EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 50
XA70/17

Lord Menzies
Lord Brodie
Lord Glennie

OPINION OF LORD MENZIES

in the Special Case stated by

THE SCOTTISH LAND COURT

for the Opinion of

THE INNER HOUSE OF THE COURT OF SESSION

under section 1(7) of the Scottish Land Court Act 1993
at the request of

JOHN MACAULAY

Applicant and appellant

In his application for an order under section 14(4)(b) of the Crofting Reform (Scotland) Act 2010 modifying the entry in the Crofting Register in respect of the croft at 1A Tolsta Chaolais, Isle of Lewis

against

MRS MARY ANN MORRISON

Respondent

and

MARK TAYBURN

Interested party and respondent

Applicant and Appellant: Party
Interested Party and Respondent: Murray; Turcan Connell

17 July 2018

[1] I am in complete agreement with the reasoning and conclusion of Lord Brodie, and there is nothing I wish to add. I would answer the question in the special case in the negative. I also agree with the views which Lord Brodie expresses in the postscript to his opinion.

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Introduction

[2] This is an appeal by way of special case from a decision of the Scottish Land Court. The special case is stated on a question of law for the opinion of the Inner House of the Court of Session in terms of section 1(7) of the Scottish Land Court Act 1993, rules 83 to 87 of the Rules of the Scottish Land Court 2014 (SSI 2014/229) and part II of chapter 41 of the Rules of the Court of Session. It is stated at the request of the applicant, Mr John Macaulay, in an application for an order under section 14(4) of the Crofting Reform (Scotland) Act 2010, as amended by the Crofting (Amendment) (Scotland) Act 2013 ("the 2010 Act").

[3] The application under section 14(4) of the 2010 Act was a challenge to the first registration (on the application of the then tenant, Mrs Mary Ann Morrison) of the croft at 1A Tolsta Chaolais, Isle of Lewis ("croft 1A"). By order of 13 March 2017, following a hearing, the Land Court dismissed the section 14(4) application. Attached to the Land Court's order is a very full Note to which we shall have occasion to refer.

[4] In his note of argument to this court Mr Macaulay designates himself as "the appellant". He refers to Mrs Morrison, who was the respondent to the section 14(4) application before the Land Court, as "the respondent", and he refers to Mr Mark Tayburn, the crofter of 1C Tolsta Chaolais, who appeared before the Land Court as an interested party and appears before this court as the compearing respondent, as "the interested party". In this opinion we shall adopt these descriptions of the parties.

[5] While in a draft statement of case the appellant proposed seven questions for the opinion of this court, the Land Court considered that the question of law arising could effectively be stated in one question:

> "Did the Scottish Land Court err in dismissing the Application on the basis that the Applicant had failed to instruct a sufficient interest to challenge the registration of the croft in the Crofting Register?"

It appears to us that the question of law arising can be further focussed as:

> "Is the appellant a person 'who otherwise is aggrieved by the registration of croft 1A in terms of section 14 of the 2010 Act'"?

The Crofting Register

[6] Among the reforms introduced by the extensive amendments to existing legislation effected by the 2010 Act, was the imposition of a duty on the Keeper of the Registers of Scotland ("the Keeper") to establish and maintain a public register of crofts, common grazings and land held runrig to be known as the Crofting Register: 2010 Act section 3. There had previously been a Register of Crofts, maintained by the Crofters Commission, initially in terms of section 3(2) of the Crofters (Scotland) Act 1961 and latterly in terms of section 41 of the Crofters (Scotland) Act 1993. For the time being the Register of Crofts remains extant. The Register of Crofts is not map-based, something which has attracted criticism (see eg Flyn and Graham *Crofting Law* (2017 edit) p29); rather, it sets out the name of the croft, the parish and landholding on which it is situated and the current tenant. It may contain, in respect of a particular entry, other relevant information such as the tenant's share in or apportionment of common grazing (see the Rural Affairs and Environment Committee of the Scottish Parliament Report at Stage 1 of the Crofting Reform (Scotland) Bill (the "Stage 1 Report")). The Commission, now renamed the Crofting Commission by virtue of section 1 of the 2010 Act, will continue to maintain the Register of Crofts but over time that register will incrementally be superseded by the Crofting Register.

[7] In introducing the Stage 1 debate on the Bill which became the 2010 Act, the responsible minister, Roseanna Cunningham, described the then proposed Crofting Register as "an accurate and unambiguous crofting register that will clearly show land that is held in crofting tenure and provide greater security for everyone with an interest in that land". The Stage 1 Report had described the Crofting Register as "map-based...which will eventually be comprehensive, so that the boundaries of each and every croft will be mapped definitively." The statutory framework for achieving this intention is now provided by a requirement that an unregistered croft must be registered in the new Crofting Register by one of the owner of the land on which the croft is situated, the landlord, the crofter or the owner-occupier crofter, on the occurrence of one of the events specified in section 4(1) and (4) of the 2010 Act and, thereafter, the registration, as they occur, of the various events specified in section 5. Mr Murray, who appeared in this court for the interested party, advised us that, for an initial period following on commencement of the 2010 Act (30 November 2012 to 30 November 2014) provision was made for voluntary registration in terms of section 4(2).

