OUTER HOUSE, COURT OF SESSION

[2022] CSOH 51

P922/21

OPINION OF LORD CLARK

In the Note of

AMANDA URQUHART and DEANNA URQUHART

Noters

for

orders under and in terms of sections 130(2) and 167(3) of the Insolvency Act 1986 in respect of the winding up of WEST LARKIN LIMITED

Noters: Dean of Faculty, Young; Currie Gilmour & Co
First Respondent: no appearance
Second and Third Respondents: O'Brien QC, Ower; TLT LLP

28 July 2022

Introduction

[1] This case concerns statutory provisions which allow, in certain circumstances, a right on the part of agricultural tenants to buy the land that was leased to them. The provisions are set out in Part 2 of the Agricultural Holdings (Scotland) Act 2003 ("the 2003 Act"). The noters claim that they have such a right. The area of land involved is known as Larkin Brae, Inverness. It was formerly owned by Vastlands Property Limited ("VPL"). VPL leased the land to members of the Urquhart family. In due course, the land came to be owned by West Larkin Limited ("WLL"), a company controlled by members of the Sweeney family. The Urquhart family (including the two noters in this case) and the Sweeney family (including

the second and third respondents) have been engaged in a long-running dispute about the tenancy and whether there is any right to buy. WLL is now in liquidation. In this application, the noters seek orders, in particular that missives should be concluded by the liquidator of WLL for the sale of the land to the noters.

[2] The noters contend that there is no sound defence and the order for missives to be concluded should be granted *de plano.* The first respondent is the present liquidator of WLL. He takes what is described in the pleadings as a neutral position in relation to the orders sought. The second and third respondents oppose the granting of the orders. They aver that the lease has terminated, because it ceased to be an agricultural tenancy, and hence there is no right to buy. The second and third respondents say: (i) that there is a relevant defence and that the case should be dealt with by a proof before answer; and (ii) that certain averments of the noters (about personal bar) are irrelevant and should be excluded from probation. The case called for a debate on those issues.

Background

[3] On 29 October 1990, VPL offered to lease the land as an agricultural holding to the second noter and her husband Mr Hugh Urquhart. They accepted the offer. A lease which came to be within the Agricultural Holdings (Scotland) Act 1991 ("the 1991 Act") was entered into, with a term of 25 years. WLL was incorporated in 1993 by members of the Sweeney family, who lived near to the land. They did not accept that the tenancy had been created. On or around 23 April 2003, WLL formally acquired the land from the Queen's and Lord Chancellor's Remembrancer, following the dissolution of VPL. The background to that acquisition was described by each party as complex. The main point is that the acquisition related back to an earlier purported disposition by VPL to WLL, but as that was made prior

to the incorporation of WLL it was abortive. It is, however, undisputed that WLL became the owner and the landlord and so it is not necessary to go into any further details about the background to the acquisition of the land by WLL.

[4] In about 2000, Mr Urquhart and the second noter commenced an ordinary action in Inverness Sheriff Court against, among others, Mr Owen Sweeney and WLL seeking declarator as to the existence of the tenancy, and an interdict against Mr Sweeney from interfering with their peaceable possession of the land. Those orders were granted. Notwithstanding that outcome, the parties have remained in dispute. In particular, various members of the Sweeney family have consistently refused to accept the tenancy or the rights of the noters to have possession of the land. There have been numerous litigations between the two families over the years. Mr Urquhart died in 2005 and the first noter, his daughter, acquired his interest in the tenancy in February 2006.

[5] On 21 April 2006, in terms of Part 2 of the 2003 Act, the noters registered their notice of interest in acquiring the land. The notice was registered in the Register of Community Interests in Land ("the Register") by the Keeper of the Register. Thereafter, the noters arranged to re-register their interest after every 5 years to avoid the registration ceasing to have effect. The noters say that they intimated the notices of registration to WLL, but the second and third respondents say they have no record of receiving the notices. However, it did not appear to be disputed that the Keeper of the Register intimated them to WLL. On 20 February 2019, the person then acting as the liquidator of WLL gave written notice under the 2003 Act to the noters of a proposal to transfer the land. On 7 March 2019, the noters executed a counter-notice under the Act of their intention to purchase the land. In 2019, two separate Notes were raised in the Court of Session by Joseph Sweeney and Donalda Sweeney (the second and third respondents in the present action). One of the

points argued in the Note by Joseph Sweeney was that the liquidator should be ordered to challenge the noters' right to buy the land. That application was refused by the Lord Ordinary and the decision was affirmed by the Inner House (*Joseph Sweeney and Donalda Sweeney, Noters* 2020 CSIH 65).

