

New guidance for Development Schemes and Removal Applications in crofting areas



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Two recent decisions by the Scottish Land Court (“SLC”) provide guidance on two distinct areas of crofting law: objections to development schemes and grounds for applications for the removal of a crofter. These cases are of interest to developers seeking to work in crofting areas and to landowners respectively.

In *Coigach Wind Power Limited v Achiltibuie Common Grazings Shareholders & Others*, the SLC found that “interested persons”, for the purpose of objecting to a development scheme application on an area of common grazing, are “member[s] of the crofting community in the area affected by the development”.

In *Thrumster Estate Ltd v Mindt*, the SLC found that the discharge of a formerly insolvent crofter was not decisive to the outcome of an application by the landlord to remove them on the basis of their insolvency. Instead, it was a factor for the SLC to consider in the exercise of its discretion.

Coigach

Background

In Coigach, a number of shareholders of the common grazing and crofters living within the area of the proposed development objected to an application by Coigach to develop some common grazing land by erecting one wind turbine. However, before the substance of the application could be heard by the SLC, the question of whether these individuals were permitted to object under the Crofters (Scotland) Act 1993 (“the 1993 Act”) arose. Section 19A(7)(b) of the 1993 Act provides that “the [Crofting] Commission or any other interested party” may submit written objections to an application to the SLC for approval of a development scheme. The first question was therefore: who is an “interested party”? Only then could the court look at whether the grounds of objection used, set out under s19A(8), by the objectors were satisfied.

SLC Decision

The SLC found that the meaning of “any other interested party” was broader than only those with rights in crofting or common grazing land over which the application

is being made. However, it did not extend as wide as “public interest”, since that is covered in the planning process. Instead, the SLC concluded that an “interested person” is a “member of the crofting community in the area affected by the development”.

The SLC then went on to consider the substance of Coigach’s application, which was approved despite the objections. It was found that the application was for a reasonable purpose and the objectors had failed to produce substantive evidence that the development would have significant adverse consequences for them or that those consequences would be disproportionately greater for them than for other “interested parties”.

Analysis

This decision helps clarify who may competently submit objections to an application to the SLC for a development scheme on common grazing land. It also confirms that the onus is on the competent objector to provide evidence in respect of their claims and not make speculative claims, for those will not satisfy the SLC that the legal grounds for objection have been met.



Thrumster

Background

Thrumster, a landowner, applied to the SLC for an order for removal of a Crofting tenant. The basis for the application was that the crofter had breached one of the statutory conditions ("SC") listed in Schedule 2 of the 1993 Act. Any breach of an SC constitutes a ground for seeking removal of the tenant. The condition relevant to this case, SC10, provides that the "crofter shall not do any act whereby he [or she] becomes apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 1985". The issue of the crofter's insolvency having occurred was not in dispute. The question was whether the fact that the crofter had been discharged from the insolvency affected the relevancy of an application for removal based on SC10. The landowner relied on a previous decision (*Culfargie Estates Ltd v Leslie* 1957 SLCR 38) to argue that insolvency was an "irremediable breach" and so the discharge was irrelevant and removal should be permitted. The crofter submitted that all breaches of SCs were remediable and that where the tenant was no longer apparently insolvent when the case became before the SLC for a decision, the application for removal ought to be dismissed.

SLC Decision

The SLC found that even where there had been a breach of SC10, granting or rejecting the application remains at the discretion of the SLC. The SLC found that, where the

insolvency continues, the tenant would have to provide compelling reasons to oppose the order but this burden does not apply when the insolvency has been discharged. A breach of SC10 was, as the crofter contended, remediable. Having decided this legal point, the SLC decided to send the case to proof (a hearing on the evidence) so that it could hear evidence as to whether to grant the order for removal in this case.

Analysis

This is an interesting case, but the SLC decision cannot be said to be unexpected given the wording of the 1993 Act. Section 26 indicates that the granting of an order for removal is not automatic even when one of the SCs has been breached. For SC10, this applies whether or not the insolvency is still in existence. However, the SLC did confirm that the discharge of insolvency does not automatically free a Crofter from the possibility of being removed. This is because SC10 strikes at "the occurrence of an act that leads to apparent insolvency" and such an act still occurred in this case. All of the circumstances of the case will usually be considered, with discharge from insolvency one of the factors to be weighed up in the exercise of the SLC's discretion.

For further information or advice on any of the issues discussed in this briefing note, please get in touch with your usual Shepherd and Wedderburn contact.