FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 8
XA61/19

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Special Case stated by the Scottish Land Court

in the application by

HIGHLANDS & ISLANDS AIRPORTS LTD

Applicants

against

THE COMMITTEE FOR THE COMBINED COMMON GRAZINGS OF MELBOST AND BRANAHUIE

Respondents

_____

Applicants: Sir Crispin Agnew of Lochnaw Bt QC, E Gratwick (sol adv); Addleshaw Goddard LLP
Respondents: Upton; Turcan Connell

28 February 2020

Introduction

[1] This is a special case arising from the Land Court's interlocutor of 6 February 2019 which declared that, for aught yet seen, certain areas of the land, which are owned by the applicants at Stornoway Airport remain subject to crofting tenure. The process before the

Land Court had begun as an application for a declarator to the opposite effect, with a view to the applicants selling a specific area to a local residential developer. The core issue is whether the land was the subject of compulsory acquisition in the 1940s, with the effect that any crofting rights would have been terminated without the need for any consent from the Land Court (*Highlands and Islands Oil and Gas Co* v *Bourbloch Common Grazings* 1995 SLCR 110). The Land Court held that compulsory acquisition had not been demonstrated.

Legislation

Lands Clauses Consolidation (Scotland) Act 1845

[2] Section 6 of the 1845 Act (Power to purchase lands by agreement) states:

> "… it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special Act authorized to be taken, … and with all parties having any right or interest in such lands, … for the absolute purchase of any such lands… and for the purchase of all rights and interests in such lands of what kind soever."

Section 80 (Form of conveyances) provides:

> "Conveyances of lands so to be purchased… may be according to the form of the schedule (A.) respectively… or as near thereto as the circumstances of the case will admit…".

Acquisition of Land (Assessment of Compensation) Act 1919

[3] Section 1(1) of the 1919 Act (Tribunal for assessing compensation in respect of land compulsorily acquired for public purposes) states:

> "Where by or under any statute… land is authorised to be acquired compulsorily by any Government Department…, any question of disputed compensation … shall be referred to and determined by the arbitration of ... one of a panel of official arbitrators …".

Section 2 (Rules for the assessment of compensation) provides:

> "In assessing compensation, an official arbitrator shall act in accordance with the following rules:—

(1) No allowance shall be made on account of the acquisition being compulsory:

(2) The value of land shall … be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise…

(5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may … be assessed on the basis of the reasonable cost of equivalent reinstatement; …".

Section 8 (Power to refer to… agreed arbitrator) states:

"(1) Nothing in this Act shall prevent, if the parties so agree, the reference of any question as to disputed compensation or apportionment of rent … to an arbitrator agreed on between the parties…".

Air Navigation Act 1920

[4] Section 7 (Special powers in case of emergency) of the 1920 Act provides:

"(1) In time of war …, the Secretary of State may, by order, regulate … the navigation of … aircraft over the British Islands…; and, … any such order may provide for taking possession of and using for the purposes of His Majesty's naval, military or air forces any aerodrome or landing ground …

(3) Any person who suffers direct injury or loss, owing to the operation of an order of the Secretary of State under this section, shall be entitled to receive compensation from the Secretary of State, the amount thereof to be fixed, in default of agreement, by an official arbitrator appointed under the [1919 Act], …".

Small Landholders and Agriculture Holdings (Scotland) Act 1931

[5] Section 25 of the 1931 Act (Avoidance of agreement inconsistent with the

Landholders Acts) states:

"Any contract or agreement made by a [crofter] by virtue of which he is deprived of any right conferred on him by any provision of the Landholders Acts shall to that extent be void unless the contract or agreement is approved by the Land Court."

Emergency Powers (Defence) Act 1939

[6] Section 1 (Defence Regulations) of the 1939 Act states:

"(1) … His Majesty may by Order in Council make such Regulations … as appear to him to be necessary or expedient for securing ... the defence of the realm ...

> (2) … Defence Regulations may, so far as appears to His Majesty in Council to be necessary or expedient for any of the purposes mentioned in that subsection …
>
> (b) authorise—
>
> (i) the taking of possession or control ... of any property or undertaking…".

The Defence (General) Regulations 1939

[7] Regulation 50 of the 1939 Regulations states that:

> "(1) Any member of [HM's] forces ... and any person authorised by a competent authority to act under this Regulation, may, for any purpose connected with the defence of the realm ... do any work on any land or place anything in, on or over any land ...".

Regulation 51 states:

> "(1) A competent authority, if it ... [is] in the interests of ... the defence of the realm ... may take possession of any land ...".

Regulation 52 states:

> "(1) ... a Secretary of State ... may by order authorise ... the use of any land ... for ... air force purposes ...".

The Rules of the Scottish Land Court Order 2014 (SSI 229)

[8] Rule 72 (Appeal against order which is not final decision) of the Land Court Rules

provides that:

> "(1) If an order appealed against is not a final decision, the taking of the appeal does not stay procedure in the case and the divisional court may make such order, or interim order, as appears to it to be requisite having regard to the balance of convenience."

Examples of such orders are given as those involving the preservation of evidence,

consignation or payment of money, custody of things and the production of documents.

[9] Rule 84 (Draft statement of case) provides that:

> "(2) The draft statement of case must specify –
> ...