[8] An application for registration in the Crofting Register must be submitted to the Commission by the person specified in section 6. The Commission must then forward the application to the Keeper, subject to the Commission being entitled to refuse to do so in the event of any of the circumstances specified in section 7 (5) (one of which being that there is a material inaccuracy in the application) being applicable. The Keeper must accept an application if it is accompanied by such documents and other evidence as the Keeper may require (section 8(1)). Having accepted an application, the Keeper must complete registration, in the case of a first registration by making up a registration schedule in accordance with section 11 (section 9(1)), and issue a certificate confirming registration (section 9(2)). Section 11(1) requires the Keeper to make up and maintain a registration

schedule of every croft registered in the register. In terms of section 11(2) the Keeper must enter in the registration schedule: (a) a description of the land which comprises the croft that must consist of or include a description of it based on the ordnance map or such other map as the Keeper considers appropriate; (b) the name and designation of, as the case may be, any tenant of the croft, any owner-occupier of the croft, any landlord of the croft, and any owner of the croft; and (c) such other information as the Keeper considers appropriate.

[9] The Keeper may accept an application for registration despite the fact that the description of the croft includes land which is already entered in the registration schedule of another croft, a common grazing or land held runrig (section 8(3)). However, in terms of section 11(3), the Keeper may not include in a registration schedule a description which includes already registered land.

[10] Registration of a holding in the Crofting Register has the effect: (a) of confirming the holding as a croft for the purposes of the Crofters (Scotland) Act 1993: (b) of determining, by reference to the description in the registration schedule, the extent of the land (including any right of pasture or grazing in land held in common or apportioned and any land held runrig) which comprises the croft; and (c) of confirming that any person entered as the tenant of the croft is a crofter: 1993 Act section 3ZA.

[11] Section 15 provides for the removal of resumed and decrofted crofts from the Register.

[12] Thus, the scheme for registration under the 2010 Act is for the incremental but eventually comprehensive registration of crofts, which in due course will be identifiable as a patchwork of discrete units on (most probably) the Ordinance Survey map of the crofting counties, with any ancillary rights adhering to these units being specified in the relevant registration schedule. There are accordingly parallels between this scheme and the scheme

for the creation of a comprehensive Land Register of Scotland in substitution for the Sasine Register which is now provided for by the Land Registration (Scotland) Act 2012, although one obvious point of difference is the involvement of a public authority, the Commission, in the process prescribed by the 2010 Act.

[13] Broadly speaking, post 30 November 2014, what will trigger the requirement to register an unregistered croft in terms of section 4 of the 2010 Act is the creation or transfer of a right in respect of a croft and it will be the person acquiring that right who will, in terms of section 6, be obliged to apply for registration. An application for registration can therefore be seen as having the character of an assertion of a particular right in respect of a croft of a particular extent which registration will endorse.

[14] Section 14 provides a mechanism for that assertion to be challenged and the challenge adjudicated upon by the Land Court. This appeal raises the question whether the appellant is a person who can bring such a challenge in relation to the registration of croft 1A. Before going further it is convenient to note the terms of the legislative provisions which bear most directly on that question.

The legislation

[15] Sections 12 and 14 of the 2010 Act provide, *inter alia*:

> "**12 Notification of first registration**
> (1) Subject to subsection (2), the Commission must, on receipt of a certificate of registration under section 9(2) or, as the case may be, a copy of such a certificate under section 9(4), notify any persons mentioned in subsection (3) of the matters mentioned in subsection (4).
> (2) The Commission need not notify a person mentioned in subsection (3)—
> (a) where that person is the applicant for registration; or
> (b) where the certificate of registration issued under section 9(2) relates to a first registration as a result of the taking of the step mentioned in section 4(4)(p).
> (3) Those persons are—
> (a) the owner of the croft;

(b) the landlord of the croft;
(c) the crofter of the croft;
(d) the owner-occupier crofter of the croft;
(e) the owner of any adjacent croft;
(f) the landlord of any adjacent croft;
(g) the crofter of any adjacent croft;
(h) the owner-occupier crofter of any adjacent croft;
(i) the owner of any adjacent land (not being land which is an adjacent croft);
(j) the occupier of any adjacent land (not being land which is an adjacent croft).

(4) The matters referred to in subsection (1) are—
(a) that the croft has been registered;
(b) the description of the croft as it is entered in the registration schedule;
(c) the names and designations of any persons entered in the registration schedule in accordance with section 11(2)(b);
(d) the right to challenge the registration by applying to the Land Court under section 14(1);
(e) the period, mentioned in subsection (5), before the end of which such a challenge must be brought.

(5) That period is the period of 9 months beginning with the date on which the Commission issue notification under subsection (1).

…

(7) The Commission must notify the applicant of the date mentioned in subsection (5).

(8) The applicant, on receipt of the certificate under section 9(2) relating to a first registration (other than of a new croft or other than as a result of the taking of the step mentioned in section 4(4)(p)), must give public notice of the registration of the croft by—
(a) placing an advertisement, for two consecutive weeks, in a local newspaper circulating in the area where the croft is situated; and
(b) affixing a conspicuous notice in the prescribed form to a part of the croft.

…

14 Challenge to first registration

(1) Subject to subsection (3), any person to whom notice is given under section 12(1), or who otherwise is aggrieved by the registration of the croft to which the notice relates, may apply before the end of the period mentioned in section 12(5) to the Land Court for an order under subsection (4)(a) or (b).

(2) Where an application under subsection (1) is made after the end of the period mentioned in section 12(5), the Court may, on cause shown, deal with the application as if it had been made before the end of that period.

