

**MESSRS STRONACHS
SOLICITORS
34 ALBYN PLACE
ABERDEEN
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21st September 2005

Your ref: DCC.CS.HIG43.181

Dear Sirs,

**HIGHLANDS AND ISLANDS ENTERPRISE
INTERPOSED LEASES AND CROFTING
OPINION**

I refer to your letter of instruction. I have had an opportunity to examine matters and enclose my opinion in this letter.

1. Matter at Issue

- 1.1.** You act on behalf of Highlands and Islands Enterprise (“HIE”). HIE are currently considering assisting various crofting community bodies which have been formed with a view to purchase land in terms of **Land Reform (Scotland) Act 2003, asp. 2, (“2003 Act”), Part 3.** This legislation allows crofting community bodies to purchase eligible croft land.
- 1.2.** It has become apparent that in a number of cases the owner of the relevant land has formed a company (“the Estate Company”) and the owner has then granted a lease in favour of the Estate Company. In some cases the Estate Company has granted a further lease to a wind farm operator. There is some doubt as to the validity of these leases and it is to this matter that this opinion relates.
- 1.3.** Despite its very laudable purposes and the very efficient and pragmatic administration by the Crofters Commission, the crofting

legislation is not a model of clarity. It unfortunately suffers from occasional bad drafting. In some parts the principles of land law otherwise applicable throughout Scotland are deliberately altered for good reason but in other places the legislation proceeds almost in a vacuum and basic principles of law are simply ignored. The upshot is that practitioners of law and crofters generally are sometimes left to cobble together a coherent code from statutory hints and suggestions supplemented by reported decisions. Such an occasion arises in the present case. The result is that the answer to your enquiry is far more complex than you might have initially supposed.

1.4. Let us first of all try to distil some principles because these principles fill the gap when the detailed rules in the statute fall short. I must add that I am aware that this matter is a novel one and I am not aware that the Crofters Commission has ever had to consider the terms of **Crofters (Scotland) Act 1993 Act, (“1993 Act”), ss.23(3) and 52(4)** in such a context. My approach is therefore conservative as regards the validity of the leases. Put another way, I have doubts as to their validity.

1.5. Three basic points may be made:-

- (a) Where the leases in question affect land already subject to a crofting lease these leases will require to be interposed leases in terms of **Land Tenure Reform (Scotland) Act 1974 c.38, (“1974 Act”), Part III, s. 17.** Simply stated, a croft is a lease (the relevant parties being a landlord and a tenant: **1993 Act, s.61(1)**) and the principles of leases apply generally to crofts unless dis-applied or varied by statute. (**MacDonald v Dalgleish (1894) 21R. 900; Sutherland v Sutherland 1986 SLT (Land Ct.) 22.**)
- (b) Where the leases in question affect common grazings the weight of authority is to the effect that a right in un-apportioned common grazings is not a “real right of tenancy” but is another form of “incorporeal right”. (**Ross v Graesser 1962 SC 66 per Lord President Clyde at 74 and per Lord Sorn at 76; Hilleary v MacAskill and Another, Land Court, Application RN SLC/126/03, Order of 27th July 2004.**) Consequently this land is not tenanted and the leases noted above are not interposed leases. They are simply leases and sub-leases as the case may be. However, this analysis leaves us with a mystery as to whether such unapportioned grazings could be regarded as “vacant crofts” in any

sense and in particular the sense used in the headnote to **1993 Act, s.23.**

(c) After an apportionment of common grazings it appears that the land apportioned becomes subject to the crofting lease of the crofter to which the land has been apportioned and may be used for “exclusive use”. This imports more than just grazing. (See **Guthrie v Bowman (No.1) 1998 SLT (Land Ct) 5**). Possible, albeit hardly convincing, support of this contention lies in a comparison of the wording used in **1993 Act, s.3(4)(a)** referring to “any right in pasture or grazing land... in common with others” with the wording in **1993 Act, s.3(4)(b)** which refers to “any land comprising any part of a common grazing which has been apportioned for the exclusive use of a crofter...”. (See **Crofters Commission v Arran Ltd 1996 SLCR 103 at 129**). Unconvincing though this distinction is, I accept that it is the best we have to go on and I use it in this opinion.

1.6. I have seen copies of two leases. These are:-

- (a) Lease between Galson Estate Limited and Galson Energy Limited (unsigned). (109 year lease).
- (b) Lease between Pairc Crofters Limited and Pairc Renewables Limited dated 12th & 24th August 2004. (75 year lease).

I understand that these are typical of the leases being granted. The rent is relatively low in each case. The period of the lease is well in excess of 21 years rendering the lease capable of registration (provided of course there is no other objection). The rights of crofters are excepted from warrandice. There is, I understand, a further lease to the relevant wind farm operator which will contain a provision for a full market rent.

1.7. In neither case have I seen a copy of the registered lease. The last remaining parts of Scotland (including Lewis) became operational eras for Land Registration on 1st April 2003. (**The Land Registration (Scotland) Act 1979 (Commencement No. 16) Order 2002: 2002 No. 432 (C.21)**). To create a real right on the part of the tenant in the leases granted by the Owners to the Estate Company and by the Estate Company to the Wind Farm Operators, the various leases will all therefore have to be registered in the Land Register of Scotland. (**Land Registration (Scotland) Act 1979, s.3(3)**). The taking of possession or the recording of the leases in the Books of

Council and Session will be insufficient. Conversely, the ability to take possession is an express pre-requisite of making a lease real in the Land register of Scotland albeit a highly qualified document conferring less than possession is sometimes regarded as incapable of creating a real right. (**TCS Holdings Limited v Ashtead Plant Hire Company Limited and Others**, noted at 2003 GWD 2-42 and available on Scottish Courts Website, 8th January 2003, Opinion of T G Coutts, O.C. now reported at 2003 SLT 177). The Keeper may wish to consider this in the light of **1993 Act, s.52(4)**.