[6] The second and third respondents contend, in their pleadings, that the noters (and their family) had ceased to occupy the land, or to carry on any sort of agricultural activity on it, by at least 2006 and hence have lost the right to buy. The land was said to have been abandoned, left derelict and also not used for the purposes of a trade or business. Accordingly, the lease is said to have expired on 29 October 2015 and, in any event, had ceased to be "a 1991 Act tenancy" by then. The noters say that they have not (either expressly or impliedly) abandoned the tenancy or any agricultural use of the land. The tenancy had continued to exist by tacit relocation. No notice to quit had ever been given by WLL to the noters. As a result of behaviour by the Sweeney family, the noters say that the livestock eventually had to be removed from the land because it was unsafe to maintain them. The second and third respondents dispute these allegations.

[7] The noters accept that they had not, until recently, tendered any payment of rent to the present liquidator. The noters say that they had routinely sought to tender rent prior to liquidation, but WLL and its agents routinely refused to accept it. Ultimately the noters say that they ceased attempting to do so as it was futile. Following liquidation, the noters duly tendered the outstanding rent to the former liquidator, who accepted it. Since the Note raised in this court at the instance of Joseph Sweeney, the noters did not tender rent on the basis that the whole issue was the subject of litigation. After it had been raised as an issue by the present liquidator in his pleadings, the noters duly tendered the outstanding rent to the present liquidator.

Relevant provisions of the 2003 Act

[8] Part 2 of the 2003 Act deals with the tenant's right to buy land. The Keeper has to keep the Register (section 24(2)). The tenant may apply to register an interest in acquiring the land comprised in the lease (section 25(1)). Various matters must be specified in the notice given by the tenant (section 25(3)). The owner must be sent a copy by the tenant (section 25(4)). On receipt of the notice, the Keeper must register the tenant's interest and send an extract to the tenant and the owner (section 25(5)) and a creditor who has a standard security (section 25(6)). If the owner disputes "any matter contained in the extract of registration" he can challenge the registration on the ground of inaccuracy (section 25(8)). The Keeper then makes such enquiry as is considered appropriate, and if the inaccuracy is material must rescind the registration of the tenant's interest (section 25(9)). Either party can appeal to the Land Court against the Keeper's decision (section 25(11)).

[9] Sections 25(12), 25(13), 25(15) and 28(1) are of major importance in this case and they state:

> "25 Registration of tenant's interest
>
> …
>
> (12) A registration of a tenant's interest in acquiring land–
> (a) continues to have effect only in relation to such land as remains comprised in the tenancy; and
> (b) ceases to have effect–
> (i) if the registration is rescinded;
> (ii) if the tenancy is terminated; or
> (iii) where neither of those things has occurred, at the expiry of the period of five years from the date of registration.
>
> (13) Where–
> (a) the tenancy is terminated during that period; or,
> (b) there is a reduction in the land comprised in the tenancy,
> the landlord must give notice in writing of that fact to the Keeper.

…

(15) The Keeper must remove from the Register any registration of a tenant's interest in acquiring land which no longer has effect.

28 Right to buy

(1) Where a tenant's interest in acquiring land is for the time being registered under section 25 and—

(a) the owner of the land or a creditor in a standard security with a right to sell the land, gives notice to the tenant under section 26 of a proposal to transfer the land or any part of it; …

the tenant has the right to buy the land to which the transfer relates (including any interest or rights comprised in the land) from the owner or, as the case may be, the creditor."