(3) Subsection (1) does not apply as respects the registration of a croft as a result of the taking of the step mentioned in section 4(4)(p).

(4) On receipt of an application under subsection (1), the Court may—
(a) make an order that the entry in the register relating to the croft be removed;
(b) make an order that the entry in the register relating to the croft be modified;
(c) make no order.

(5) Where subsection (6) applies, the Court must, if making an order such as is mentioned in subsection (4)(b), declare the boundary of the croft to be that which, in all the circumstances, it considers appropriate.

(6) This subsection applies where—
(a) the application challenging the registration raises a question as to the boundaries of the croft; and
(b) the evidence available to the Court is insufficient to enable any boundary to be clearly determined.
(7) Where the Court makes an order under subsection (4)(a) or (b), the Keeper must make such amendment to the registration schedule of the croft and to the register as is necessary."

Procedure before the Scottish Land Court

[16] The Note appended to the Land Court's order of 13 March 2017 narrates that registration by the Keeper of croft 1A in the Crofting Register on an application by the respondent, duly completed by the Keeper in terms of section 11, provoked two challenges before the end of the 9 month period mentioned in section 12(5) of the 2010 Act. In their separate applications, the appellant (by Application RN SLC/119/15) and Mrs Mary A Taylor and Mrs Ena Jess (by Application RN SLC/127/15) (collectively, "the Applicants") applied for orders under section 14(4) of the 2010 Act modifying the entry in the Crofting Register. Answers were lodged by the respondent and the interested party. The interested party having called into question the interest of the Applicants to challenge the first registration, the Land Court made arrangements in terms of rule 11(2)(c) of the 2014 Rules for cases SLC/119/15 and SLC/127/15 to be heard together with a debate fixed for 8 November 2016 at Stornaway.

[17] The Applicants and the interested party appeared at the debate as did the respondent albeit, as was explained to the Land Court, she had assigned the croft to Ms Frances Muriel Berrill on 29 February 2016. The Land Court indicates in its Note that no practical issue arose as to the respondent's interest to oppose the section 14 applications because at the hearing her representative was content to adopt the submissions advanced on behalf of the interested party.

[18] Having disposed of a preliminary issue in case SLC/127/15 as to the sufficiency of the notice which had been given in respect of first registration, the Land Court heard argument on the preliminary pleas taken by the interested party in his answers to the respective section 14 applications. His plea to the application at the instance of the appellant (SLC/119/15) was in these terms: "The applicant not being aggrieved by the registration of croft 1A, the application should be found incompetent and should be dismissed." His plea to the application at the instance of Mrs Taylor and Mrs Jess (SLC/127/15) was in these terms: "The applicants not having standing or interest and not being aggrieved by the registration of croft 1A, the application should be found incompetent and should be dismissed." The difference between the terms of the preliminary pleas was intended to reflect the different status of, on the one hand Mrs Taylor and Mrs Jess, as persons entitled to notice in terms of section 12(1) of the 2010 Act, and, on the other, the appellant, who was not a person entitled to notice. Mrs Taylor and Mrs Jess own the decrofted house site and garden ground which formerly formed part of the croft 1B Tolsta Chaolais ("croft 1B"). Croft 1B adjoins one of the five discrete and separate plots of land that together make up croft 1A. As the Land Court observed at paragraph [31] of its Note, the appellant can point to none of the various proprietary or crofting interests listed in section 12(3) of the 2010 Act. He had assisted family members in working crofts 1A, 1B and 1C in the early 1950s and the tenancy of croft 1C Tolsta Chaolais had remained within his family until the 1990s but, as far as his present interest was concerned, he sought to rely simply on his being a regular visitor to the area (albeit a visitor with personal knowledge of how crofts 1A, 1B and 1C had formerly been possessed).

[19] In upholding the interested parties' preliminary pleas and dismissing both Application RN SLC/119/15 and Application RN SLC/127/15, the Land Court held that in

order to challenge first registration by way of a section 14 application it was necessary that an applicant must demonstrate an interest in effecting the modification (or removal) sought. This was so whether that applicant was a person who was entitled to notice in terms of section 12(1) and (3) or if he or she was a person who claimed to be otherwise aggrieved by the first registration. In the present cases the Applicants contended that the extent of croft 1A as registered did not precisely conform to its historical state of possession. This was accepted by the respondent and the interested party. On that basis it had been argued that the entry in the Crofting Register was other than correct. However the Land Court did not accept that the Applicants' wish that the register reflected the "true or historic boundary" was sufficient by way of a live practical interest in the demarcation of the boundaries of croft 1A to challenge its registration.

Submissions to this court

Preliminary

[20] Both the applicant and the interested party had lodged full notes of argument. Consideration of the interested party's note led the court to seek to confirm with Mr Murray, on behalf of the interested party, whether he proposed to insist on an argument to the effect that as the appellant had not specified in his notification requiring that a special case be stated that he requested an interim order suspending registration of croft 1A, as he might have done in terms of rule 84(2)(e) of the 2014 Rules, the special case and the instant appeal were now hypothetical, as the registration of the croft had now been completed. On the court questioning whether this was really an arguable proposition, Mr Murray intimated that he did not insist in the argument. It was therefore not further considered.

