

century in *Fibrosa*,²⁰ “The mills of the law grind slowly”. In this matter of the relationship between causes of action and remedies, it is time that the case law mills started to grind.

Robin Evans-Jones
University of Aberdeen

EdinLR Vol 11 pp 109-116

No Place Like *Holme*: Community Expectations and the Right to Buy

When the Land Reform (Scotland) Act 2003¹ came into force, a vast area of Scotland became “registrable” within the terms of section 33.² Since then, many communities have sought to utilise the powers which the Act confers to take control of land in their area. Unlike communities before it, however, the community based in the Holmehill area of Dunblane was unsuccessful in its attempt to acquire ownership, as the Scottish Ministers decided that its community interest was not suitable for registration and could proceed no further. The community’s appeal against the Ministerial decision was refused on 27 April 2006 by Sheriff J C C McSherry, leaving the decision unchanged and the community disappointed.³ This case is of particular interest to land law practitioners, providing as it does the first judicial interpretation of the Land Reform Act. It also provides a valuable insight into how the community right to buy process operates, and highlights how difficult it is to challenge decisions made in relation to community applications.

A. THE REGISTRATION PROCESS

Part 2 of the Act gives communities in rural Scotland a pre-emptive right to buy land. A number of steps must be taken before communities can exercise this right, including formation of a community body, registration of a community interest in land, and activation of the right to buy when land subject to a registered community interest is exposed for sale.⁴ Each step requires a varying degree of involvement from the

20 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 58.

- 1 All statutory references are to this Act unless otherwise stated.
- 2 Section 33(1) defines registrable land as “any land other than excluded land”, and the excluded land population level was set at 10,000 by the Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2004, SSI 2004/296, now superseded by the Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2006, SSI 2006/486.
- 3 *Holmehill Limited v The Scottish Ministers* 2006 SLT (Sh Ct) 79. The headnote misleadingly refers to “Land registration”. All case references are to *Holmehill* unless otherwise stated.
- 4 No attempt is made here to explain the right to buy process in any detail. See further M M Combe, “The Land Reform (Scotland) Act 2003: a definitive answer to the Scottish land question?” 2006 JR 195; A J M Steven and A Barr, “The Land Reform (Scotland) Act 2003 (Part 2)” (2003) 67 *Greens Property Law*

Scottish Ministers. First, Ministers must confirm that a community body is suitably constituted as a company limited by guarantee with a main purpose which is “consistent with furthering the achievement of sustainable development”.⁵ Ministers must also decide whether or not a community interest is to be registered in the Register of Community Interests in Land, and must advise the Keeper accordingly. Finally, Ministers must consent to the exercise of the right to buy itself, after community members have approved the buyout in a ballot.⁶

Of these three stages, it is arguably the second (registration) where Ministerial consent is of most significance. The first stage is largely declaratory,⁷ while the criteria at the final stage (exercise) are largely repetitive of previous provisions of the Act,⁸ so that it is difficult to visualise a scenario in which a community body – on the back of a ballot in favour of exercising the right to buy – would not be granted consent, unless there had been a major change in its management or structure.⁹

The registration stage is also crucial because of its implications for the landowner. After registration the landowner is forbidden from transferring the land other than in a manner compliant with the terms of the Act,¹⁰ thus making the community body the preferred, and effectively the only possible, bidder. In a concession to predictability in the marketplace, the legislation differentiates between punctual and “late” applications for registration, thus minimising disruption to a landowner seeking to transfer land not currently subject to a community interest. Where an application is timeous, i.e. before the land is exposed for sale, it falls under section 38 and the community must demonstrate only that there is support in the community for registration and that registration is in the public interest. Late applications, however, fall under section 39 and must demonstrate that the level of support is “significantly greater” than under section 38 and that the factors surrounding the application are “strongly indicative” of it being in the public interest, while further satisfying Ministers that there were good reasons for the application being late.¹¹

Bulletin 3; K G C Reid and G L Gretton, *Conveyancing 2003* (2004) 131-141 (contributed by A J M Steven and A Barr).

5 Section 34(4).

6 Section 51(3).

7 With the exception of the sustainable development test. If Ministers do not confirm that a body's purposes are consistent with sustainable development, it is unclear what remedy is available to them: see Combe (n 4) at 220.

