necessarily be frustrated by allowing a crofter who had no other land, and whose apportionment was at the periphery of the common grazings, to acquire his apportionment". It was therefore arguable that Parliament had merely overlooked the situation of the apportionment holder with no other croft land. It went on to say (at page 54)

that "there may be a case for future legislative change in order to place a tenant of an apportionment who has no other croft land, in the same position, as regards the right to acquire, as the tenant of an apportionment who also has other croft land". *MacMillan* was decided in 1994, since which time there have been two major reforms of crofting law, as well as more minor ones. None has included amendment of sec 12(3).

[58] Fourthly, the position for which Mr Kennedy argues would produce an absurd and unfair result in that it would mean that holders of free-standing apportionments could acquire their land wherever it was on the common grazing whereas those whose apportionments derived from shares attached to their crofts could only buy if their apportionments were adjacent or contiguous as aforesaid. We do not believe Parliament could have intended such a result. As to Mr Kennedy's suggestion that the solution to that problem – by way of the simple act of registering the apportionment so that it became a croft in its own right for all purposes – had been provided in the 2010 Act, that would be the Scottish Parliament subverting the intention behind sec 12(3). In our view, if it intended to change the effect of sec 12(3), it is likely to have taken a much more direct approach than Mr Kennedy suggests it has.

[59] There remains to be dealt with the argument that something said or done in either *The Reference* or *Lamont* has changed the law as decided in *MacMillan* and *Bowman*. Having re-read the numerous passages in these two decisions to which we were referred, we can find nothing in them to that effect. Many of the passages referred to emphasise the need to give the "deeming" provisions in secs 3(4) and 3(5) their full effect. But even there the Court realised that there were limits; for example, absurdity (at para [26] of *The Reference*) and clear statutory provision to different effect (para [32] of *Lamont*). Although some of the *dicta* in *MacMillan* was said to be misleading in *Lamont* (at paras [34] and [35]), it was not said that the decision itself was wrong. It had already been held to be correct in *Bowman.* Mr Kennedy sought to distinguish *Bowman* on the basis that it was a sec 3(4) case but (a) no significance was attached to that as a distinction between *Bowman* and *MacMillan* in the *Bowman* case and (b) it leaves Mr Kennedy with the problem of *MacMillan.* The case of *MacArthur v The Trustees of the Tenth Duke of Argyll* does not avail him. All it decided which is of any relevance to the present case was that the effect of sec 3(5) was "to allow persons

entitled to share grazings with crofters to apply for apportionment and that such apportionment is to be treated as a croft" (page 113). It was not concerned with sec 12 and did not, therefore, have to consider the terms of sec 12(3).

[60] On the whole matter, therefore, we consider that nothing said or done in *The Reference* or *Lamont* changes the law as decided in *MacMillan* and *Bowman*.

[61] Before departing from this case we should correct a misconception as to whether the Court in *The Reference* decided the question whether a grazings share came within the definition of croft land in secs 12 and 13 of the Act and was, therefore, something in respect of which the tenant could apply to this court for authority to acquire. Mr Kennedy seemed to think it had decided that point and in the affirmative. It certainly discussed the matter at some length but, at page 182, in answer to question 2(b), it declined to answer it on the basis that it was not a matter on which the Commission needed an answer and that a decision was best left for argument in the context of a real case where the court would have the benefit of full submissions from interested parties.

[62] The application is refused as incompetent.

Expenses

[63] Following our customary practice, we have allowed 21 days for written motions and submissions on expenses.