[10] If a tenant's interest in acquiring the land is registered, section 26 (referred to in section 28(1)), requires the owner to give notice to the tenant if the owner proposes to transfer the land or any part of it to any other person. Within 28 days of receipt of the owner's notice, the tenant may give notice that the tenant intends to buy the land (section 29(2)). The procedure for buying is set out in section 32, including that the tenant makes an offer to buy at a specified price. If the price is not agreed, a valuer is appointed to set the price (section 33) and the owner or the tenant can appeal to the Lands Tribunal against that valuation (section 37).

Order sought by the noters

[11] The debate concerned the first order sought by the noters which is, under section 167(3) of the Insolvency Act 1986, to direct the present liquidator to conclude missives on behalf of WLL for the sale of the land to the noters, in accordance with the provisions of Part 2 of the 2003 Act. The noters argued that this order should be granted *de plano*.

Submissions

Submissions for the noters

[12] The averments of the second and third respondents about the validity of the noters' registration of interest in acquiring the land were irrelevant. The 2003 Act provides a specific statutory right to buy, flowing from registration, and a statutory remedy for challenging registration. Registration is a necessary precondition of the tenant's right to buy the land. It confers a "contingent right to buy the land that will become enforceable if and when the owner…should propose to transfer the land or any part of it to a third party…": Gill, *Agricultural Tenancies* (4th ed), at 29-16. Section 28(1) of the 2003 Act made that clear. Where Parliament creates a statutory right and a statutory remedy, it is not competent for the court to ignore it. The Keeper of the Register is supposed to have an opportunity to consider any challenge to the accuracy of the Register*: Serup* v *McCormack & Others* 2012 SLCR 189.

[13] The 2003 Act confers exclusive jurisdiction for such challenges on the Keeper and the Land Court. This court could not competently consider such a challenge: *Barraclough* v *Brown* [1897] AC 615, p 620 (Lord Herschell), p 622 (Lord Watson); *Grubb and Others* v *The Perth Educational Trust* 1907 SLT 492, p 493 (Lord Guthrie); *Dante* v *Assessor of Ayr* 1922 SC 109, p 121 (Lord Justice Clerk (Dickson)), pp 127-128 (Lord Ormidale); *British Railways Board* v *Glasgow Corporation* 1976 SC 224, p 237-238 (Lord Justice Clerk (Wheatley)).

[14] As the present liquidator takes a neutral stance and does not oppose the directions sought, there is no relevant defence to the Note. In any event, the noters have a crystallised right to buy the land flowing from the undisputed and unreduced exchange of the notice of proposal to transfer and counter-notice under the terms of the 2003 Act in 2019. The second

and third respondents appeared to be inviting the court to just ignore important notices with important legal effects under the 2003 Act without any relevant party seeking reduction of them. But short of reduction, there is "no remedy known to our law of setting aside or refusing to enforce a document": *Eastern Motor Company Limited* v *Grassick* 2022 SLT 139, para [64] (Lord Pentland, delivering the Opinion of the Court).

[15] In relation to personal bar, there was a relevant case averred by the noters that WLL, and the present liquidator as its agent, are personally barred from challenging the validity of the noters' registration and/or the existence of any tenancy. The requirements for a relevant plea of personal bar, explained *in Ben Cleuch Estates Ltd* v *Scottish Enterprise* 2008 SC 252, at [85]-[87] (Lord Macfadyen, delivering the Opinion of the Court), were met. Personal bar can operate so as to create an enforceable right where there otherwise would not be one, or by causing something that is not within particular statutory or contractual provisions to be treated as if it were within those provisions: cf *City Inn Limited* v *Shepherd Construction Limited* 2011 SC 127, [67]-[75] (Lord Osborne); *McMullen Group Holdings Limited* v *Harwood* [2011] CSOH 132, [69]-[76] (Lord Hodge). Where personal bar prevents a challenge to someone's right or title being advanced, there is little, if any, functional difference between the defensive plea of personal bar and the positive creation of an independent and freestanding right: Reid and Blackie, *Personal Bar* (2006), at 5-24 - 5-25. Moreover, any title to challenge the existence or validity of the noters' tenancy or the registration of their interests in the Register rests with WLL as the owner of the land. To the extent that the second and third respondents have any title to advance these challenges in the present process, they can have no better title than WLL and so are equally affected by any plea of personal bar.