8 In s 51(3), the tests relating to whether the land is registrable and whether the purchase is in the public interest are repeated from ss 38 and 39, while s 51(3)(b) goes as far as to refer explicitly to compliance with the community body tests in s 34. Section 51(3)(c) makes one of several references to sustainable development, this time with specific reference to what the community plans to do with the land, with the result that this test may be the one to which community bodies should pay most attention at the activation stage.

9 Section 51(3)(e).

10 Section 40(1).

11 Section 39.

B. THE HOLMEHILL LITIGATION

The facts of *Holmehill* can be simply stated. A resident of the area in question, realising that land owned by Stakis Limited was for sale, felt that it would be beneficial to the community for this to come into community ownership. A petition was gathered to evidence community support, eventually attracting 887 signatures from a possible 6670 on the electoral roll.¹² Holmehill Limited was incorporated as a community body, with Ministers confirming on 15 February 2005 that the newly formed company complied with the sustainable development criterion set out in section 34. An application for registration of a community interest in land was submitted shortly thereafter, under section 39, but was ultimately rejected.¹³ The Scottish Ministers felt good reasons had not been demonstrated for the application being late.¹⁴ They also felt that the factors surrounding the application were not strongly indicative of it being in the public interest but were only “finely balanced”.¹⁵ The “significantly greater support” requirement¹⁶ was not referred to.

Section 61 of the Act provides for an appeal to the sheriff court against a Ministerial decision, and Holmehill Limited made use of this statutory appeal.¹⁷ From the outset, there was no question of the application being anything other than late, and that issue was not under appeal. It is clear the buyout concept was not even conceived until advertising hoardings were noticed, so the easier route under section 38 was never available. If it had been, the application would have led to registration.¹⁸

One interesting detail to note is that another community organisation, the Dunblane Development Trust, attempted to submit an application 26 days before Holmehill, but this was rejected as the Trust did not meet the criteria asked of a community body.¹⁹ The requirement to incorporate as a company limited by guarantee has been criticised elsewhere,²⁰ but this case highlights another possible criticism of the incorporation requirement. If land was not exposed for sale at the beginning of the incorporation process, but appeared on the market during the window occasioned by the need to form a suitable company, a community would be forced to traverse the more difficult section 39 route. Whether Ministers would classify a delay caused by incorporation as an example of a “good reason” is unclear.

Another point of interest is the approach adopted by the court in considering the appeal. The Act is silent as to the nature of the appeal conferred, and there was some

12 Finding in fact 15. It seems these figures were amended downwards somewhat and those names who signed the petition under the pretence that the buyout was solely to prevent development were discounted, to remove the appearance that the buyout was a blocking measure rather than a precursor to sustainable development: see the remarks of Richard Frew, for the Executive, summarised at 94 F-H.

13 Letter dated 5 April 2005, available, along with other relevant documentation, at <http://rcil.ros.gov.uk/RCIL/default.asp?Category=RCIL&Service=View®num=CB00016>.

14 Section 39(3)(a).

15 Section 39(3)(c). See C below.

16 Section 39(3)(b).

17 Section 61(2)(a) allows a community body to appeal against a decision “that its community interest is not to be registered in the Register”.

18 Evidence of Richard Frew, summarised at 92 J.

19 The criteria are set out in s 34.

20 Combe (n 4) at 217-218.

uncertainty as to how the court would handle the case.²¹ As it happened, the court adopted a narrow approach, refusing to reconsider the merits despite encouragement from Holmehill's counsel to do so.²² Such a limited approach severely curtailed Holmehill's chances of success, and any future appeal against a Ministerial decision will face a similar test.²³

It was accepted that the *Carltona*²⁴ principles applied, with the result that decisions of the civil service were equated with those of the Scottish Ministers.²⁵ While this point may be uncontroversial from a legal point of view, it has not escaped criticism from commentators. Andy Wightman, a land reform activist who appeared in the case as an expert witness for the pursuers, has been particularly critical of this aspect of the judgment.²⁶ This may also be criticised from a more theoretical point of view, as discretion and property law tend to make unhappy bedfellows.²⁷ Discretion often comes at the expense of certainty, so those exercising discretion must be beyond reproach. Sheriff McSherry, understandably, felt that it was not for him to replace the original decision with his own,²⁸ but to describe the decision-makers as "duly constituted and elected"²⁹ while in the same breath accepting the *Carltona* principles is slightly misleading. In the light of the legislative scheme, the sheriff's approach is difficult to fault, but his decision serves to highlight the crucial role played by civil servants: whether they deserve that role is another matter entirely.