Appellant

[21] On the court indicating that it had read the parties' respective notes of argument, the special case, the Land Court's Note and the authorities referred to therein, the appellant initially stated that he was content simply to adopt his note of argument. However, encouraged by the court, in a concise oral submission he highlighted why it was that he considered himself aggrieved by the registration of croft 1A. His concern was that the registration of the croft had been incorrect in that it did not reflect its proper boundaries. He knew the area well and knew exactly what should have been included and what should have been excluded. There was the potential for trouble in future. His interest was the same as that of anyone else in the country or in the locality: that the Crofting Register should be correct. When it came to croft boundaries small differences were significant. Attempting to delineate boundaries on the Ordinance map was a very imperfect measure. At best only a rough boundary could be indicated. In the present case there was a public right of way. That required to be precisely marked. While a right of way will pertain to the land, irrespective of any crofting interest, it was important that the location of the track over which it could be exercised was clear, particularly where there was a new tenant who was unaware of the history. Moreover, if, as he submitted (and this did not seem to be disputed) everything that should have been included when croft 1A was registered was not included, the effective result is an exchange of croft land as among the crofters of crofts 1A, 1B and 1C. That is something which is specifically forbidden by section 4A(1) of the 1993 Act.

[22] The applicant's submissions as set out in his note of argument and adopted by him may be summarised as follows.

[23] The only basis for a valid challenge to a first registration is that the information submitted to the Keeper is incorrect. Accordingly, any person who can objectively articulate

such a challenge should be allowed to lead evidence in its support. In enacting section 14(1) of the 2010 Act the Scottish Parliament has not restricted the category of those who can competently challenge the registration of a croft, other than by the requirement that they are aggrieved in the sense of having an objective, or quantifiable grievance about the registration. It is evident that Parliament intended to provide the public at large with both the authority and the opportunity to mount challenges to incorrect croft detail being submitted for registration. As a public, map-based register of land, the Crofting Register requires to all entries to be as accurate as possible. There is no room in the legislation for boundaries other than *de iure* boundaries (as the Land Court had termed them) to be entered; any other approach is wrong. It follows that all entries must reflect the *de iure* boundaries of crofts; the register will cease to be accurate should the *de facto* croft boundaries, if in conflict with *de iure* boundaries, be registered therein. There is a public interest in the accuracy of the register, particularly in relation to croft 1A given the number of public rights of way traversing the croft land. Determining croft boundaries can be difficult and troublesome. In Land Court proceedings there has often been resort to evidence of knowledge handed down over the generations. That being so, it is particularly incumbent on the Land Court, on a section 14 application, to hear the most knowledgeable and informed evidence as to the correct boundaries that is available. In the present case neither the respondent nor the interested third party had any knowledge as to the correct boundaries of the croft, albeit that they conceded that the boundaries submitted for registration differed in various respects from the true or historical position.

[24] It was the Land Court which introduced the concept of *de facto* as opposed to *de iure* croft boundaries (Note, paragraph 33). There is no legal basis for such a distinction and the Land Court misdirected itself in making such a distinction between the "purist" approach

and the "pragmatic" approach. Either the croft boundaries as submitted for registration were correct or they were not.

[25] Moreover, the Land Court erred (by equating submissions with evidence) in finding as a matter of fact that the appellant's challenge would involve the disruption of an established pattern of occupation and fencing with which the persons who actually occupy crofts 1A, 1B, 1C Tolsta Chaolais have confirmed they are content. The Court had not heard evidence on the matter and therefore was not entitled to make any findings in fact.

[26] The correct test for determining whether the appellant was a person who might competently make an application in terms of section 14 of the 2010 Act was whether he was someone who had something which can be fairly regarded as an objective grievance, in other words something other than a fanciful or speculative grievance, see *Conti* v *AIP Private Bank Ltd* 2000 SC 240 and also *AXA* v *Lord Advocate* 2012 SC (UKSC) 122, *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 and *The Christian Institute and Others* v *The Lord Advocate* (in the Inner House) 2016 SC 47 and (in the Supreme Court) 2017 SC (UKSC) 29.

Interested party

[27] Mr Murray adopted his note of argument and invited the court to answer the question in the special case in the negative.

[28] It was the respondent's submission that the applicant was not "a person aggrieved" by the first registration of the croft, in other words the applicant did not have the necessary title and interest to make an application to the Land Court under section 14(4)(b) of the 2010 Act. It was not in dispute that the applicant had no proprietary or financial interest in the crofts subject to registration or in any nearby land. The 2010 Act had not conferred any new right on the appellant: cf *Buxton* v *Minister of Housing and Local Government* [1961] 1 QB 278

at 283. The Land Court had made no error of law. It had not disregarded judicial authority. *AXA*, *Walton* and *The Christian Institute*, to which the appellant had made reference, all concerned public law issues whereas the present case concerned private law where the approach to title and interest explained by Lord Dunedin in *D&J Nicol* v *Dundee Harbour Trustees* 1915 SC (HL) 7applied. The function of the supervisory jurisdiction of the Court of Session is entirely different from challenges to the registration of crofts before the Scottish Land Court. The Land Court had been correct in stating that standing depended on the distinction made by Lord Fraser in *R* v *Commissioners of Inland Revenue ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (the Fleet Street Casuals case) at 646 between "the desire of the busybody to interfere in other people's affairs" and "the interest of the person affected by or having reasonable concern with the matter to which the application relates." In Fleet Street Casuals Lord Fraser had gone on to identify the approach to be adopted in making the distinction between, on the one hand, the busybody and, on the other, the person affected by or having a reasonable concern with the matter. That was to look at the statute under which the duty arises, and to see whether it gave any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission. Looking at the relevant part of the 2010 Act one can see that it has five purposes: (1) the institution of a system of registration of crofts with a view to reducing disputes over boundaries; (2) allowing crofters to register, individually or collectively, what are private interests in a public register; (3) providing for approval of registration by the Crofting Commission; (4) allowing for challenge to registration by those with an interest in adjoining properties; and (5) allowing a limited scope for challenge by a person otherwise aggrieved by registration. Three benefits arise from this system: (1) improved regulation based on the requirement of a map showing the croft; (2) certainty for those coming into

occupation of the croft by removing doubt as to its past history; and (3) maintaining the system of crofting tenure. When regard is had to these purposes and benefits it becomes clear that the appellant has no legal rights, interests or expectations which are prejudiced by registration of the croft; he therefore cannot be "aggrieved" by the registration.