1.8. Registration in terms of Land Registration (Scotland) Act 1979, s.3(1)(c) renders a right a real right only

“...insofar as the right ... is capable, under any enactment or rule of law of being vested as a real right of being made real or, as the case may be, of being affected as a real right”.

In short, if the right cannot be made real, or if the lease granted by the Owner or the Estate Company is otherwise declared to be void or a nullity, registration does not perfect it and does not render it real. It may therefore be the case that the Keeper will refuse to register the relevant lease if he regards it as null by virtue of the **1993 Act, ss.23(3) or 52(4)** (see below). However, even if matters have progressed further than this, the fact that he has accepted the lease does not mean that it is valid or that a real right has been created by registration. Everything depends on the proper interpretation of **1993 Act, s.23(3)**.

1.9. There are three statutory provisions which are to be considered in connection with the above. These are:

(a) Land Tenure Reform (Scotland) Act 1974 c.38, (“1974 Act”), Part III, s. 17. This section is headed “**Interposed leases**”;

(b) Crofters (Scotland) Act 1993 c. 44, (“1993 Act”), s.23(3). The whole of **1993 Act, s.23** is entitled in a statutory headnote: “**Vacant crofts**”; and

(c) Land Reform (Scotland) Act 2003, asp.2, Part 3.

1.10. One might put forward the view that the present issue has arisen because the provisions of this Act are defective. I am not convinced by that view because of my interpretation of 1993 Act, s.23(3). However, if I am wrong, there is a major flaw in 2003 Act. This will require to be remedied by further legislation. Clarification in new legislation is strongly desirable in any case given the complexity of the matters arising.

1.11. Let us look at the relevant parts of these various statutes.

1.12. 1974 Act, s.17(1) and (2) read as follows:-

“(1) It shall be competent, and shall be deemed always to have been competent, for the person in right of the lessor of a lease to grant, during the subsistence of that lease, a lease of or including his interest in the whole or part of the land subject to the lease first mentioned, and whether longer or shorter than or of the same duration as that lease, and the said grant shall be effectual (or, as the case may be, shall be deemed to have been effectual) for all purposes as a lease of land; and the grantee or person in his right shall be deemed (whether before or after the commencement of this Act) to have entered into the possession of the land leased under the grant at the date of that grant: Provided that, in the case of a lease which is registrable under the Registration of Leases (Scotland) Act 1857, or which (being a lease granted before the commencement of this Act) would have been so registrable if this Act had been in force, the rights of parties shall be determined by reference to that Act, as amended by any other enactment, including this Act.

(2) Subject to any agreement to the contrary, as from the date of the grant of a lease in terms of subsection (1) above, the lessee under the lease so granted shall become (or, as the case may be, shall be deemed to have

become) the lessor of the lessee in the subsisting lease, on the same terms and conditions as if the subsisting lease had, in respect of the property subject to the lease granted as aforesaid, been assigned to the grantee of the lease so granted; and, on the determination, for any reason, of the lease so granted, any remaining rights and obligations of the person in right of the said grantee, in relation to the said subsisting lease, shall vest (or as the case may be, shall be deemed to have vested) in the person in right of the grantor of the lease granted as aforesaid, on the same terms and conditions as if that lease had not been granted.”

1.13. 1993 Act, s.23(3), (4) (10) and (11) (which came into force on 5th January 1994 and replaced similar material in the earlier crofting legislation) read as follows:¹-

¹ The whole text of 1993 Act, s.23 reads as follows:-

(1)Where-

(a) the landlord of a croft receives from the crofter a notice of renunciation of his tenancy or obtains from the Land Court an order for the removal of the crofter; or
(b) the landlord of the croft either gives to the executor of a deceased crofter, or receives from such an executor, notice terminating the tenancy of the croft in pursuance of section 16(3) of the 1964 Act;

or

(c) for any other reason the croft has become vacant otherwise than by virtue of a declaration by the Commission in the exercise of any power conferred on them by this Act;

the landlord shall within one month from—

- (i) the receipt of the notice of renunciation of the tenancy, or
- (ii) the date on which the Land Court made the order, or
- (iii) the date on which the landlord gave or received notice terminating the tenancy, or
- (iv) the date on which the vacancy came to the landlord's knowledge, as the case may be, give notice thereof to the Commission.

(2) Any person who, being the landlord of a croft, fails to comply with the requirements of subsection (1) above shall be guilty of an offence and shall be liable on summary conviction to a fine of an amount not exceeding level 1 on the standard scale.

(3) The landlord of a croft shall not, except with the consent in writing of the Commission, or, if the Commission withhold their consent, except with the consent of the Secretary of State, let the croft or any part thereof to any person; and any letting of the croft otherwise than with such consent shall be null and void.

(4) Where any person is in occupation of a croft under a letting which is null and void by virtue of subsection (3) above, the Commission may serve on him a notice in writing requiring him to give up his occupation of such croft on or before such day as may be specified in the notice, being a day not less than one month from the date of the service of the notice; and if he fails to give up his occupation of the croft on or before that day, subsection (3) of section 22 of this Act shall, subject to any necessary modifications, apply as it applies where a crofter fails to give up the occupation of a croft as mentioned in that subsection.