It is worth observing that late registrations are now more likely to be refused than in the days immediately following the enactment of the legislation. As of April 2005, unawareness of the legislation is no longer regarded as a valid reason for not submitting a timeous registration.³⁰ Bearing in mind his overall approach, it is perhaps

21 There seems to be an absence of recent authority on this issue, a point acknowledged by Sheriff McSherry, at 96 L, with reference to I D Macphail, *Sheriff Court Practice*, 2nd edn, by C G B Nicholson and A L Stewart (1998) vol 1, para 25.11. Of the authorities the sheriff considered, the approach of Lord Emslie in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 found favour (97 D-G).

22 A comparison between s 68(6) of the draft Bill, which was limited to "procedural requirements", and the more open wording of s 61 was made in an attempt to convince the sheriff that the appeal procedure as enacted was intended to be wide, but this approach failed: see 96 C-E.

23 See further M Shaw, "Right to buy and the planning process", 16 May 2006, available at <http://www.biggartbaillie.co.uk/righttobuyandtheplanningprocess.aspx>.

24 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

25 See 97 J-L, with reference to *Somerville v Scottish Ministers* 2005 CSOH 24. See further Rt Hon Colin Boyd QC, "Ministers and the Law" 2006 JR 179 at 189-190.

26 Wightman describes the role of civil servants, combined with the narrow approach adopted by the court, as "potentially worrying since this group has no professional expertise in the areas of land tenure, community development, planning or sustainable development and Ministers in practice follow their recommendations...This leaves the land reform process vulnerable to the inadequacies of a decision making process that lacks any kind of structured and analytical decision making and to the political whims of Ministers who can write their own guidance and determine their own policy intentions": see http://www.landreformact.com/docs/judgement_response1a.pdf.

27 C Rotheram, *Proprietary Remedies in Context* (2002) 253: a "dreaded juridical phenomenon: a discretionary proprietary remedy."

28 As he noted (at 96 J-K): "To do so would involve me in exercising my discretion in a matter within my local jurisdiction...this would not sit well with ensuring consistency of decision making throughout Scotland and I do not believe that this is the proper approach".

29 At 96 I.

30 Evidence of Richard Frew, summarised at 95 D.

unsurprising that the sheriff was reluctant to interfere with the decision that Holmehill Limited had not provided “good” reasons for the delay, noting that there was “nothing in the reasons given...amounting to good reason when considered in light of the policy principles [of the Act]”.³¹ If such a view is adopted in future cases – where the policy principle against late registration is elevated above that of increasing community ownership of land – it is difficult to imagine any reasons for lateness being accepted as good.³²

Another interesting aspect of the *Holmehill* case is that, somewhat inexplicably, Ministers failed to give as a reason for their refusal the lack of “significantly greater support” in the community than would have been required for an application under section 38.³³ Sheriff McSherry found this particularly striking, noting that:³⁴

it is a mystery...why the Scottish Ministers regarded 13.62 per cent as being significantly greater support than 10 per cent and did not refuse the application on that ground. However, I concede that it is for them to exercise their discretion in this respect.

This observation leads naturally to a follow-on question: what would have happened if the other two tests had somehow been met and a *landowner* wished to appeal against a failure to reject under the “significantly greater” test? Apparently the landowner would have been unsuccessful.

C. PUBLIC INTEREST, THE PLANNING PROCESS AND THE *FAIRLIE* DISPUTE

Despite suggestions that *Holmehill* was the first application under section 61 of the Act, this honour seems to fall on a case involving the Earl of Glasgow and a community in Fairlie, but on that occasion the application was made by the landowner.³⁵ Interestingly, the Executive in this instance were arguing for registration, and the arguments raised in the pleadings of the *Fairlie* case make for an intriguing read alongside the *Holmehill* judgment.³⁶

In *Holmehill*, there was a perception that the community’s plan to acquire ownership was in fact an attempt to “thwart” the planning process.³⁷ Richard Frew, the Scottish Executive’s only witness in the case, seemed to be of the view that any attempts to acquire ownership while alternative plans were in place were to be discouraged. He noted that “the planning system was already there to prevent development that was

31 At 101 B.

32 Andy Wightman has been critical of this aspect of the judgment, observing that “[t]he late registration provisions of the Act are...to all intents and purposes useless”: see http://www.landreformact.com/docs/judgement_response1a.pdf.