Submissions for the second and third respondents

[16] Section 25 sets out a number of conditions which must be met for a registration of a tenant's interest to be valid. The noters' argument that the effect of section 25(8)-(11) is to create an exclusive jurisdiction for the Land Court in this matter was misconceived. Those provisions create a regime for the correction of inaccuracies in registration. However that regime is, necessarily, subject to the pre-conditions for validity which are set out in section 25(12). On a plain reading of section 25, no registration can have effect where no tenancy exists. That is axiomatic. By creating the procedure in section 25(8)-(11), the legislature did not bring about the position contended for by the noters, that even where the tenancy has come to an end or lost its agricultural character, the registration subsists unless and until it is set aside by the Land Court. The legislature intended the regimes under section 25(12) and sections 25(8)-(11) to sit alongside each other, and to co-exist. If a registration has already become ineffective under section 25(12), there can be no need to challenge its accuracy under section 25(8)-(11). Accordingly, if the noters' registration does not meet the conditions set out in section 25(12), it is of no effect.

[17] The circumstances described by Lord Watson in *Barraclough* v *Brown* were quite different, as were those in the other cases relied upon by the noters. Section 25 provided for a registration to lose effect by operation of law, without the need for proceedings in any forum. Even if the noters' position was correct and some form of proceedings were required, it was within the court's powers to find, in supervising the winding-up, that the conditions for validity of registration set out in section 25(12) not having been met, and the procedure provided for under sections 25(8)-(11) being superfluous and unnecessary in the circumstances, the first direction sought by the noters ought to be refused.

[18] If, against those submissions, the court decided that the procedure set out in section 25(8)-(11) is mandatory in the circumstances, an opportunity should be afforded to the liquidator to lodge a notice under section 25(8) with the Keeper. No time limit is provided for the lodging of such notice. However, the result remains the same: the conditions for validity under section 25(12) are not met.

[19] If a registration has no effect in terms of section 25, then it cannot be relied upon to meet the requirement for the tenant's interest to be "registered under section 25". Given that the pre-conditions for validity of registration in section 25(12) were not met, the notices exchanged were ineffective. This case was quite different from *Eastern Motor Company Limited* v *Grassick*. The registrations here were already ineffective by operation of the statute. There was no need for any further step to bring about that result. If the court considered that the proper approach in the circumstances is for the second and third respondents to amend to take a plea in law of reduction *ope exceptionis*, they offer to do so.

[20] The noters' averments concerning personal bar were irrelevant. Personal bar cannot operate to validate a registration which is invalid. The noters appeared to be using personal bar as a sword rather than a shield, which cannot be done: *Shaw* v *James Scott Builders & Co* [2010] CSOH 68, Lord Hodge at [64]; *The Advice Centre for Mortgages* v *Mcnicoll* 2006 SLT 591, Lord Drummond Young at [18] and [23]). It is not capable of creating any positive right, far less one where the pre-conditions of section 25(12) of the 2003 Act are not met. The acts of the former liquidator could not revive a long-extinguished lease. Personal bar does not arise merely because a landlord accepts a legally erroneous view that a lease subsists: *Cantors Properties (Scotland) Ltd* v *Swears & Wells Ltd* 1978 SC 310. Nor did the noters aver any prejudice sustained by them, so as to make it unfair to allow the respondents' argument to be advanced.

Decision and reasons

Issue 1: can the second and third respondents rely upon section 25(12) to challenge the noters' right to buy?

The nub of the dispute

[21] The noters' position is that section 25(8)-(11) deals with challenging registration and that section 25(12) simply deals with events that might occur post-registration. In summary, the second and third respondents say the intention of the legislature was that the regimes under section 25(12) and section 25(8)-(11) were to sit alongside each other, and to co-exist. So, they argue, the regime under section 25(8)-(11) only applies if the pre-conditions for validity, provided in section 25(12), exist. Section 25(1) refers to the fact that a tenant of "a 1991 Act tenancy" may apply to have registered an interest in acquiring the land comprised in the lease. As Lord Woolman observed in *John Sweeney and Donalda Sweeney, Noters* (at [24]) "…if a lease ceases to be an agricultural tenancy, the lessee loses the right to buy". However, when this matter was raised with senior counsel for the second and third respondents, he noted that was said in the particular context of that case and in the present case the ground of challenge was based on section 25(12), although that challenge was on the same basis: that a 1991 Act tenancy was no longer in place.