(5) Where a croft is vacant the Commission may, at any time after the expiry of one month from the occurrence of the vacancy, give notice to the landlord requiring him to submit to them his proposals for re-letting the croft, whether as a separate croft or as an enlargement of another croft, and if, within a period of 2 months from the giving of such notice, no such proposals are submitted or such

“(3) The landlord of a croft shall not, except with the consent in writing of the Commission, or, if the Commission withhold their consent, except with the consent of the Secretary of State, let the croft or any part thereof to any person; and any letting of the croft otherwise than with such consent shall be null and void”.

“(4) Where any person is in occupation of a croft under a letting which is null and void by virtue of subsection (3) above, the

proposals are submitted but the Commission refuse to approve them, the Commission may, if they think fit, themselves let the croft to such person or persons and on such terms and conditions (including conditions as to rent) as may be fixed by the Commission after consultation with the landlord; and such let shall have effect in all respects as if it had been granted by the landlord: Provided that the Commission shall not themselves let the croft while the Secretary of State is considering an application made to him under subsection(3) above for consent to let, or the Commission are considering an application made to them under section 24(3) of this Act for a direction that the croft shall cease to be a croft.

(6) Where a croft has been let on terms and conditions fixed by the Commission, the landlord may within one month from the date of the letting apply to the Land Court for a variation of the terms and conditions so fixed, and any variation made in pursuance of such application shall have effect as from the date of the letting.

(7) Where the Commission have under subsection (5) above let a **vacant croft** as an enlargement of another croft, and any of the buildings on the **vacant croft** thereby cease to be required in connection with the occupation of the croft, the Commission shall give notice to that effect to the landlord, and thereupon--

(a) the buildings shall cease to form part of the croft; and
(b) the landlord may, at any time within 6 months after the giving of such notice, give notice to the Secretary of State requiring him to purchase the buildings.

(8) If the landlord, within one month after the Commission issue a direction under section 24(2) of this Act that a croft shall cease to be a croft, gives notice to the Secretary of State requiring him to purchase the buildings on the croft, the Secretary of State shall purchase such buildings.

(9) Where a notice has been duly given under subsection (7)(b) or (8) above, the Secretary of State shall be deemed to be authorised to purchase the buildings compulsorily and to have served notice to treat in respect thereof on the date on which the notice aforesaid was given: Provided that the consideration payable by the Secretary of State in respect of the purchase of the buildings shall be such sum as may be agreed by the Secretary of State and the landlord, or, failing agreement, as may be determined by the Land Court to be equal to the amount which an out-going tenant who had erected or paid for the erection of the buildings would have been entitled to receive from the landlord by way of compensation for permanent improvements in respect of the buildings as at the date on which notice was given as aforesaid to the Secretary of State requiring him to purchase the buildings.

(10) For the purposes of this section and sections 24 and 25 of this Act, a croft shall be taken to be vacant notwithstanding that it is occupied, if it is occupied otherwise than by the tenant of the croft.

(11) The provisions of this section and sections 24 and 25 of this Act shall have effect in relation to a part of a croft as they have effect in relation to a croft.

(12) This section and section 24 of this Act shall have effect as if--
(a) a person who has become the owner-occupier of a croft were required under subsection (1) above within one month of the date on which he became such owner-occupier to give notice thereof to the Commission; and

(b) any reference in this section and section 24 of this Act, other than in subsection (1) above, to a landlord included a reference to an owner-occupier.

Commission may serve on him a notice in writing requiring him to give up his occupation of such croft on or before such day as may be specified in the notice, being a day not less than one month from the date of the service of the notice; and if he fails to give up his occupation of the croft on or before that day, subsection (3) of section 22 of this Act shall, subject to any necessary modifications, apply as it applies where a crofter fails to give up the occupation of a croft as mentioned in that subsection.”

...²

“(10) For the purposes of this section and sections 24 and 25 of this Act, a croft shall be taken to be vacant notwithstanding that it is occupied, if it is occupied otherwise than by the tenant of the croft.”

“(11) The provisions of this section and sections 24 and 25 of this Act shall have effect in relation to a part of a croft as they have effect in relation to a croft.”

1.14. For the purposes of the **1993 Act** there is an extensive definition of the terms “croft” and “crofter” in **1993 Act, s.3**. In **1993 Act, s.3(4) and (5)** it is provided:-

“(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.

² Material omitted by me

(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.”

1.15. Land Reform (Scotland) Act 2003, asp.2, Part 3 contains an array of sections.

1.16. In 2003 Act, s.68 we find the definition of “eligible croft land” which is the land that may be bought under 2003 Act, Part 3. This is as follows:

(a) land within the meaning of "croft" given by section 3 (meaning of "croft" and "crofter") of the Crofters (Scotland) Act 1993 (c.44) ("the 1993 Act") together with any land or right which is deemed by subsections (4) or (5) of that section to be a croft or part thereof (including arable machair and scattalds);

(b) any land in which a tenant of a croft, whether alone or in common with others, has a right of pasture or grazing;

(c) any land-

(i) comprising any part of a common grazing held by a tenant of a croft; or

(ii) held runrig by a tenant of a croft,

which has not been apportioned for the exclusive use of a tenant of a croft under section 52 of the 1993 Act; and

- (d) any land which consists of salmon fishings in inland waters within or contiguous to, or mineral rights (other than rights to oil, coal, gas, gold or silver) in, land referred to in paragraphs (a) to (c) above (including any such fishings or rights which are owned separately from that land).
- (3) Eligible croft land does not, however, include any croft occupied or worked by its owner or a member of its owner's family.
- (4) In subsection (3) above, the reference to a croft being occupied includes-
 - (a) a reference to its being occupied otherwise than permanently; and
 - (b) a reference to its being occupied by way of the occupation by its owner of any dwellinghouse on or pertaining to it.
- (5) In this Part of this Act, "inland waters" has the same meaning as in the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951 (c.26).