33 Section 39(3)(b).

34 At 101 K.

35 See further J Watson, “Villagers vow to tackle earl over land sale” *Scotland on Sunday* 23 October 2005.

36 *The Right Honourable Patrick Boyle, The Earl of Glasgow v Fairlie Land Acquisition Company Ltd and The Scottish Ministers*, Kilmarnock Sheriff Court (ref B594/05).

37 See the decision notice under s 37(17) dated 5 April 2006, available at [http://rcil.ros.gov.uk/RCIL2/CB00016/Ministerial%20decision%20Notice%20under%20s37\(17\)%20050405.pdf](http://rcil.ros.gov.uk/RCIL2/CB00016/Ministerial%20decision%20Notice%20under%20s37(17)%20050405.pdf) and quoted at 2006 SLT (Sh Ct) 79 at 81 K - 82 A.

not compatible with the public interest. The policy intention was not to allow the right to buy to subvert the planning system”.³⁸ This point was taken up by Sheriff McSherry, who observed that:³⁹

The practical effect of ownership, once accomplished, is to give the owner control over land use and a veto over development that the owner does not like. The community right to buy had the potential to subvert the planning process...[I]n the real world, I would think it unlikely that the planning process would be commenced or continued with, for example, in respect of an application to allow housebuilding, if the developer was aware that the land was subject to a community right to buy.

In the *Fairlie* case, the land was subject to an unadopted local plan within the terms of section 11 of the Town and Country Planning (Scotland) Act 1997. Here, the issue was not the “thwarting” of the planning process by the community. Instead, it was argued for the pursuer that “the proposal brought forward by Fairlie is intended to thwart the development of the site as was proposed by him by way of objection to the Local Plan”.⁴⁰ In the Executive’s reply to these pleadings, it was noted that “the application to register a community interest by Fairlie was not made to subvert the public interest, rather to promote it. The operation of the local plan process is not a reason for the second defenders to refuse to register an interest in the RCIL pursuant to the 2003 Act.”⁴¹ On this point, it should also be noted that the Scottish Executive’s guidance for community bodies states that “inclusion in [a] local plan should not, of itself, prevent the land from being registered”.⁴²

This divorce from planning law is in direct contrast to the approach of the Executive in *Holmehill*. Read side by side, these two approaches highlight the absurdity of conflating the planning process with the right to buy: while one community was criticised for thwarting the planning process, the other was criticised for thwarting the chance to object. In fact, the position adopted in *Holmehill* seems highly damaging to the effectiveness of the right to buy. When rural land is transferred, it is not uncommon for a change of use to be proposed (the scenario of a farmer selling a field to a developer being a prime example). *Holmehill* seems to suggest that, once planning permission is obtained for a development, or perhaps even before, the development is viewed as being in the public interest, and resistance by way of a community buyout is no longer permitted, regardless of the relative merit of an alternative proposal.⁴³

The Executive’s pleadings in *Fairlie* distinguished the registration stage from the exercise stage, noting that it would be the later stage where⁴⁴

38 Evidence of Richard Frew, summarised at 93 K-L.

39 At 101 J-K.

40 *Earl of Glasgow v Fairlie Land Acquisition Co Ltd*, Condescendence 3(a).

41 *Earl of Glasgow v Fairlie Land Acquisition Co Ltd*, Answers 3(a).

42 *Community Right to Buy: Guidance for Community Bodies* para 30, available at <http://www.scotland.gov.uk/library5/rural/lracrb-00.asp>.

43 See R R M Paisley, “Tenants statutory rights to buy and similar rights”, unpublished paper presented on 31 Aug 2006 at the Second Biennial Conference of the Centre for Property Law at the University of Aberdeen.