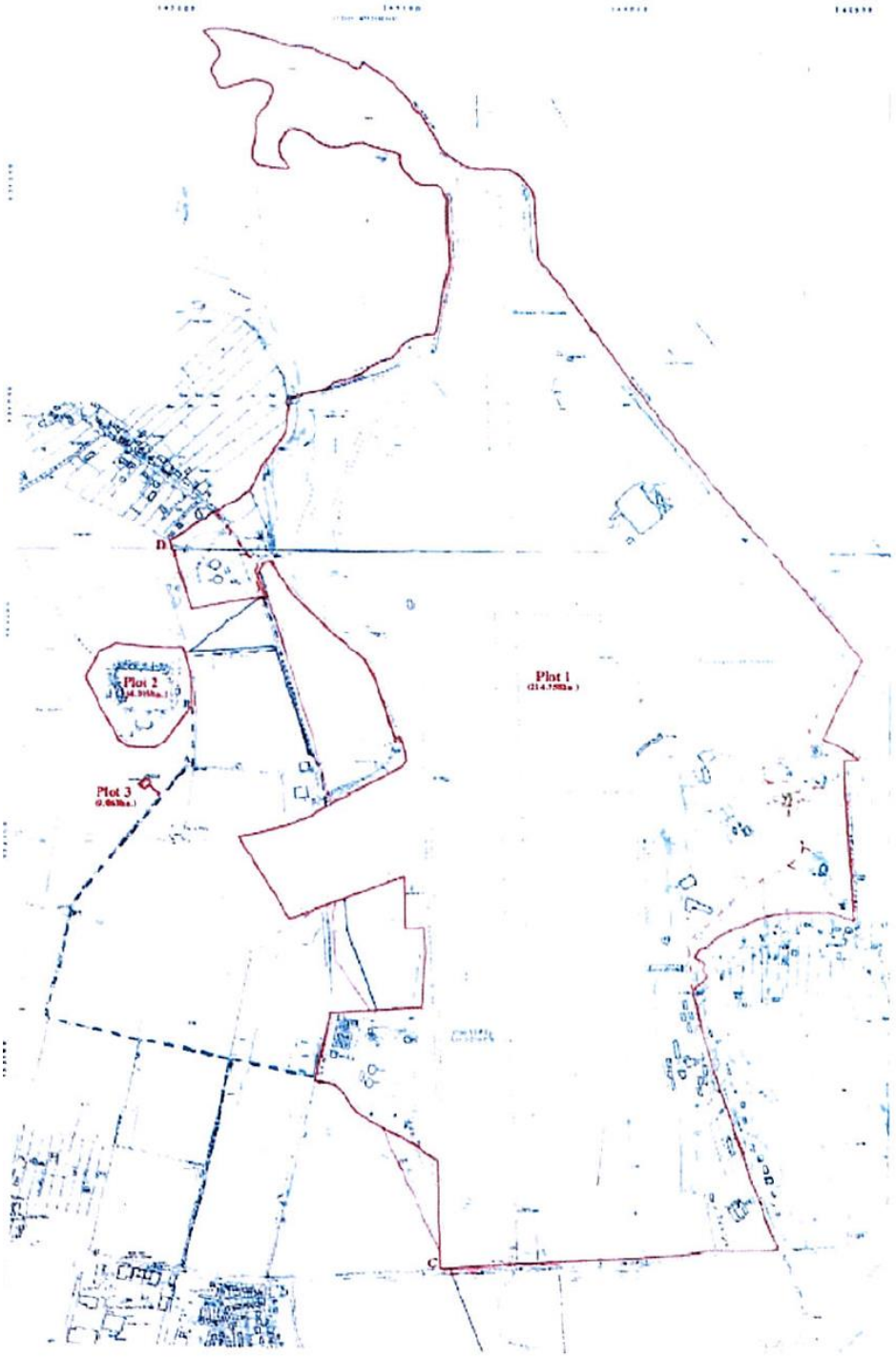
(e) what interim orders are requested to sist procedure or otherwise to regulate the affairs of parties pending determination of the special case ...".