Clearly, the definition is sufficiently broad to incorporate common grazings un-apportioned.

1.17. Exercise of the Crofting Community's right to buy is dealt with in **2003 Act, Part 3, Chapter 2, s.73 et seq.** Given the references to "owner" of the "eligible croft land" throughout this part it is clear that the right to purchase refers to the right of property. The difficulty arises as to whether this right of property would be burdened by any lease already granted by the "owner" and any further subleases. If this were to be so the crofting community body would not acquire vacant possession and the value of the land to be acquired would be devalued if the lease were to be at an undervalue. I would add in the passing that **2003 Act, s.84** which is headed "effect on other rights of Ministers' decision on right to buy" relates to the temporary suspension of rights of pre-emption, redemption or reversion, options

to purchase and statutory rights of tenants and crofters to purchase. It does not refer to leases (except insofar and to the extent that they contain such rights). Hence a lease is not suspended by the provisions of **2003 Act, s.84**.

1.18. The procedure for exercise of the right to buy involves the obtaining of the consent of Ministers to the exercise of the right. The date upon which Ministers consent to the application under **2003 Act, s.73** is defined in **2003 Act, s.87(1)** as being the “consent date”. This is an important definition for the anti-avoidance provisions to be noted now.

1.19. **2003 Act, s.95** is headed “Avoidance of disposal other than as crofting community body”. The section reads as follows:-

(1) It is not competent for the owner of the land or person entitled to the interests to which an application under section 73 above relates to dispose of the land or interests after the consent date to any person other than the crofting community body which made the application.

(2) Subsection (1) above has no effect where the crofting community body has withdrawn the application or has otherwise decided not to proceed to exercise its right to buy the land or interests.

(3) In subsection (1) above, "consent date" has the same meaning as in section 87 above.

1.20. It is possible to make a case that additional anti-avoidance measures can be implied at Common law. The form of this Common law anti-avoidance measure is the “offside goals” rule (noted below). Arguably, this would arise when the right to purchase on the part of the crofting community comes into existence and not just when it is capable of exercise. (The analogy is that a personal right to purchase land usually arises when the contract are concluded but cannot be exercised until the timetable in the contract is complied with – usually

on the date of entry). If this is correct, it is arguable that the crofting community right to buy comes into existence when the crofting community body is created. However, for various reasons which are unnecessary to detail here, I am of the view that this argument is probably unsound in the context of the **2003 Act** and the express provision of a set of anti-avoidance measures excludes the implication of a wider set of Common law restrictions.

1.21. I am therefore of the view that the **2003 Act** imposes no restraint on the “disposal” of land by the owner prior to the “consent date”. If the leases granted by the owners and the Estate Company are granted prior to this date then they are unaffected by the **2003 Act** and a crofting community body will acquire the right of property subject to the lease.

1.22. Let us proceed to construe the word “disposal” used in **2003 Act, s.95**. The term is nowhere else used in the **2003 Act**. Unhelpfully, it is not defined in the Act either. The Explanatory Notes to **2003 Act, s.95** provide (**at para 395**):

“This section provides that after the date on which Ministers approve a right to buy application the owner of the land or sporting interests in respect of which the right to buy has been approved may not thereafter sell it to anyone other than the crofting community body. It further provides that the prohibition on sale will end if the body decides not to exercise the right to buy or withdraws the crofting community right to buy application”.

1.23. **Explanatory Note 333** also uses the word “disposal” in connection with **2003 Act, s.84(3)** relating to the operation of an inhibition on sale, an adjudication and the operation of diligence. However, the word “disposal” is not used in that section itself. These Explanatory Notes may be taken to suggest that “disposal” is restricted to sales and analogous matters such as gifts or forced sales and transfers all of which transfer the property right i.e. the ownership of the land. There is no express provision to the effect that the word “disposal” would extend to other matters such as the grant of a trust deed for creditors or the grant of a lesser real right such as the grant of a lease. However, that is not to say that the word “disposal” is

confined to a sale. There is a history of debate as to whether the grant of a lease amounts to a disposal or an alienation in the context of trusts and pre-emption clauses. These may have some relevance given that we are dealing here with the effect of a statutory right to purchase. What we are dealing with here is a very difficult matter that has been debated since the Sixteenth century (See, e.g. **Craig, *Ius Feudale*, II,x,5**). It is arguable that a grant of lease of the eligible croft land (even if it attracts security of tenure in any form – such as a short tenancy) would not fall within the meaning of the word “disposal” because it falls short of an outright transfer. On the other hand, it is arguable that a long lease is functionally the same as an outright disposal because it deprives the owner of the ability to transfer the effective use of the land. Let us look at both sides of the argument.