44 *Earl of Glasgow v Fairlie Land Acquisition Co Ltd*, Answers 3(a).

competing interests between the parties would be weighed up and consent either granted or refused on the basis of which of them was in the best interests of the community ... The pursuer's competing interests and the as yet unadopted local plan are not valid grounds upon which the second defenders would have been entitled to decline to register the community interest in the land as sought by Fairlie.

Again, this can be contrasted with the approach in *Holmehill*. After considering the policy reasons behind the Act, Sheriff McSherry felt a strict approach to late registration was justified, as granting late applications as of right "would be akin to an automatic right of pre-emption and direct intervention in the live land market".⁴⁵

With respect, this view loses sight of the fact that the right is not automatic but is subject to further assessment at the exercise stage.⁴⁶ Arguably the public interest is better gauged at the exercise stage, with its compulsory ballot,⁴⁷ than at the registration stage. A strong presumption against late applications would deny community bodies their best chance of proving that a buyout is indeed in the public interest. One way of preventing this in future would be to amend the Act by shifting the extra burden placed on late applicants to the exercise stage rather than the registration stage. Such an approach would make registration largely declaratory, and available to all communities before a landowner concludes missives,⁴⁸ while allowing the higher "strongly indicative" threshold of public interest to be gauged more accurately after a campaign and ballot on the issue. Admittedly this could lead to delays for selling landowners, but this could be offset by requiring a ballot in a shorter time frame for late applications.

The conclusion to the *Fairlie* litigation is somewhat cryptic; indeed, the only reference to it in the public domain seems to be a letter held in the Register of Community Interests in Land from the Executive to the community body with an attached interlocutor, which states that Sheriff McDonald at Kilmarnock ordered the deletion of the community interest on 23 January 2006.⁴⁹ The interlocutor seems to grant both of the pursuer's pleas-in-law, namely for recall of the decision and for rectification of the Register of Community Interests in Land, despite initial representations that the remedy of recall was not competent.⁵⁰ This followed a joint motion for the pursuer and the second respondent. That the case should conclude with such a confused joint motion is perhaps fitting when one considers the mysterious capitulation of the respondents' legal case.

45 At 99 A.

46 This is despite recognition early in the judgment, at 82 I, that the appeal concerned the registration stage rather than the exercise stage.

47 Land Reform (Scotland) Act 2003 s 51(1)(a), (2).

48 Using this approach, the requirements of an amended s 38 would be limited to confirming a number of points such as that the land in question is registrable and that the community has a substantial connection to it.

49 Available at <http://rcil.ros.gov.uk/RCIL2/CB00020/Fairlie%20Rejection%20Letter%20070206.pdf>.

50 In *Fairlie* the respondents' first plea in law read "[t]he remedy of recall of the decision of the Scottish Ministers not being competent in terms of the 2003 Act, the action should be dismissed".

D. CONCLUSION

Following the *Holmehill* decision, one MSP was moved to say the ruling “appears to drive a coach and horses through the original spirit of the Land Reform Act, which was designed to encourage local communities to take control over key local assets”.⁵¹ When taken with the unsuccessful bid in *Fairlie*, *Holmehill* seems to suggest that the community right to buy is not leading to community empowerment and tangible land reform,⁵² especially when a community body is faced with a well-argued, and well-funded, challenge by the landowner.⁵³

After *Holmehill*, it would take a brave community to launch an appeal against a Ministerial refusal to register a late application. In this regard it is unfortunate that the *Fairlie* dispute did not produce a written judgment which might have served as a counterbalance to *Holmehill*. Communities attempting a buyout face a difficult enough task already. A restrictive approach to community appeals makes a challenging process more challenging still.

Malcolm M Combe
University of Aberdeen

The author would like to thank Professor Roderick R M Paisley and Professor David L Carey Miller for their encouragement and support.

51 www.markruskellmsp.org/news/2006/may/20060501holme.htm.

52 That there is a lack of real change in the Scottish land market is reflected in the opening article of Strutt and Parker’s *Scottish Estates Review 2006*, by Andrew Hamilton, appropriately entitled “Plenty of reform, but how much actual change?”

53 See I MacKinnon, “Land reform for all – except when big business is selling” *West Highland Free Press* 9 June 2006, available at <http://www.whfp.com/1780/focus.html>.