Facts

General

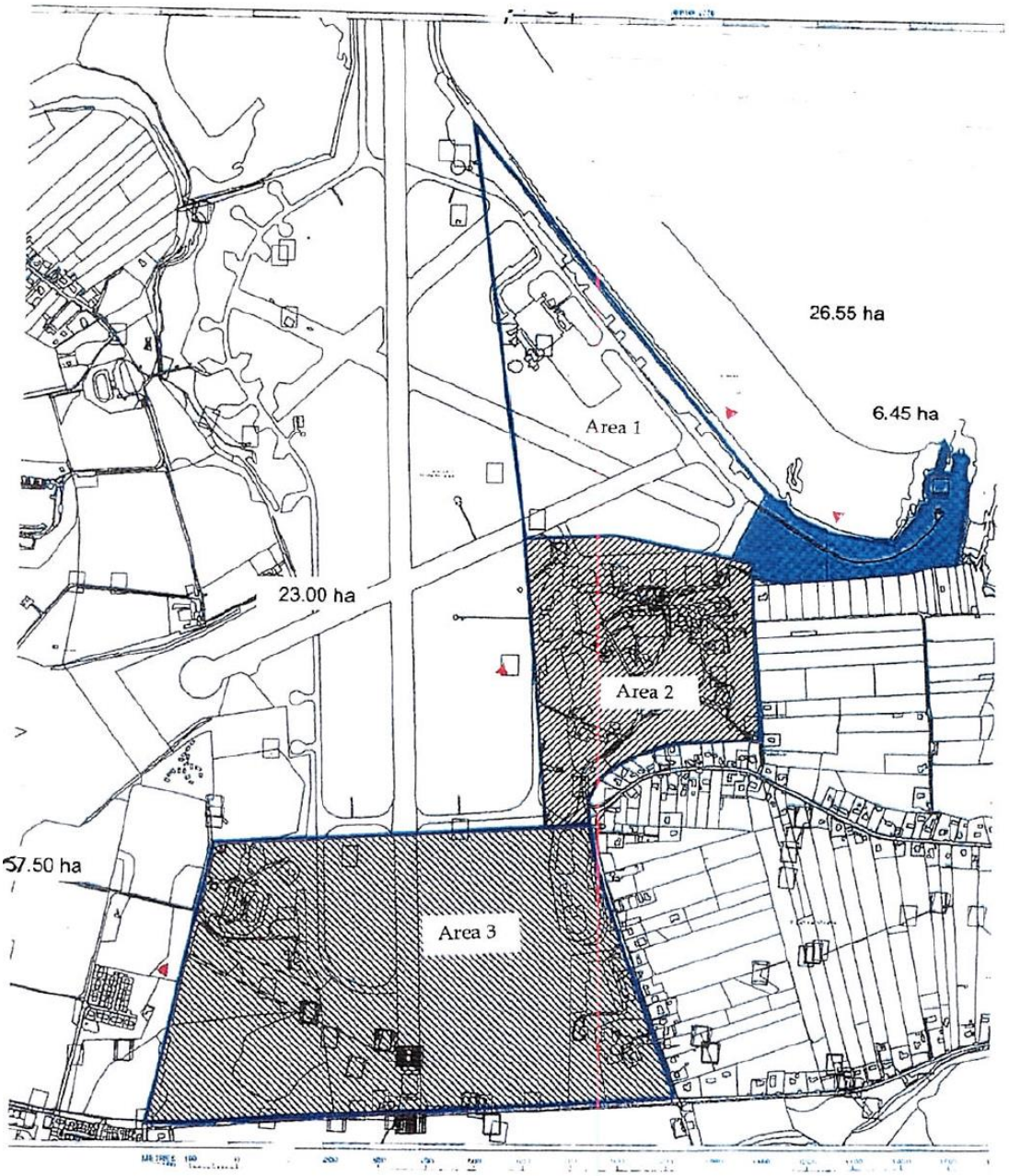
[10] Stornoway airport lies to the east of the town, between the villages of Steinish on the west and Melbost and Branahuie on the east. Its northern and southern boundaries are essentially defined by the sea, although there is also the main road on the southern side. The whole area was previously owned by the Stornoway Trust, to whom it would have been disponed by Lord Leverhulme in the 1920s. Stornoway Golf Course, which was formed in 1890, was originally laid out on the land. The proposal to create a civil aerodrome emerged in the 1930s. For that purpose, 140 acres of crofting land was resumed by the Trust from the Steinish Common Grazings by virtue of two resumption orders of the Land Court, dated 1934 and 1936. The precise boundaries of the resumed land were not provided, but it was said to encompass the central part of the current airport.

[11] It is not disputed that in about 1940, the Secretary of State for Air took possession of what was then a grass landing strip and ancillary facilities. The airport was expanded to meet the needs of the war effort. A Royal Air Force base was established. After the war, the airport returned to civilian use. The Secretary of State for Air nevertheless took title to the land by disposition from the Trust dated 30 August 1946 and recorded in the Sasines Register on 25 November 1947. The date of entry was backdated to Whitsunday (1 June) 1941. The area conveyed, which included the resumed Steinish common grazings, is shown bounded in red on a somewhat indistinct plan as shown:



[12] The disposition made no reference to compulsory acquisition. The "price" was £13,057 14s, which is the same amount which the Land Court assessed as being the "compensation" due to the Trust (see *infra*). The disposition was not in a form prescribed in Schedule A of the 1845 Act. The land disponed affected three crofting areas: (1) the Melbost

common grazings; (2) inbye land of eleven Melbost crofts; and (3) the combined Melbost and Branahuie common grazings. These three areas are respectively marked on the following plan:



[13] The disposition followed upon four Minutes of Agreement and Reference between the Air Ministry and, respectively, the Stornoway Trust, the crofters in four townships (Melbost, Steinish, Sandwick North Street and Branahuie), the tenant of Melbost Farm and the Trustees of the Golf Club. It is important to look in some detail at the content of these

Minutes in order to understand the context in which the various parties and the Land Court considered they were acting in the 1940s.

The Minutes

The Stornoway Trust

[14] In relation to the Trust, the preamble of the Minute narrated that the Air Ministry were carrying out, or had carried out, "certain works" on land belonging to the Trust. It had been "... arranged that the [Trust] shall sell to the Minister [the Secretary of State for Air] and that the Minister shall purchase the… land ..." shown on an annexed plan. This plan was not produced. It was agreed that the price was to be referred, in terms of section 8(1) of the 1919 Act, to the Land Court as an agreed arbitrator. The agreement was that the Land Court would fix the price "in terms of Section 2 of the said Act" with interest from a date of entry which the Court was also to fix.

[15] The Minute continued:

> "Whereas the Stornoway Trustees have intimated to the Minister that they have a claim for compensation payable to them in addition to such price, the parties hereto hereby submit and refer to the Scottish Land Court as sole Arbitrator foresaid the question of whether such claim to compensation is a valid claim and, if said claim is a valid claim, the amount thereof".

The expenses of the reference and disposition and for the "Discharge of the [Trust's] claim to compensation" was to be covered by the Minister, subject to taxation.

[16] Over the Summer of 1945, the Land Court heard evidence, inspected the airport land and the land identified for the relocation of the golf course, which is now in the castle grounds, and heard submissions. Heads of compensation for the replacement of the clubhouse and other buildings were included in the Trust's claim, rather than remaining in the Golf Club's claim (*infra*). On 31 December 1945 the Land Court assessed "the sum to be

paid by the Secretary of State for Air to the Claimants in terms of Section 2 of the [1919 Act]" at £13,047 14s, including £9,600 for the re-instatement of the golf course and clubhouse. Sums for the loss of ownership of Melbost Farm, crofts and common grazings, rent from Scottish Airways and a shooting value were all part of the calculation. Entry was fixed at Whitsunday (1 June) 1941.