1.24. In **Lumsden v Lorimer (1841) 3D. 1119** an interim interdict was granted at the instance of a superior against a vassal carrying into execution a lease granted, as alleged, in violation of a stipulation against alienations without his consent. In the follow up case, however, the merits of the matter were fully addressed. (**Lumsden v Stewart (1843) 5D. 501; (1843) 15 Sc. Jur. 258**). A vassal who was bound by her feu charter not to sell or alienate the subjects until she had made the first offer to the superior, granted a lease of them for 19 years, for payment, on entry of £26 and the yearly rent of 17s 6d binding herself, at the expiry of the lease to take the buildings which might be erected thereon at a valuation, and failing doing so, to grant a continuation of the lease for another 19 years. The lessees having proceeded to erect a temperance hall and weaving shop, it was held in a suspension and interdict at the superior’s instance, praying that the building should be interdicted, that the lease could not be deemed an alienation. The case is commented upon in **Halliday, *Conveyancing Law and Practice*, (2nd. Ed.), Vol. 2, (1997), page 206, para 32-75** where a subsequent case **Petrie’s Trs v Ramsay (1868) 7M. 64; (1868) 41 Sc. Jur. 38** is cited as authority for the following: “It is thought, however, that the granting of a lease for a longer period would amount to a disposal and would be an occasion for exercise of a right of pre-emption expressed as arising on alienation or on disposal”. With respect, I must disagree with Professor Halliday. That case last cited has nothing to do with pre-emptions but instead deals with the wholly different issue of whether trustees who were directed “not to sell or dispose of” a warehouse but to keep it in good repair were held not entitled to let it on lease for 99 years. In my view the strict construction applied to real

conditions at Common law tends to limit the operation of clauses affecting the right of a proprietor to dispo. Instead the conservative construction placed on the empowering clause in a trust deed would be interpreted in cases of doubt to protect the interests of the beneficiary i.e. by striking down dubious transactions. Similar decisions precluding the granting of leases in the context of entails are also to be found. In **Baroness Mordaunt v Innes March 9, 1819, Fac. Coll. 679, case no 218** an entail relative to the estate of Durris in Kincardineshire contained a prohibition to “dispo, wadset, sell or put away”. After very lengthy argument and a review of earlier authorities, this clause was found to strike at a lease of the whole estate for four period of 19 years plus a lifetime with power to work the minerals. This case was appealed and the same decision reached in **Duke of Gordon v J. Innes (1822) 2S. 28**. The lease of the lands was reduced and could not be sustained for shorter period. Similarly a restriction against “dispoing” in an entail was admitted to apply to a lease of 40 years in **Sir M. Malcolm v H. Bardner (1823) 3S. 410, case no 387**. However, I remain of the view these cases are restricted to the context of trusts and entails and not to restrictions on the rights of a proprietor. The right of alienation is inherent in a property right and I think something further is needed to bring a lease within the definition of disposal.

- 1.25. That something further may be found by reference to the use of the word “disposal” in **Housing (Scotland) Act 1987, s.72(1)** and the comments in **Souter (McDonald’s Tr) v Aberdeen City Council, 2000 SC 185 per Lord Gill at 193-194**. He opined that a purposive definition of the word must be applied to it:

“... In my opinion, by granting the trust deed the debtor has disposed of the house within the meaning of sec 72. It is unnecessary in this case to define the precise nature of the right of a debtor who has granted a trust deed for creditors. It is sufficient to construe the section and to identify the effects of this particular deed. The section speaks of the purchaser's selling or otherwise disposing of the house. It is apparent therefore that selling is merely one type of disposal. Other types of disposal would include, for example, the making of a gift or the granting of an ordinary trust.

In my view a disposal under sec 72 need not involve a formal conveyance. It is sufficient that the former tenant puts it out of his power to deal with the house as owner.

In this case the debtor has put her entire estate into the hands of a third party as trustee for her creditors and has conferred upon him all the powers that she could have exercised in relation to the estate if she had not granted the deed. Such is the extent of the trustee's powers that the debtor is entitled only to an accounting from him and, after the trust purposes have been fulfilled, to a reconveyance of any unrealised assets and the repayment of any remaining surplus.

The debtor has a prospect, but no more than that, that after satisfaction of the debts, part of the trust estate may revert to her either in cash or *in specie*; but that consideration emphasises that so long as any asset of the estate does not revert to her, the debtor has no control over it and cannot prevent its being sold (*White v Stevenson*). The trust deed specifically empowers the trustee to sell any asset of the estate without reference to the debtor.

I cannot see why for the purposes of sec 72 a disposal must involve an outright transfer of the house with no prospect of return. In my view, the decisive consideration is that on granting the trust deed the debtor had no right to have the house returned to her. She merely had the hope that in a specified, and normally unlikely, event the right to deal with the house freely as owner would revert to her.

For these reasons I consider that the effects of the granting of the trust deed were such that the debtor 'disposed of' the house within the meaning of sec 72.

I am confirmed in my interpretation of sec 72 by the unlikelihood that Parliament intended that the benefit to the sitting tenant, which depended on her not disposing of the house

within the specified period, should nonetheless, in consequence of the trust deed, accrue to her creditors, and perhaps even to her, on a sale by the trustee at any date within that period.

There is also some support for this view in sec 73, which refers to certain specific transactions which are exempted from the provisions of sec 72. It is not disputed that each of these transactions would otherwise constitute a disposal. The granting of a trust deed for creditors is not included in the list of exempted transactions.

In my view, this purposive construction is attractive and the courts may feel inclined to use it to avoid leases granted after the consent date. However, it would have been much better if the statute had expressly provided for that.