[29] There may be a tension between reinstating historic boundaries and registering boundaries that reflect the immediate *status quo ante*. The Land Court had properly resolved this in its analysis of the statutory scheme, finding that there was a duty on the Court to recognise a boundary and give effect to it where the evidence available was sufficient to enable the boundary to be clearly determined (Note, paragraph [29]). The underlying public policy was to have an effective system of croft registration that gives legal effect to the *status quo ante* of croft boundaries, rather than to provide a forum for debate over historic croft boundaries. The test of "live practical interest" adopted by the Land Court was an appropriate one, forming as it did part of the assessment of title and interest. The historical enquiry envisaged by the applicant was, as was recognised by the Land Court, likely to be evidentially difficult and costly (Note, paragraph [30]). Registration was intended to make such litigation a thing of the past. Section 53A of 1993 Act gave the Land Court some discretion in disputed and uncertain situations. It is inherent in the statutory scheme for registration that the process should be practical and effective. The boundaries registered in the present case are those which the tenants of crofts 1A, 1B, and 1C have agreed and which reflect the long-established position on the ground (Note, paragraph [27]). That has the practical benefit of following existing fencing and suiting stock management. Conversely, there can be no practical benefit to be derived from an historical enquiry into what were referred to as *de iure* boundaries, particularly when the person seeking the enquiry has no proprietary or financial interest in the matter.

[30] The Land Court was not making a finding of fact when it observed that modification of the register "would involve the disruption of occupation and fencing with which [the occupants] have confirmed they are content". It was uncontroversial that the registration sought to be challenged reflected the existing boundaries. If the section 14 challenge did not seek to modify these boundaries it would be of no substance.

[31] The remarks made by the Land Court about *de facto* as opposed to *de iure* croft boundaries were obiter dicta. The issue was whether the person seeking to make the section 14 challenge had demonstrated that he or she had sufficient interest to do so (Note, paragraph [33]). The Land Court had been correct in finding that the appellant did not have sufficient interest.

Decision

[32] Given that it had two applications before it, from parties with different status, the Land Court required to consider the issue of qualifying interest to make a section 14 application both from the perspective of persons entitled to notice in terms of section 12(1), and from the perspective of a person who was not entitled to notice. We do not have to do that. Mrs Taylor and Mrs Jess, who were entitled to notice, have not appealed the dismissal of Application RN SLC/127/15. The appellant, on the other hand, has appealed the dismissal of Application RN SLC/119/15 but he was not entitled to notice. Thus, as we have already identified, the sole issue is whether the appellant has demonstrated that he should be regarded as a person who, for the purposes of section 14(1) of the 2010 Act, is "otherwise aggrieved by the registration of croft 1A".

[33] Determining what is meant by "any person …who otherwise is aggrieved by the registration of the croft" is an exercise in statutory interpretation. As such, the object is very

familiar: discerning the intention of Parliament by reference to the ordinary and natural meaning of the words used, read in their context. Thus, while the starting point will inevitably be a consideration of what is the ordinary and natural meaning of the word or phrase in question, because of the importance of context it is not the case that a particular word or phrase will necessarily have the same meaning when encountered in one statute as it has when encountered in another: *Walton* v *Scottish Ministers*, Lord Reed at para. 84, under reference to *Arsenal Football Club Ltd* v *Ende, Smith*[1979] AC 1 at 32 and *Lardner* v *Renfrewshire Council* 1997 SC 104 at 108.

[34] The importance of context when interpreting legislation impacts on how useful it will ever be to seek to interpret an expression in one statute by reference to decisions on the interpretation of the same or a similar expression in other statutes. At paragraph [20] of its Note the Land Court questioned just what assistance it could get from the decision in *Conti* v *AIP Private Bank Ltd*, a decision which was concerned with the interpretation of section 653(1) of the Companies Act 1985, when the task in hand related to the interpretation of section 14(1) of the 2010 Act. The Land Court was right to be cautious about simply applying what was said in *Conti* about the circumstances in which a company or any member or creditor of it might feel aggrieved by the company being struck off the Companies' Register, to the different case of someone being a person aggrieved by the registration of a croft in the Crofting Register, but that is not to say that in matters of interpretation there can be no purpose in referring to authorities which consider the meaning of the same or similar expressions, even when they are to be found in different statutes. After all, that was just what Lord Reed did in *Walton* at paras [83] and [85] to [87]. That there is a legitimate purpose in referring to authorities addressing the interpretation of a particular expression is identified by Salmon J (as he then was) in *Buxton* v *Minister of*

Housing and Local Government, a case mentioned by Mr Murray, which raised "the perennial question" as to what the legislature meant when it uses the words "aggrieved person". Although, "some cases [go] one way and some the other", it is legitimate, Salmon J explains (at 286), to look at the authorities in order to see what the general principles are that can be extracted from them as a guide in approaching the question as to what the particular words in question, for example "aggrieved person", mean in any particular statute.