[17] The Land Court's Note recorded that:

> "This is an arbitration… to the Land Court in terms of Section 8(1) of the [1919 Act] to adjudicate on claims by the… Trustees against the Minster arising out of the acquisition by the Minister of certain lands belonging to the Trustees for the purpose of forming an aerodrome."

The only significant dispute had related to the relocation of the golf course. The Court, echoing the Ministry's submission, reasoned that it should not assess compensation, in accordance with rule 1 of section 2 of the 1919 Act, on the basis of equivalent reinstatement of the golf course, if that would amount to a penalty for "the taking of land which the legislature has authorised the Ministry to acquire". Having cited Lord Shand in the *Princes Street Gardens* arbitration, unreported, 25 October 1892, the Court said:

> "The 1919 Act provides machinery for assessing *compensation where land has been acquired by a Government Department* or any local or public authority. The rules for assessing compensation are set out in Section 2. These rules are in the main little more than declaratory of the practice that has been built up over a long period of years in the assessment of compensation claims under the Land Clauses Acts and the Railway Clauses Acts. *The fact that the acquisition is compulsory* is no ground for fixing an inflated value for the land and this is provided for in Rule 1. Compulsory purchase is common throughout the British Commonwealth and the same principles of compensation obtain generally." (emphases added).

Ultimately, the Court held that the re-instatement value was appropriate.

The Crofters

[18] This Minute set out the names of the many individual crofters "whose claims for compensation" were involved. As with that of the Trust, the Minute narrated that the Air

Ministry were carrying out, or had carried out, "certain works" on land which was occupied by the crofters or grazed by them. The Ministry had "interfered" with the crofters' rights. The Minute recorded that:

> "…it has been arranged that the *compensation* payable to each of the [crofters] in respect of the interference with their respective holdings and/or grazing rights shall be referred to and fixed by the Scottish Land Court, as the Arbitrator agreed on between the parties in terms of section 8(1) of the [1919 Act]" (emphasis added).

"Therefore", the Minute continued:

> "The [crofters] and the Minister for their respective rights and interests, hereby refer to the Scottish Land Court, as sole Arbitrator foresaid, to fix and determine the *compensation* to be paid to each of the [crofters], in terms of [section 8(1) of the 1919 Act]; The compensation so fixed shall bear interest ... from the date or dates fixed by the Court as the date or dates on which the Air Ministry interfered with or *requisitioned* the holdings or part thereof" (emphasis added).

The expenses of the reference were again to be paid by the Ministry, subject to taxation.

[19] The Land Court heard evidence, visited the crofts and listened to submissions in the Summer of 1945 before issuing proposed findings on 14 September 1945 and a final determination on 31 December 1945. The Court set out in detailed schedules the compensation which was payable under the 1919 Act "in respect of interference with their respective interests in the land". For each croft, it determined the value of the rent reductions in respect of any diminished holding. It then provided a figure for the capitalised value of the loss of profits which each crofter would suffer. This was followed by figures to be paid for the loss of fences and buildings together with miscellaneous moveable items, such as grass seeds.

[20] The Land Court appended a Note as follows:

> "We think it desirable to make a short explanation regarding the proposed *awards* in so far as they deal with the claims which are put forward in respect of 'Redundant Buildings.' Where awards have been made under this head the amount awarded in each case is our measure of the sum required to *compensate* the holder in respect of the lower *compensatable value* of his buildings consequent on the diminished value of

> his holding *due to the compulsory acquisition of part of it by the Air Ministry*" (emphasis added).

Twenty nine crofters were awarded compensation in Melbost, 26 in Branahuie, 14 in Steinish and 36 in North Street Sandwick. Each crofter and croft was respectively named and numbered and each was awarded a specific compensatory sum.

The Melbost Farm Tenant and the Golf Course

[21] The Farm Minute was not produced, but the Land Court order is available. It is headed:

> "Acquisition of Land by Air Ministry – Compensation to Farm Tenant – Minute of Agreement and Reference to Land Court – Acquisition of Land (Assessment of Compensation) Act 1919."

It reads:

> "Under a Minute of Agreement and Reference the Joint Applicants asked the Land Court to assess compensation payable to the tenant of Melbost Farm whose lands were affected by *the compulsory acquisition of land by the Air Ministry*" (emphasis added).

Sums were awarded for loss of profits and goodwill, disturbance and inconvenience, together with the value of sundry moveable and heritable items.

[22] The Golf Course Minute was not produced, but the Land Court Order is in process. Ultimately, only £150, being the value of the Golf Club's lost moveables, was awarded as the claim for reinstating the golf course had been transferred to the Stornoway Trust (*supra*). The preamble stated:

> "Under a Minute of Agreement and Reference the Joint Applicants asked the Land Court to assess compensation to the Trustees of Stornoway Golf Course whose lands were affected by *the compulsory acquisition of land by the Air Ministry*" (emphasis added).

Post War

[23] Although it is not specifically averred, Stornoway airport has operated for civilian purposes since the war. In addition, from 1986 until 1993 it was used as a NATO forward Operating base. During this time, a substantial runway (running north to south) was constructed across the earlier civilian surfaces. This can be seen on the plan (*supra*). The court was told that the new runway involved the reclamation of land from the sea at the runway's northern extremity. In 2001, the airport was conveyed by the Secretary of State for Defence (as successor to the Secretary of State for Air) to the applicants.