1.26. The **1993 Act** is a later statute than the **1974 Act**. It may therefore repeal the provisions of the **1974 Act** expressly or by implication. It clearly does not purport to repeal the **1974 Act** by express provision. The entire matter was overlooked by the draftsman but he may be rescued by the provisions of **1993 Act, s.23(3)**. (See below). The **2003 Act** is a statute later than either the **1993 Act** or the **1974 Act** and the same may be said for repeals except there is no equivalent of **1993 Act, s.23(3)**. The **1974 Act, s.17** is nowhere mentioned in the **2003 Act** and this again is an unfortunate oversight. Consequently, for the reasons stated above, I see no limitation on the grant of interposed leases in the **2003 Act** provided they are granted prior to the “consent date” defined in **2003 Act, s.87**. However, on balance, by reference to principles enunciated by the courts, I take the view that the provisions of **2003 Act, s.95** are sufficient to preclude interposed leases granted after the “consent date” and leases of un-apportioned common grazings granted after that date. However, I must stress this is a view on balance and the **2003 Act** could have been much better drafted.

1.27. The **2003 Act** is a later statute than the **1993 Act**. It may therefore repeal the provisions of the **1993 Act** expressly or by implication. The drafting is somewhat better here because there is an express saving in **2003 Act, s.96(a)**. This provides:

“Nothing in this Part of this Act-

(a) affects any rights given by or under the 1993 Act or prevents a crofting community body from being a landlord for the purposes of that Act; ...”

This is a bizarre provision because it is clearly inaccurate. **2003 Act, s.84(2)(b)** suspends the crofter’s right to buy in terms of **Crofters (Scotland) Act 1993, s.12**. However, subject to that quibble – and it is not insignificant – one can presume the draftsman intended to say that apart from express variations of the **1993 Act**, the **2003 Act** has no effect on the **1993 Act**. So let us proceed to consider the **1993 Act**.

1.28. Let us turn immediately to **1993 Act, s.23(3)**. The terms of **1993 Act, s.23(3)** are not expressly limited to “vacant crofts” albeit the entire section (**s.23**) is prefaced by that heading.

1.29. There is a relatively large body of case law relating to statutory interpretation that deals with the issue of the value of section headings and side notes. The effect of this case law is summarised in **Bennion, Statutory Interpretation, 2nd. Ed., (1992), pages 510-511** (relative to headings) as follows:-

“A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the act, provided due account is taken of the fact that its function is to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached”.

The same comment is made in relation to sidenotes on page **512**. Bennion goes on to say at page 511:-

“Where a heading differs from the material it describes, this puts the court on inquiry. However, it is most unlikely to be right to allow the plain literal meaning of the words

to be overridden purely by reason of a heading”.

The authority cited for this proposition is all English. (*Fitzgerald v Hall Russell & Co Ltd* [1970] AC 984 per Lord Upjohn at 1000; *Pilkington Bros Limited v IRC* [1982] 1WLR 136 at 145). There is one contrary case decided by the House of Lords: *Infabrics Ltd v Jaytex Ltd* [1982] AC 1. I take the view that the approach outlined by Bennion represents the balance of judicial view. Albeit the authority is English, I take the view that the Scottish courts would follow it.

1.30. On balance, this authority persuades me that there is no certainty that the Scottish courts will hold that the 1993 Act, s.23(3) is limited to vacant crofts. On balance, I think they will not. If this is so, then one also should notice that the definition of “croft” in 1993 Act, s.23(3) is *prima facie* the wide definition used in 1993 Act, s. 3(4)(b) and therefore includes any right in pasture or grazing land in unapportioned common grazings. The issue then arises whether a lease of the common grazings themselves i.e. the land will amount to a lease of the right of pasture or grazing land in unapportioned grazings? The *dicta* noted above at para **1.5(b)** suggest that a distinction can be made. (*Ross v Graesser* 1962 SC 66 per Lord President Clyde at 74 and per Lord Sorn at 76). It could be argued that a lease which excepts all rights of crofters in terms of the 1993 Act cannot be a lease of the rights to graze in unapportioned grazings. By definition, it is argued, it is a lease of whatever is retained by the landlord and, albeit subject to the grazing rights, is outwith those grazing rights. So, the 1993 Act, s.23(3) is a muddle. It is arguable either way that the lease of the land subject to the unapportioned common grazings is void. However, the clinching evidence appears to me to come from another part of the 1993 Act – s.52(4).

1.31. Unapportioned common grazings are subject to the potential of apportionment in terms of the crofting legislation. They were subject to this right prior to the grant of the various leases. (1993 Act, s.52(4)). When this apportionment takes place the right so apportioned is apportioned:

“for the exclusive use of the applicant”.

Once apportioned, the applicant may use the apportioned land for any lawful purpose under the statutory conditions including use as arable land. (**Foxley v Forestry Commission 1982 SLCR 73 at 77; Guthrie v Bowman (No.1) 1998 SLT (Land Ct) 5**). So, ever since 1993, suitable crofter applicants have been permitted to apply for apportionment of a common grazing, and if it were to be awarded, the **1993 Act** affords them “exclusive use”. Their potential to obtain “exclusive use” by this route was created in 1993 and cannot be taken away by a subsequent lease. Simply put, this potential for exclusive use is inconsistent with someone having a lease of the land of the common grazing given that the essence of a lease is exclusive use on the part of a tenant (subject to any reserved rights).

Now let us ask one simple question. If a crofter is entitled to use land apportioned for “exclusive use” how could any tenant of the same land in terms of a lease granted by the landlord claim the privileges of a tenant unless these were restricted to the reserved rights of the landlord or subject to the crofters’ rights under **1993 Act, s.52(4)**? Indeed the latter may be exactly what the express reservation of “all crofters’ rights” in the various leases does achieve.