[35] We begin then with the ordinary and natural meaning of the words "any person …who otherwise is aggrieved by the registration of the croft". Clearly the expression is intended to identify a restricted category of persons; otherwise "any person" would have sufficed. Were there any doubt about that we would see it dispelled by the association of "who otherwise is aggrieved" with the immediately preceding "person to whom notice is given under section 12(1)". Now, the persons to whom notice is given under section 12(1) have the common character that they are all persons with an interest in land in the immediate vicinity, whether it be the croft in question; an adjacent croft; or other adjacent land, not being land which is an adjacent croft. We do not consider that it follows from that that a person "who otherwise is aggrieved" must have an interest in land (wherever situated). However, we would see it to be self-evident that the person must be "aggrieved" and that he or she must be aggrieved "by the registration of the croft".

[36] As for "aggrieved", the Oxford English Dictionary (2nd edit) provides four definitions of aggrieved. Two are described as obsolete. One is "injured physically, hurt, afflicted." However the definition which is apposite for present purposes is: "injured or wronged in one's rights, relations or position; injuriously affected by the action of any one; having cause for grief or offence, having a grievance". Now there are cases where the dictionary definition has to yield in the face of special circumstances, for example where a word in

common usage has an additional meaning as a legal term of art or where the statute itself provides a definition, but in the United Kingdom the Oxford English Dictionary can be taken to be a reliable indicator of the ordinary and natural meaning of a particular word. This is not a case of special circumstances. Thus, for a person to be "aggrieved" it is not enough that he is unhappy about something; he must have an identifiable cause for his unhappiness and it must have adversely affected him in some way. That was the point being made by Lord Prosser, when considering the expression "feels aggrieved by the company having been struck off the Register" in *Conti* v *AIP Private Bank Ltd* at 243D. As he put it: "subjective dissatisfaction is not enough: there must be something which can fairly be regarded as an objective grievance." Similarly, in *Lardner* v *Renfrew District Council*, in a passage particularly relied on by Mr Murray, the Lord President (Rodger) said:

> "…there is a difference between feeling aggrieved and being aggrieved: for the latter expression to be appropriate, some external basis for feeling 'upset' is required – some denial of or affront to his expectations or rights."

And in *Attorney General of the Gambia* v *N'Jie* ([1961] AC 617 at 634 (a passage cited by Lord Reed in *Walton*), Lord Denning delivering the judgment of the Judicial Committee of the Privy Council, having acknowledged that the words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation, went on:

> "They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

[37] Obviously, "interests" can include proprietary or other pecuniary interests but, as is illustrated by the authorities, the expression can have a wider meaning. What was in issue in *Attorney General of the Gambia* v *N'Jie* was whether the Attorney General had standing by virtue of being a "person aggrieved" to seek leave to appeal against a finding by the West

African Court of Appeal setting aside an order made in disciplinary proceedings against a barrister and solicitor. In giving the judgment Lord Denning said this (*supra* at 694):

> "Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action."

Attorney General of the Gambia v *N'Jie* was one of the decisions in the most recent of three groups of cases concerned with whether public authorities may be "aggrieved" for the purpose of rights of appeal, which were considered by Woolf LJ, as he then was, in *Cook* v *Southend-on-Sea Borough Council* [1990] 2QB 1 (described by Lord Reed in *Walton* at para [85] as a "valuable review of the English authorities"). Woolf LJ saw the recent cases as illustrating a progressively more generous interpretation of "person aggrieved". He concluded (at 18) that normally:

> "…a public authority which has an adverse decision made against it in an area where it is required to perform public duties is entitled to be treated as a person aggrieved."

At para [85] of *Walton* Lord Reed turned to statutory appeals under the Town and Country Planning Acts and at para [86] he observed that it was apparent from these authorities that persons will ordinarily be regarded as aggrieved if they had made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made. He then quoted what had been said by the Lord President (Hope) in *North East Fife District Council* v *Secretary of State for Scotland* 1992 SLT 373 at 375 and 376:

> "But in my opinion the fact that all three appellants were present at, and made representations at the public inquiry is sufficient for them to be persons 'aggrieved' … they were entitled to expect that the Secretary of State, in considering their representations, would act within the powers conferred upon him by the statute and … they are entitled to appeal against his decision on the ground that he has not done so."

[38] Thus, a person may be aggrieved where he takes part in a decision-making process and a decision is improperly made which is contrary to the decision he had advocated. Similarly, as Lord Reed explains at para [87] in *Walton*, a person may be aggrieved if he is improperly prevented from participating in a decision-making process in which he had an entitlement to participate. There is therefore a variety of sorts of interests which, if adversely affected, may give rise to a relevant grievance but, as appears from all the cases considered in *Walton*, to be a person aggrieved that person must be able to point to something of the nature of a personal interest in the matter to which the decision, act or omission in question relates, and he must be able to point to some way in which the decision, act or omission has adversely affected that interest. One of the cases cited by Woolf LJ in *Cook* as illustrating a more generous approach was *Arsenal Football Club Ltd* v *Ende, Smith* [1979] AC 1. There, a ratepayer was found to be a "person aggrieved" for the purpose of challenging (as too low) the assessment to rates of a neighbouring football stadium, albeit he could demonstrate no direct financial or other loss. However, the passage from the speech of Viscount Dilhorne which Woolf LJ quoted by way of illustration of the more generous approach again emphasised that to be "aggrieved" a person must be adversely affected by the matter of which he complains (*supra* at 17).