The statutory scheme

[22] In interpreting the language in a statute, the central point is identifying its purpose and the general scheme by which the purpose is put into effect: *R (Quintavalle)* v *Secretary of State for Health* [2003] 2 AC 687, Lord Bingham of Cornhill at [8]; *Bloomsbury International Ltd & others* v *Department for Environment, Food and Rural Affairs (Sea Fish Industry Authority*

intervening) [2011] 1 WLR 1546, Lord Mance at [10]. The main purpose of the 2003 Act is to seek to further improve, beyond the protections in the 1991 Act, the rights of farmers who lease land for agricultural purposes. Putting it very broadly, the 1991 Act created a long-term arrangement for the tenant farmer, at a rental cost which is economic and with a right to adequate compensation for improvements made. It provided, among other things, for a degree of security of tenure for the tenant by restriction of the operation of notices to quit. The 2003 Act introduced two new types of fixed term tenancies (short limited duration and limited duration) to create more ways of allowing farming tenancies, and most importantly for present purposes, in Part 2 it introduced the scheme giving the "right to buy".

[23] The tenant's right to buy has been appropriately described as a "contingent and restricted right of pre-emption" (Gill, *Agricultural Tenancies* 4th ed., at 29-01). That succinct description captures the key points in the wording of Part 2. Section 28(1) states that "where a tenant's interest in acquiring land is for the time being registered under section 25" the right to buy applies. Registration, for the time being, is therefore a key factor. Registration can, as explained earlier, be challenged (section 25(8)). It is important to note the wide scope of the challenge to the accuracy of "any matter contained in the extract of registration". The Keeper will then decide whether or not to rescind the registration (section 25(9)) and either side can appeal against that decision (section 25(11)). Further, the owner must inform the Keeper if the tenancy has terminated (section 25(13)) and the Keeper must remove any registration that ceases to have effect (section 25(15)). But registration which persists gives rise to the right to receive notice from the owner (or secured creditor) if he intends to transfer the land, creating the right to buy (section 28(1)). Thus, the scheme is a discrete

set of provisions introducing a right to buy for the benefit of the tenant, subject to certain contingencies and restrictions. The scheme sets out the process from start to finish.

Interpretation

[24] In my opinion, it would not make sense to interpret the provisions in Part 2 of the 2003 Act as giving a free-standing right to challenge under section 25(12) based on the allegation of the tenancy no longer being a 1991 Act tenancy and having come to an end. Under the scheme, where there is such an issue it is dealt with by a challenge by the owner under section 25(8) or (if there is termination after registration) a notice by the landlord to the Keeper that the lease has terminated, under section 25(13). The proposition that no such steps are taken and the right to buy process proceeds to its final stages, but that there remains a right to challenge under section 25(12), is not in my view correct. Among other things, this approach leaves the registration in place, but asks that it be ignored. It also proceeds on the basis that section 25(8) and section 25(13) are merely options and that a broad right to challenge based on section 25(12) subsists, even when the right to buy has been achieved. This would interfere with, and indeed usurp, the role of the Keeper and the Land Court set out in Part 2 of the 2003 Act.

[25] When one has regard to the purpose of the scheme and its context, section 25(12) has a much more limited purpose. Section 25(12) is dealing with how alterations to the tenancy, after registration of the tenant's interest to buy, can affect the registration. It is not setting out pre-conditions for registration, as the second and third respondents argue. The reference (in section 25(12)(a)) to the registration continuing to have effect only in relation to such land as remains comprised in the tenancy is dealing with a situation in which there has been a reduction in that land, after registration. Section 25(12)(b) deals with the registration

ceasing to have effect, firstly if the registration is rescinded (which the Keeper could do under section 25(9)(a)) or secondly "if the tenancy is terminated", again after registration. It is notable that section 25(13) refers to "if the tenancy is terminated during that period" which can only be a reference to the period stated in the preceding sub-section: "five years from the date of registration". The registration gives rise to consequences, but it may not continue to have effect or may cease to have effect if the circumstances just noted arise after registration and the Keeper is notified by the landlord and removes the registration.