It may be that the courts would take the view that the landlord as owner and Estate Company as interposed tenant are leasing something which is a reserved right not subject to the crofting system (see the list in **1993 Act, Sched. 2, para 11(a and (b))** but, on what I have seen to date, I am not yet convinced that this is a possibility. It seems to me that the activity of wind farming is simply too different from what is described in the Schedule to the **1993 Act**. The nearest possibility appears to be mineral extraction but wind or air is not a “mineral” to be extracted in any normal use of the term. The action of the wind is a function of the weather and this has generally been regarded as being incapable of separate ownership and lease. (See **Paisley, Land Law, para 1.25; M.A. Rabie and M.M. Loubser, Legal Aspects of Weather Modification, 1990 CILSA 177-218**). In my view, shooting leases are valid if granted by the landlord because “hunting, shooting, fishing or taking of game or fish, wild birds or vermin” are reserved to the landlord in terms of **1993 Act, Sched. 2, para 11(h)**. So too would a leaseback of the sporting interests in terms of **2003 Act, s.83** be valid on the same reasoning. In any event it would be prudent for the crofters to seek some clarification from the Commission as to their view of the legislation.

So one way to read the 1993 Act, s.52(4) is either that all leases of the common grazing are void because they might frustrate the purpose of the 1993 Act or, alternatively, that they are voidable when the a crofting tenant obtains a suitable apportionment.

A further reading is that the saving of “all crofters’ rights in the leases effectively renders them subject to the potential to exclusive use in 1993 Act, s.52(4). This would be the neatest way of seeking a reconciliation between the 1993 Act and the leases. It would not, however, reconcile the 2003 Act and the leases – on my view the lease prevail.

1.32. Let us now assume the 1993 Act and the leases cannot be reconciled with the 1993 Act coming out trumps.

1.33. In my view the Scottish courts will have regard to potential damage to the entire crofting system if landlords could grant interposed leases of crofts and leases of unapportioned common grazings. What effect would this have on the crofter’s statutory right of purchase in terms of 1993 Act, s.12? What would the crofter be entitled to purchase if an interposed lease were to be valid? What effect would it have on the right to “exclusive use” of apportioned grazings under 1993 Act, s.52(4)? How could a crofter obtain exclusive possession if the lease of the common grazings were valid? How could he use the land as a landfill site is there was an existing lease of a windfarm site. (*Viz Guthrie v Bowman (No.1) 1998 SLT (Land Ct) 5*). With these consequences in mind, on balance, I take the view there is a distinct possibility that the courts would interpret the 1993 Act, s.23(3) as applying whether or not the croft was actually vacant.

1.34. Now a brief aside in this paragraph. I take the above view even though I do recognise that the matter is made even more complex in relation to unapportioned common grazings. In this regard one must start with the extended definition of “croft” in 1993 Act, s.3(4) and (5) and its application to common grazings. There is no right on the part of the crofter to purchase such grazings until they are apportioned. (*Foxley v Forestry Commission 1982 SLCR 73 at 77, para 6*) However, a crofter holding a deemed croft alone does not have a right to purchase the croft: *Macdonald v Hilleary 1993 SLT (Land Ct.) 26* overruled by *MacMillan v Mackenzie 1995 SLT (Land Ct.) 7*. I would add that the provision of 1993 Act, s.23(3) does not limit its efficacy to those parts of a croft which are subject

to a right to purchase. It also includes therein “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”. (**1993 Act, s.3(4)**). Albeit this may not extend to the common grazing itself, I take the view that there is sufficient in the terms of **1993 Act, s.52(4)** to allow a court to hold that, after apportionment, exclusive use cannot be obtained for a successful applicant crofter unless the lease were to be invalid in terms of **1993 Act, s.23(3)**. Admittedly, this is an extended reading but the alternative is to regard the lease of the unapportioned common grazing as voidable – probably at the instance of the crofter but this is not clear. There remains a possibility the lease is voidable at the instance of the Commission.

1.35. There therefore remains the *possibility* that the interposed lease of a croft and a lease of unapportioned common grazings both will be null without the Consent of the Commission. If that is so, it cannot be made valid by the consent of the crofters. The alternative, in my view, is that the lease of the croft as void and the lease of the unapportioned common grazing is voidable. However, this is less than satisfactory for the crofting system as a whole because it is inconsistent and also because an individual crofter may sell his right to regard a lease as voidable. This argument may be countered if the courts regard the power to regard a lease as voidable as one held by the Crofters Commission. That would be consistent with their role under **1993 Act, s.23(3)** and, in my view, is to be preferred for policy reasons.

1.36. Consequently, before HIE go further it would be prudent to ascertain whether the landlords and tenants in the leases by the owners and the Estate Companies have sought the consent of the Commission or at least if the Commission have a policy as regards this sort of lease. If these leases are subject to the provisions of **1993 Act, s.23(3)** then even the consent of the crofters will not avoid the operation of that provision.

1.37. There remains a final argument on the other topic of the “double” grant which arguably has been effected by the grant of the leases by the owners and the Estate Companies. The crofters have a statutory right to buy certain croft land in terms of **Crofters (Scotland) Act 1993, c.44, s.12 et seq.** and had so as at the date of the grant of the leases. However, it does not affect unapportioned common grazing rights until the land is apportioned.