[24] In respect of crofting usage since 1941, the respondents aver (and it was not disputed) that:

> "[W]hile the airside fences constructed by the [applicants] and aircraft safety prevents the shareholders making use of the grazings on the airside parts, the second of the Named Respondents makes use of the Struiper [an area of ground adjacent to the disputed area at its northwestern comer] for grazing cattle and the fourth of the Named Respondents keeps his tups amongst the redundant RAF buildings at the junction with the main road [i.e. on part of the disputed area]. The Third Respondent ... has grazed his ram [on the part of the disputed area intended to be disponed to Calmax Construction Ltd] for the last 35 years without seeking, or feeling the need for, permission, as his grandfather had before him. In addition, until the late 1960s, when a larger and modern fank was built for use by the shareholders, elsewhere, the shareholders made use of a fank within the vicinity of the RAF buildings and the land subject to this application, and another fank with the area known as the Struiper. ... Sheep did in fact graze the airfield for many years after the war."

The Land Court Decision

[25] The Land Court determined that, on the material presented to it, other than the resumed Steinish grazings, the airport land remained subject to crofting tenure.

[26] The applicants had pled that there had been a requisition in terms of the Emergency Powers (Defence) Acts of 1939 and 1940 (and, presumably the Defence (General) Regulations 1939), but before the Land Court they accepted that they could no longer advance that

proposition because other statutory powers could have achieved the same result. Their position remained that it was a necessary inference that the acquisition had been made under compulsory powers.

[27] The Land Court reasoned that it was unlikely that any formal process of compulsory acquisition had taken place for five reasons. First, no documentation constituting or representing such a process had been found. Secondly, there was no reference to any particular statutory power in any of the documents, including the disposition. Thirdly, the disposition was in ordinary form; of the kind used in a consensual transaction. It was not in the form prescribed in Schedule A of the 1845 Act. Fourthly, consistent with the form of the disposition, it was narrated in the Stornoway Trust's Minute that the Ministry had agreed to buy the subjects and the Trust had agreed to sell them. Fifthly, the terminology of "interference with" rights or holdings in the Crofters' Minute suggested something short of a complete extinction of rights.

[28] The absence of a formal procedure did not mean that there was no element of compulsion. What had been done was in the knowledge of the existence of powers of compulsion. It was understandable that no-one would not want to frustrate the war effort by insisting on formalities. The parties would have known they would receive compensation for their loss. There was "a certain logic", but no legal basis for saying that compulsory powers had been used.

[29] The applicants had argued that the Crofters' Minute was an agreement to give up their interests in the land and that the Land Court's compensation award was an approval of that agreement in terms of section 25 of the 1931 Act. The Court commented that exactly what was being compensated for had not been spelled out, although "interference" suggested something short of permanent deprivation of rights. However, there had been no

limitation of time in the calculation of the reductions in rent. The compensation related to rent "going forward and not just for the war years. That suggests permanent loss of something, whether some inbye land, grazing rights or both". The claims had been based on a 14 year multiplier. On this basis the Land Court concluded that the crofters were being compensated for future permanent loss "if not of their rights, then their ability to exercise these rights over the disputed area". That was not an end of the matter.

[30] The Court had not been asked to issue section 25 approvals in 1945. Approval had not been given (*Macdonald* v *Prentice's Trs* 1993 SLT (Land Ct) 60). In any event, any agreement, which had been approved under that section, would have had to have been between the Secretary of State for Air and the Stornoway Trust as landlord (*Crofters Commission* v *Arran* 1997 SLT (Land Ct) 22, at 123-137; *Crofters Commission Reference* 2012 SLCR 159, at paras [49] to [57]). The Trust remained the crofters' landlord after the acquisition. An agreement with a party who was not the landlord could not be effective in depriving the crofters of rights held from the landlord as part of their crofts.

Interim Interdict Proceedings

[31] Subsequent to the Land Court's determination, some of the crofters introduced sheep into the disputed areas. They emailed some of the applicants' tenants, stating that they were "squatting" on land subject to crofting tenure. The applicants sought interim interdict from the Court by relying on Land Court Rule 84(2)(e). The Court considered that it did not have the power to grant interim interdict pending disposal of a special case in crofting, as opposed to agricultural, cases. The Court's powers were limited to those granted by statute (*Garvie's Trustees* v *Still* 1972 SLT 29). No power of interdict in crofting cases had been

granted (see rule 72). It was not necessary to infer that power in the Court, as it was available as a remedy in the Court of Session or the Sheriff Court.

Questions in the Special Case

[32] The questions for the court are:

1. Did the Land Court err in determining that the references under the [1919 Act] ... together with the other adminicles of evidence, were not sufficient to establish that compulsory purchase powers had been used by the Air Ministry to acquire the land ...?

2. *Esto* the Land Court was right to hold ... that, while formal procedures do not seem to have been resorted to, the sale of the airfield was, nevertheless, conducted under threat of compulsion, did the court err in holding ... that the leases or grazing rights of the [crofters] were, nevertheless not extinguished in the same way as they would have been had the formal procedures been followed?

3. If the Court has not erred in respect of the first question, did it err in determining that the Minute of Agreement and Reference ... did not amount to approval by the Court for the purposes of sec 25 of the [1931 Act] of an agreement on the part of the relevant [crofters] to relinquish their rights ... in return for receiving compensation?

4. Did the Court err in holding that Rule 84(2)(e) of the Rules of the Scottish Land Court 2014 did not give the Court power to grant interim interdict?