[26] Here, the second and third respondents' challenge is that there was no longer a 1991 Act tenancy from 2006, and the lease terminated in 2015. But in fact registration occurred thereafter (in 2016 and then in 2021). Put shortly, section 25(12) deals with the specified forms of challenge to registration occurring within a period of 5 years after registration by notification to the Keeper. It does not allow the much broader form of challenge made by the second and third respondents.

[27] It might be said that this approach to interpretation could result in a person who wrongfully claims to be a tenant under a 1991 Act tenancy, and registers an interest in buying the property, succeeding in buying it if the registration is not challenged under section 25(8) or by notice under section 25(13). However, it is equally clear that the owner will have notice of the registration (including from the Keeper) and will be fully able to challenge it, if it is in any way inaccurate or, for example, if the tenancy has terminated after registration. Further, the owner can readily (and indeed must) draw to the Keeper's attention any reduction in the land comprised in the tenancy or the termination of the tenancy. The owner is therefore adequately protected by the scheme, albeit that the owner must respond and challenge the tenant's position. The owner may also take other steps, to which I shall now turn.

Proceedings outwith the scheme

[28] The 2003 Act amended the provisions of the 1991 Act in respect of jurisdiction of the Land Court and significantly extended that jurisdiction, allowing a wide range of remedies, including declarator. In *Fyffe* v *Esslemont*, Scottish Land Court, 28 March 2018, a landlord sought declarator that there was no longer a 1991 Act tenancy, because agricultural use had ceased. The Land Court held that it was open to the landlord to seek declarator (as occurred in England in *Wetherall* v *Smith* [1980] 1 WLR 1290), that the protection of the statute is lost if agricultural activity is wholly or substantially abandoned during the course of the tenancy. The case did not involve the right to buy provisions in the 2003 Act, but it illustrates that action can be taken to seek such a declarator.

[29] In *Serup* v *McCormack & Others*, registration of an interest to buy in relation to a 1991 Act tenancy was made by a purported tenant in 2005 and again in 2010. The applicant sought various orders to the effect that the respondent had no current rights as a tenant in relation to the farm, including declarator that the agricultural lease had been extinguished. Those orders were granted, although the tenant was found to have entered into a limited duration tenancy thereafter. The case was described by the Land Court as an ordinary application, but in respect of the fourth order, which sought to ordain the Keeper of the Register to remove the entry in the Register based on the respondent's supposed interest as a tenant under the 1991 Act, the court said that crave "should properly be viewed as an appeal in terms of sec 25 of the [2003] Act". The court also noted that it was "not clear from the pleadings what stage any procedures under sec 25 (8) and (9) had reached before the present action was raised".

[30] Accordingly, *Serup* involved a direct application to the Land Court, in which it was held *inter alia* that the 1991 Act tenancy had been extinguished in 1993 by virtue of the respondent's acquisition of a one-half share of the farm, but one crave, for actual removal of the entry in the Register, was regarded as in effect an appeal under section 25(11) of the 2003 Act. The existence of a 1991 Act tenancy can therefore be challenged in an ordinary application to the Land Court, and if removal from the Register is also sought that can be viewed as an appeal.

[31] In the present action, counsel made no submissions about these other means of challenge, presumably because they differ from the second and third respondents' position here, which is that section 25(12) allows their defence to the Note. However, the decision in *Serup* illustrates that, where registration has occurred, there is a need to apply the court's finding about extinction of the lease and have the Keeper rescind the registration. It shows that the scheme and the role of the Keeper must be respected: to bring the process of right to buy under the scheme to an end, that matter is to be raised with the Keeper. The decision in *Serup* also shows that, in a case where the tenancy was held to be extinguished long before registration, section 25(8) is the method of challenge and not section 25(12), which fits with the interpretation I have reached. *Fyffe* v *Esslemont* is of course different because there is no reference to registration and so the statutory scheme did not require to be engaged. But if there had been registration, then no doubt a section 25(8) challenge could have been made.