[39] What then does the appellant say is his interest and how does he say it has been adversely affected by the registration of croft 1A? The appellant was very clear when putting forward his position. While he had a particular knowledge of how crofts 1A, 1B and 1C had been possessed in the past, based on his family's experience, and he continued to visit the area, he claimed no interest other than that of anyone else in the country or the locality in ensuring that the Crofting Register was "correct". It followed that to the extent he could claim to be aggrieved it was because he considered the relevant entry in the register to

be incorrect. In other words it was the position of the appellant that he, a private individual, can be aggrieved by reason of the Keeper completing registration because, in the appellant's view, registration in the terms in which it was completed was contrary to the purely public interest in there being a "correct" register.

[40] Mr Murray submitted that the Crofting Register was a public register of private relationships. That statement is accurate as far as it goes but it gives no weight to the consideration that maintaining land under crofting tenure must be considered as being in the public interest and indeed that it is an important policy objective which is supported by a body of legislation and overseen by the Crofting Commission. That there is a particular public interest in registration is demonstrated by the terms of section 7 of the 2010 Act, requiring, as it does, that applications for registration be first submitted to the Commission and allowing, as it does, the Commission to refuse to forward an application to the Keeper if it includes "a material inaccuracy". The potential for registration to subvert what must be regarded as the public interest was illustrated by two instances which were brought to our attention. The first was noted by the Land Court at paragraph [24] of its Note. The Land Court posited a case where part of a croft had substantial development value and where, on an application for first registration, the tenant, in collusion with his landlord, misrepresented the extent of the croft land by failing to include that part with development value with a view to it, *ex facie* of the register, appearing not to be included in the croft and therefore available for sale free from crofting tenure. The second instance was advanced by the appellant and was of registration (or perhaps more than one registration) designed to secure an exchange of part of a croft between crofters, something that was specifically prohibited by section 4A of the 1993 Act.

[41] However, to recognise that there are public as well as private interests in play when an application is made for the first registration of a croft and that there may be scope for reliance on these public interests when a challenge is made to a first registration by a person who is entitled to apply for an order under section 14(4)(a) or (b) of the 2010 Act, does not assist the appellant with his contention that he should be regarded as a "person… aggrieved by the registration of the croft." As appears from the language of the statute, read in context, and the authorities to which we have referred, to be aggrieved by, for example, an act such as the making of an entry in a register of title, a person's private interests must be adversely affected. It is not enough in order to justify ones position to claim to be a guardian of the public interest. In the scheme for registration in the Crofting Register it would appear that that role is intended to be played by the Commission.

[42] I accordingly propose to your Lordships that the court answer the question in the special case in the negative.

[43] I further propose that we reserve all questions of expenses.

Postscript

[44] As I have observed above, whereas in his draft statement of case the appellant proposed seven questions for the opinion of this court, the Land Court considered that the question of law arising could effectively be stated in one question. That is the question that it stated and that is the question that I propose should be answered. I do not see that proceeding in this way has given rise to any difficulty but, as appears from paragraphs [41] to [44] of the special case, the Land Court has thought it appropriate to justify its decision not simply to adopt the appellant's questions. It draws attention to rule 86 of the 2014 Rules (Finalisation of special case) and section 1(7) of the 1993 Act, noting that perhaps in

deference to the terms of section 1(7), the Land Court, under its immediate past and present Chairman, habitually has proceeded upon the basis that it is for the party who has requested the special case to formulate the questions that he or she seeks to have answered, and that he or she is entitled to do so in any way that he or she sees fit, subject only to "tidying up" by the Court of perceived infelicities of grammar or style.

[45] I would see that as an overly modest characterisation of the proper function of the Land Court when finalising a special case in terms of rule 86, and while I would be slow to comment adversely on the practice and procedure which another court has found to be satisfactory, the stating of a special case to the Inner House of the Court of Session is a matter in which this court has an obvious interest. The interest is in having a document which best formulates the issues which arose before the Land Court, includes all material necessary for an understanding of these issues set out in a logical and accessible manner, excludes all unnecessary material, and sharply focusses the questions on which an opinion is required. A party may be able to produce such a document as his draft special case; he may not. It is a task which requires skills of quite a high order. It is a task for which the Land Court, with all its particular experience and having conducted the proceedings in which the question of law has arisen, is well fitted.

[46] The statutory basis for an appeal by way of special case on a point of law is, as has already been noted, section 1(7) of the 1993 Act. In so far as relevant the subsection provides:

> "The Land Court may, if it thinks fit, and shall, on the request of any party, state a special case on any question of law arising in any proceedings pending before it under any enactment …for the opinion of the Inner House of the Court of Session, which is hereby authorised finally to determine that question."