Submissions

Applicants

[33] On the first question, it was clear from the specific references to the 1919 Act in the Minutes, together with other adminicles, that in 1945 the Land Court was determining compensation in respect of a compulsory acquisition. The fact that the ultimate disposition was in ordinary form did not alter the fact that the land had been compulsorily acquired. Any crofting rights were thereby extinguished. Section 1(1) of the 1919 Act could only be invoked when land was authorised to be acquired. A Government department must have

set that process in motion by a Notice to Treat, to be followed by a negotiation on compensation, or other method. Although, despite extensive searches, no documents had been found which described what had been done, unless there had been a compulsory purchase process, the 1919 Act could not have been used.

[34] The land may have been acquired under the Emergency Powers (Defence) Act 1939 and the Defence Regulations 1939. These had been used in relation to another airport during the war. The compensation under the Regulations was for temporary disturbance. Other powers may have been used, including the Air Navigation Act 1920. It did not matter which statute had been employed, since the 1919 Act presupposed that some compulsory acquisition process had been engaged.

[35] It was possible for compensation to be assessed before the real right had been transferred. This was relevant since the parties could thereafter agree to a voluntary transfer (1845 Act s 6). The 1845 Act was a consolidation statute which applied to all compulsory purchases. The 1919 Act only applied to land which had been compulsorily acquired. It did not apply to the temporary acquisition of rights. As permitted by section 8(1) of the 1919 Act, the parties could agree upon an arbitrator. They selected the Land Court. The amount of compensation which had been assessed by the Court was the amount specified in the disposition. This demonstrated that the disposition had been granted in respect of a compulsory acquisition. The Court accepted that the compensation was for permanent loss.

[36] In stating that it was "unlikely that any formal process of compulsory acquisition was undergone", the Land Court erred. Once the Government had initiated the statutory procedure for compulsory acquisition, the parties were free to settle the conditions of that acquisition voluntarily. It was still a compulsory acquisition. The Court had referred to the absence of documentation, but the Minutes were documents which indicated that a

compulsory purchase process had commenced, since they were entered into under the 1919 Act. The Court should have applied the maxim "*omnia praesumuntur rite et solemniter esse acta*" ("all thing are presumed to have been done duly and in the usual manner or all things are presumed to have been done solemnly and with the usual ceremony"; Trayner's Latin Maxims). When the Minutes all referred to the Court acting under the 1919 Act, it had to be presumed that the Government had acted under a statute which authorised the compulsory acquisition.

[37] The Stornoway Trust Minute referred to the Land Court being appointed under section 8(1) of the 1919 Act and to the compensation being assessed under section 2 of that Act. It referred to the compulsory acquisition of land by the Minister. The Land Court's Note referred to the diminished value of a holding due to such acquisition. Although the disposition did not mention statutory powers, the price paid was the amount of the compensation. This represented loss of rents, shooting value and the reinstatement of the golf course.

[38] The 1845 Act provided for conveyances to be in a particular form, but the provision (s 80) was permissive and not compulsory (see s 6). The fact that parties chose to use an ordinary form of disposition did not mean that the process ceased to be one of compulsory acquisition. Although the Minute referred to a sale of the land, the price was made up both of the value of the land and the compensation.

[39] The use of the phrase "interference with their holdings" or "their respective interests in the land" did not suggest something short of a complete extinction of rights. The whole of the grazings had not been acquired. If the acquisition had been temporary, the land would have been given back to the Stornoway Trust at the end of the war (VE day having

been 8 May 1945). The Land Court accepted that the compensation had included future loss. There was compensation for redundant buildings, which again suggested a permanent loss.

[40] On the second question, if, as the Land Court held, the purchase of the airport was carried out under the threat of compulsion, the Court erred in holding that the grazing rights had not been extinguished in the same manner as if formal procedures had been used. If there was a conveyance under threat of the use of statutory powers, the effect of the conveyance was the same as if the powers had been used, especially where compensation has been paid.

[41] On the third question, the Land Court erred in holding that its decisions on the Minutes did not amount to approval of a resumption of the land for the purposes of section 25 of the 1931 Act. The Court erred in holding that the determinations on the Minutes did not amount to tacit approval and that any agreement for the surrender of rights would have to have been with the Stornoway Trust. The crofters had agreed to the Court assessing compensation for the permanent removal of parts of their holdings in some cases and of the grazing rights of others. It was implicit, when the Court accepted the arbitration reference, that it was approving the underlying agreement that the crofters were to give up certain rights, for which they would be compensated. If the Land Court was not implicitly agreeing to the agreement, it could not have justified taking the reference as the agreement would have been void under section 25 of the 1931 Act.

[42] Having acquired title, the Air Ministry became the landlords; being the persons entitled to receive the rents or profits or to take possession of the holding (*Sorbie* v *Kennedy* 2016 SC 271). From the date of entry (Whitsunday 1941), the Ministry was the person entitled to take possession of the grazings (*Walker* v *Hendry* 1925 SC 855). In any event the Trust was a party to the overall agreements. Section 25 did not require a formal act of

approval in a court process (cf *Macdonald* v *Prentice's Trs* (*supra*)). Agreements under section 6 of the 1845 Act did not require section 25 consent.

[43] An additional question might be asked:

> "… did the agreement whereby the [crofters] were to give up their rights in exchange for compensation require approval… under section 25…where section 6 of [the 1845 Act] allows parties to agree a voluntary purchase of all rights and interests in the context of a compulsory acquisition process?"

The crofters had been compensated for their losses. Their rights had been extinguished (*Town-Council of Oban* v *Callander and Oban Railway Co* (1892) 19 R 912) even although a formal compulsory purchase process had not been completed (cf: Welsh: *Compulsory Purchase* in Stair Memorial Encyclopaedia Vol 5 para 86).