- 1.38. If the right to purchase in any case did affect land as at the date of the grant of the leases then these leases should be considered in the light of cases dealing with the landlord's sale of tenanted property under another statutory obligation: **Housing (Scotland) Act 1987** dealing with council house sales provision.
- 1.39. In terms of this legislation a local authority that conveys property to someone other than the existing tenant with a statutory right to purchase can be in breach of the "offside goals" rule as illustrated in **Higgins v North Lanarkshire Council 2000 GWD 31-1236**. (This case is discussed in **Reid and Gretton, Conveyancing 2000, pages 15, 105, 106 and 110**). The case dealt with the commonly encountered situation where a local authority tenant wished to purchase his or her tenancy only to find that the local authority has already sold it to someone else already. The court in the **Higgins** case held that the council was under an obligation to convey what was tenanted and the fact they had already sold it to a neighbour and conveyed it to that neighbour was the council's problem. They were in breach of their statutory obligation and were liable in damages when the tenant exercises his right to buy.
- 1.40. I add immediately that I appreciate the leases by the Owners and the Estate Companies are not a conveyance of property but just leases. However, even if not capable of reduction under the offside goals rule, these grants would still leave the landlord unable to grant vacant possession should the crofting tenant exercise his or her right of purchase: cf the "exclusive use" provision in **1993 Act, s.52(4)**.
- 1.41. In the **Higgins** case under the **Housing (Scotland) Act 1987** it was held that the first party to acquire from the council i.e. the neighbour could have her title reduced as she had been aware of the true position and was therefore in bad faith when she convinced the council to sell to her. Since the various leases noted at para 1.6 actually refer to crofting rights, the landlord and the tenants in those leases are clearly aware of them.
- 1.42. The **Higgins** case is an application, albeit a rather enthusiastic one, of the "offside goals" rule. This is discussed in detail in **18 Stair Memorial Encyclopaedia, para 695 et seq.** Previous authority in a similar vein comprises **Popescu v Banff and Buchan District Council 1987 SLT (Lands Tr.) 20** and **Morrison v Stirling District Council 1987 SLT (Lands Tr.) 22**. The Lands Tribunal later changed its mind in **Brown v Scottish Homes, unreported, 5th May 1994**. It

has now reverted to its original position in *Higgins*. Albeit a comparison reveals some differences in the statutory formulations of the rights to buy the landlord's interest under the **1993 Act** and the **Housing (Scotland) Act 1997** it is possible a court would apply the offside goals principle to both in similar manner leaving the leases granted by the owners and the Estate Companies voidable at the instance of the relevant crofters.

1.43. It appears to me that an individual crofter could contract so that he did not require vacant possession or could personally bar himself so that if he ever exercised his statutory right of purchase he could not insist upon vacant possession. He could also bar himself not to seek to exercise the offside goals rule principle. However, I do not think that the personal bar of one crofter (or his contractual bond) could bar any new crofter in the same croft as that new crofter would be entitled to the statutory right of acquisition as stated in the **1993 Act**.

2. Conclusions

2.1. The **2003 Act** cannot be used by Crofting Community bodies to strike down leases and interposed leases granted before the "consent date" relative to their applications to acquire. If the crofting community bodies acquire the ownership after these leases have been set up they will acquire the land subject to the leases. The matter is otherwise if the leases postdate the consent date in terms of the **2003 Act**. However, all of this is irrelevant if (a) I am correct as to my view of **1993 Act, s.23(3) and 52(4)** and (b) the Crofters' Commission have not consented to the leases.

2.2. Before HIE proceed their solicitors should ask to see sight of a Land Certificate for the tenant's interest in the various leases and interposed leases. They may wish to speak to the Keeper as, I understand, several of these leases are in the course of registration. The leases cannot be real rights without registration under the **1979 Act**. Registration is a *sine qua non* of a real right of lease in the present case but, you may then wish to consider if such a Land Certificate is valid given what I have said in conclusion **2.3** below. If I am correct as to my interpretation of **1993 Act, s.23(3) and 52(4)** the leases are void.

2.3. Before HIE proceed they should seek the view of the Crofters' Commission. I have spelled out above my reasons above as to why I

regard this as being required to render the leases valid. If I am wrong about the operation of **1993 Act, s.23(3) and s.52(4)** – the point of nullity - a consent of the Crofters Commission is unnecessary to render the leases valid. However, it would be worthwhile asking the owner and Estate Company why they think this consent is unnecessary. If I am correct, this is not something that the landlord, the tenant or the crofters can deal with amongst themselves: they cannot consent to render the leases valid. Only the consent of the Crofters' Commission can render the leases valid.

- 2.4. Given the fact that the various leases appear to affect un-apportioned common grazings (and they do not affect apportioned grazings) there is only a limited role for the “offside goals” rule. The right to purchase has not yet come into existence.
- 2.5. The fact that possession cannot be obtained by the tenant in a lease or an interposed lease or could be qualified by the effect of **1993 Act, s.52(4)** may be taken into account by the Keeper in deciding whether the lease is capable of being made real albeit it is not an express requirement of registration of long leases. (See para 1.7).
- 2.6. I have given my view above that the outcome of the above, on balance, is that the leases are void without the consent of the Crofters Commission under **1993 Act, s.23(3)** and not voidable at the instance of the crofters. They are not voidable at the instance of the crofting community body in terms of the **2003 Act**.

I trust that this has made matters clearer.

Please note that this academic opinion is given on without liability basis.

Yours faithfully,

PROFESSOR RODERICK PAISLEY