Thus, while the Land Court must state a special case on being requested to do so, the responsibility for doing so and by implication the way it does so is for the Court. That responsibility includes identifying whether a question of law does indeed arise and what that question is. This is not to ignore that parties too have responsibilities and also rights, in that a request to state a case is the route for what is effectively the only appeal to another court. The procedure for stating a case is set out in rules 83 to 87 of the 2014 Rules. It provides for collaboration between parties and the Court. Rule 83 provides that a party who intends to require the Court to state a special case must notify the Principal Clerk of the Court of his request within 4 weeks of a decision being intimated to him. Where the decision is not final there is provision for determination whether fulfilment of the requirement should be deferred. Any notification under rule 83 must be accompanied by a draft statement of case. Thus initial responsibility for drafting the special case lies with the party making the requisition. The draft is clearly important; it is the mechanism whereby a party apprises the Land Court of the point he wishes to take and it is the means by which he can lay out a structure upon which he would propose to put that point to the Inner House. Rule 84 requires it to identify: the decision in question; whether it adequately sets out any findings in fact necessary for determination of the proposed question of law and, if not, what findings the Court is required to make; in what respect the decision is erroneous in law; the question of law proposed to be submitted to the Court of Session; and any interim orders that are requested pending determination of the special case. Rule 85 provides for other parties to make their responses to the draft by way of note. Rule 86 requires the Court then to settle the terms of the special case after giving such opportunity for further comment and adjustment by the party giving notification under rule 83 as it thinks fit.

[47] There can be no doubt that in settling a special case the Land Court must consider and seek to reflect the draft, the rule 85 responses and any further comment and adjustment by the party giving notification under rule 83, however it is for the Court alone to settle and then state the special case. In doing so it has a specific responsibility to satisfy itself that the facts set out in the case accurately reflect the findings of the Court (rule 86(2)) and it has power to make such changes to the wording of the special case as it considers appropriate for clarifying or explaining any matter (rule 86(3)). I see no reason why the Land Court should in any way be diffident in discharging its responsibilities and exercising its powers with a view to stating a special case in what it sees to be the optimum form.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 50
XA70/17

Lord Menzies
Lord Brodie
Lord Glennie

OPINION OF LORD GLENNIE

in the Special Case stated by

THE SCOTTISH LAND COURT

for the Opinion of

THE INNER HOUSE OF THE COURT OF SESSION

under section 1(7) of the Scottish Land Court Act 1993
at the request of

JOHN MACAULAY

Applicant and appellant

In his application for an order under section 14(4)(b) of the Crofting Reform (Scotland) Act 2010 modifying the entry in the Crofting Register in respect of the croft at 1A Tolsta Chaolais, Isle of Lewis

against

MRS MARY ANN MORRISON

Respondent

and

MARK TAYBURN

Interested party and respondent

Applicant and Appellant: Party
Interested Party and Respondent: Murray; Turcan Connell

[48] I agree with Lord Brodie that the question in the special case should be answered in the negative, and that for the reasons given by him in his Opinion. I also agree with his observations in the Postscript to his Opinion. I wish to comment on one matter only.

[49] In paragraphs [40] and [41] of his Opinion, Lord Brodie discusses the potential for the public policy in favour of maintaining land under crofting tenure to be subverted by an inaccurate registration in the Crofting Register. He gives two examples. One will suffice for present purposes. Imagine that a tenant of crofted land wishes to exploit an opportunity for commercial development on part of it, which he will be unable to do while the land remains crofted. Imagine too that, to that end, in collusion with his landlord, he deliberately misrepresents the extent of the croft land by failing to include that particular part of it in the application for first registration on the Crofting Register, thereby on the face of the Register excluding that land from the croft and making it potentially available for commercial development. Such a situation would clearly engage the public interest. Yet, even in that situation, Lord Brodie would say, as I understand it, that the only persons entitled to challenge the (wrongful) registration would be those to whom notice was required to be given under section 12(1) of the 2010 Act or another person, if any, who could claim to be "otherwise … aggrieved" in terms of section 14(1) in the sense that his private interests were adversely affected by it. It would not be enough for an individual to claim to be a "guardian of the public interest". That would not give him a right to be heard unless he could show that his private interests were adversely affected. For my part I do not think that the position is as clear as this. The point does not arise for decision in this case, and it was not argued before us, but it seems to me that there may be an argument that in exceptional circumstances of this kind a person might be able to claim to be "otherwise … aggrieved",

and therefore entitled to make an application under section 14(1) of the 2010 Act, even though his private interests were not directly affected and even though he has no greater interest than any other member of the public: c.f. *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 per Lord Reed at para 94 and per Lord Hope at paras 151-153. I recognise that *Walton* was an Aarhus Convention case and that those remarks were made in the course of considering what gave an individual "standing" to invoke the supervisory jurisdiction of the court; but that approach is potentially transferable to the question of whether a person is "otherwise … aggrieved" within the meaning of the relevant legislation. That does not open the door to all and sundry, to busybodies wishing to interfere in other people's affairs. As Lord Reed points out, the question must ultimately be decided in each case according to the nature and importance of the issues raised and the circumstances in which the individual seeks to intervene. Those circumstances might include a consideration of who else might be in a position to bring the matter before the court – and I note Lord Brodie's reference in this context to the role intended to be played by the Crofting Commission – and the reasons for them not having done so. No doubt there are other considerations which may apply in any particular case. One can posit various factual situations which might render the argument more or less compelling. What if all those with an interest in any adjacent croft, and therefore entitled to notice under section 12(1), were induced by the prospect of financial reward (maybe a stake in the intended development) not to challenge the inaccurate registration? As I have said, the point does not arise for decision of the present case. No public interest point of that kind arises here. It is sufficient for my purposes to observe that there might be arguments capable of being deployed on either side in a case where the point does arise.