[44] On the fourth question, although this matter was now academic, Land Court Rule 84(2)(e) provided that a draft statement of case had to specify what interim orders were requested in order to regulate matters pending a determination of the special case. This was wide enough to include the grant of an interdict. This was so even if, as was accepted, the Court did not have a general power to grant interdict in crofting cases (cf Agricultural Holdings (Scotland) Act 2003 s 84(1)(a)).

Respondents

[45] The respondents explained that the applicants had not sought a proof. The applicants' position was that whether the crofters' rights had been extinguished by a compulsory acquisition was a matter of inference from known facts. At its highest, it was only one possible inference. It was also possible that there had been no compulsory acquisition. If it could not be said which possibility was the more probable, the applicants were bound to fail. There was no compulsory purchase order. There was no deliverance which compelled a transfer of title. There was no Notice to Treat. The Air Ministry had

taken possession of the land in 1939 and had retained *de facto* possession of it until 1945. There had then been a consensual sale. There was nothing done to extinguish the crofting tenure. Section 6 of the 1845 Act did not apply, because there had been no "special Act".

[46] The Land Court's five reasons justified its conclusion (*supra*). Acceptance of the arbitration reference did not involve the Court acting as a court. It did not depend on the application of the 1919 Act. The Court had been less strict in its approach to jurisdiction at the time. The parties had agreed to use the 1919 Act's valuation rules.

[47] In situations of doubt, it was to be presumed that vested rights were not extinguished (*R (Sainsbury's Supermarkets Ltd)* v *Wolverhampton City Council* [2011] 1 AC 437 at para 11). The occupation of the airport by the Air Ministry was not necessarily referable to the exercise of compulsory powers of acquisition. Regulation 51 of the 1939 Regulations could have been used to secure temporary possession. The applicants had accepted before the Land Court that they could not identify the power that had been used. That meant that they could not now refer this court to any specific authorising provision. The potential effect of the use of any such provision was speculative. The applicants' argument amounted to an assertion that the crofters' rights had been extinguished by an unknown, unidentified provision. There was an *ex facie* consensual disposition before the Court. The Stornoway Trust's Minute referred to an agreement to sell the subjects.

[48] On question two, the Land Court had been correct to hold that the absence of formal compulsory procedures meant that the crofters' rights had not been extinguished. The fact that compulsory powers could have been exercised did not mean that the voluntary conveyance had the same effect as a statutory transfer. There was no evidence that statutory powers had been used.

[49] On question three, the Land Court did not err in holding that the decisions of the Court on the Minutes did not amount to approval under section 25 of the 1931 Act. The Court were not to be taken to have approved an agreement unless it had expressly done so by interlocutor. It did not follow, from the fact of the Court having notice of an agreement, that it had granted a statutory approval of it (*Macdonald* v *Prentice's Trs* 1993 SLT (Land Ct) 60 at 68). The language of the Minutes was not consistent with the permanent extinction of rights. The Court would not have understood it to mean that crofting rights were to be renounced. The compensation was for disturbance. In terms of the Minutes, the Court was acting as a private arbitrator and not a court. Its orders had not been certified by the Sheriff Clerk. The agreements contemplated by section 25 did not have the same effect as resumption or renunciation.

[50] An approved agreement could only bind a successor in title if it was registered under section 5 of the Crofters (Scotland) Act 1993 (*National Trust for Scotland* v *Macrae* 2000 SLT (Land Ct) 27 at 33-34). A grazing right was a pertinent of the croft. Only an agreement with the landowner could affect it (*Crofters Commission* v *Arran* (*supra*) at 123-127; *Crofters Commission Reference* (*supra*) at para [57]). The agreement had been between the crofters and the Secretary of State, who was not then the landowner. A crofter could not give up a pertinent of a croft without the landowner's consent (*Macdonald* v *Macdonald* 1960 SLCR 22). The applicants could resolve the problem by seeking to resume the crofts under sections 20 and 21 of the 1993 Act. Part of the North Street Sandwick crofts, which had been used as part of the RAF station, had been resumed in 1954.

[51] On question four, the applicants had been granted interim interdict in the Court of Session on 10 May 2018. This had been recalled, by consent, on 29 August 2019 following reciprocal undertakings. This question was therefore academic. Once an appeal had been

marked against an interlocutor of the Land Court, that Court was *functus officio* (*Macaulay* v *Tayburn*, unreported, SLC 119/15, 21 June 2017. Rule 84(2)(e) did not confer the power of interdict.

Decision

[52] The parties renounced probation. The question for the Land Court was whether, on the balance of probabilities, the correct inference from the agreed written material in so far as available, and the respondents' undisputed averments concerning possession, was that the land had been compulsorily acquired during the years of World War II? If it had been compulsorily acquired, all of the crofting rights in the land would have been extinguished by that occurrence, without the need for any approval under section 25 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931 (*Highlands and Islands Oil and Gas Co* v *Bourbloch Common Grazings* 1995 SLCR 110; *Town-Council of Oban* v *Callander and Oban Railway Co* (1892) 19 R 912, LP (Robertson) at 914). As a matter of principle, the Land Court cannot undermine a duly authorised compulsory acquisition by refusing consent under that section.

[53] The Land Court has provided five reasons for its conclusion that no compulsory acquisition took place. These centre on the absence of documentary support for such an acquisition, the form and contents of the disposition of the land and the use of the terminology in the Crofter's Minute. Whilst these are all undoubtedly matters which, if they were correct, may be seen to point away from the use of compulsory powers of acquisition, they are outweighed by the material which points firmly to the opposite conclusion. In all of this, it must be assumed, for the purposes of the court's decision, that the material which has been produced is all that can be found.

[54] The critical documents are the various Minutes and subsequent Land Court orders. Although the Stornoway Trust Minute does refer to there being an agreement of sale and purchase, the price was referred to the Land Court for determination under section 8(1) of the Acquisition of Land (Assessment of Compensation) Act 1919. Section 1 of that Act makes it clear that it is dealing with compensation for land "to be acquired compulsorily" by the Government under a statute. Section 2 provides rules for the assessment of compensation in those circumstances; there being a particular rule (s 2(5)) for the use of reinstatement value in certain circumstances. That provision was used to determine the compensation payable to the Trust for the acquisition of the golf course. This formed the greater part of the price in the disposition. There was a specific reference to the use of re-instatement value in the Land Court's Note. In all of this, the Court made it clear that the exercise, which it was carrying out, was the assessment of compensation for land which was compulsorily acquired under statute.

[55] The Crofters' Minute similarly refers to the Land Court's appointment as arbitrator under section 8(1) of the 1919 Act. It refers to the assessment of compensation payable under that Act. It specifically stated that it was assessing diminished values consequent upon the "compulsory acquisition" of part of the crofts by the Air Ministry. This phraseology is repeated in the remaining two Minutes for Melbost Farm and the Golf Club.

[56] The use of this language and, more important, the adoption of the 1919 Act rules is only explicable if what was happening was an exercise in the assessment of compensation following upon the compulsory acquisition of land under statute. In the absence of material counterbalancing factors, the appropriate inference to draw from this is, as a matter of probability, that this is what had occurred; the land had been compulsorily acquired in terms of a statute.

[57] It is true that no documentation has been found which identifies the power under which the compulsory acquisition was authorised. It is conceivable that no statutory powers were used at all (see *Burmah Oil Co (Burma Trading)* v *Lord Advocate* 1964 SC (HL) 117), but that would seem unlikely given the obvious powers which were available under, for example, the Air Navigation Act 1920 (s 7). That would appear to be the most likely candidate since the Emergency Powers (Defence) Act 1939 and the Defence (General) Regulations 1939 seem primarily concerned with acquiring possession (ie as a temporary expedient) rather than securing ownership. It does not matter which statute was engaged, since it is known that competent statutory powers did exist.

[58] The Minutes do not talk of prices to be set following upon an agreement to buy, but of compensation to be assessed because of the compulsory acquisition by the Air Ministry. The court must disagree with the Land Court's reasoning, in so far as it proceeds on the basis that no documentation relative to a compulsory acquisition process has been found. The Minutes and the Court's own Notes from 1945 describe such a process. Ultimately, a standard disposition was used to convey the land to the Air Ministry, but this should not be regarded as unusual where all those holding the interests being acquired are not opposing the acquisition. There is no requirement to use the forms in the schedules to the Lands Clauses Consolidation (Scotland) Act 1845. The provision (s 80) is permissive only. The process occurred before the formal procedures under the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 were in force. All that would have been needed to acquire the land compulsorily, in advance of a formal conveyance of title, would have been a Notice to Treat, which would have had the effect of concluded missives. It may be slightly surprising that no-one has produced any documentation emanating from, or internal to, the Air Ministry, but it was eighty years ago.

[59] The use of the word "interference" does not convey a notion of temporary interruption. Even if it did, as the Land Court held, the compensation which was paid to the Stornoway Trust, the crofters and others was for, *inter alia*, future permanent loss. That was, in the case of the Trust, the ownership of the land (including the golf course) and, in the case of some of the crofters, their inbye land and/or, in the case of others, their grazing rights. This is strongly indicative of the use of statutory powers of acquisition since that alone would give rise to claims for compensation.

[60] The usefulness of the airport to the Air Ministry presumably diminished, at least to a material extent, on the cessation of hostilities. If the interference had been temporary, there would have been no need to convey the land to the Ministry in 1945. That conveyance, and the fixing of the entry date at 1941, is again strongly indicative of a permanent acquisition of all rights in the land as a result of compulsory action as at that entry date.

[61] For these reasons, the court will answer the first question in the affirmative. The appropriate inference was that in 1941 the Air Ministry had used compulsory purchase powers to acquire the land. The second and third questions do not now arise. However, in deference to both the Land Court's reasoning and the submissions made, if formal procedures had not been adopted, but the threat of their use had prompted the Stornoway Trust and every crofter to consent to either a sale of their property or a renunciation of their rights, there would have had to have been a formal interlocutor of the Land Court, which approved of the agreements relative to each croft, under section 25 of the Small Landholders and Agriculture Holdings (Scotland) Act 1931. Such approval cannot be implied. In light of this conclusion, there is no need to answer the additional question posed by the applicants. The court agrees with the Land Court's *dicta* to this effect in *Macdonald* v *Prentice's Trs* 1993 SLT (Land Ct) 60 (at 68). The fact that such approval was neither sought nor given

strengthens the finding that compulsory acquisition is what had already occurred. If it had not, the Land Court neither could nor would have entertained the Minutes.

[62] From a practical viewpoint, since the arrangements have already been implemented, in so far as the payment and receipt of compensation is concerned, it is difficult to conceive any reason for withholding approval 80 years on. The court has not ignored the fact that sheep may have been allowed to roam, and hence graze, in non-operational parts of the airport. This is not surprising and may be a sensible use of land. It does not persuade the court that, standing the acceptance of compensation for giving up the crofting rights for the land which includes these parts, these rights remain extant.

[63] Question four is academic and will not be answered formally. Suffice it to say that, as presently advised, the court does not consider that the Land Court erred in understanding its own statutory jurisdiction.