[32] Under the 2003 Act, there are restrictions on the use of a notice to quit by the landlord. However, when such a notice can be served, as was pointed out by Lord Gill in *Trustees of the North Berwick Trust* v *James B Miller & Co* [2009] CSIH 15, registration of the tenant's interest does not restrict any right the landlord may have to terminate the tenancy and, following such termination, the landlord may proceed to sell the relevant land with

vacant possession. This is an example of a termination of which notice may then be given by the landlord to the Keeper under section 25(13) so as to have the registration removed.

[33] It is not necessary to identify all of the means by which the owner or landlord can seek to challenge the tenant's position, but the short point is that the owner or landlord is able to bring proceedings about the tenancy being extinguished or no longer being a 1991 Act tenancy. However, as the scheme is the statutory process giving rise to a right to buy, the steps necessary to stop that right progressing must be taken, by a challenge under section 25(8) or a notice of termination under section 25(13).

Conclusions on Issue 1

[34] For these reasons, in my opinion, section 25(12) does not cover an allegation that in 2006 the land ceased to be a 1991 Act tenancy and the tenancy came to an end in 2015. It is not in dispute that for at least many years this was a 1991 Act tenancy. Notices of interest were registered on the dates referred to by the noters. No challenge was made by the owner under section 25(8) and no notice of termination was given under section 25(13). As observed earlier, an application to the court by the second and third respondents to have the court ordain the former liquidator to intimate a challenge under section 25(8) was refused. No other challenge, outwith the scheme, was made by the owner. In fact, the owner (at that time, the former liquidator) gave notice under the scheme of his intention to transfer the land. Accordingly, the registration did not cease to have effect, so that section 28(1) came into play. The noters responded under the scheme, giving notice of their intention to buy the land. The second and third respondents have presented no relevant defence to enforcement of that right.

Ancillary issues

[35] The decision on interpretation resolves this first issue, but it is appropriate also to deal with four ancillary points that were raised.

(1) Challenge by persons other than the owner

[36] Part 2 of the 2003 Act is about the parties to the lease: the landlord (or owner) and the tenant. The scheme does not allow interested parties, such as the second and third respondents, to mount a challenge under section 25(8) or to give notice under section 25(13), and of course they have not sought to do so. These provisions refer to the owner or landlord. I can see no basis in the statute to suggest that the second and third respondents can raise arguments under section 25(12) at all, let alone when the owner has not challenged under section 25(8), has not given notice of termination under section 25(13) or used any other means of challenge, and indeed the owner's agent (the former liquidator) has issued a notice under section 26, clearly proceeding on the basis that the registration of interest by the noters was valid. The second and third respondents' challenge based on section 25(12) would have failed for this reason alone. The question of whether an interested party could in a court action seek declarator that the tenancy is no longer a 1991 Act tenancy, and perhaps also reduction of the notices exchanged, and thereafter have the registration removed from the Register was not raised in this case. However, to seek to unravel the tenant's right to buy under the scheme an interested party would need to find some other form of remedy than those made available to the owner or landlord within the scheme.

(2) Reduction

[37] The former liquidator's notice of proposal to transfer and the noters' counter-notice give rise to the right to buy (section 28(1)). If, contrary to my decision, the second and third respondent's position on interpretation had been correct, it would have been necessary for them also to have sought reduction of the notices in order to avoid the right to buy. I do not accept their contention that reduction would be of no relevance and indeed not required. Without reduction, a purportedly extant statutory right to buy would remain in place. It would not simply be set aside or refused to be enforced, there being no such remedy: *Eastern Motor Company Limited* v *Grassick* (Lord Pentland, giving the Opinion of the Court, at [64]). If I had found in favour of the second and third respondents' interpretation, the suggested amendment to seek reduction *ope exceptionis* would have been considered.

(3) Jurisdiction

[38] Again, if contrary to my decision the interpretation put forward on behalf of the second and third respondents is correct, on that hypothesis this court would have been able to determine the matter. It is plain that there are specific provisions about the role of the Keeper and the Land Court, but the second and third respondents' interpretation would have given a free-standing right to challenge, unfettered by those provisions. For the reasons given however, I have rejected that position. Any challenge under section 25(8) gives exclusive control to the Keeper and jurisdiction for an appeal only to the Land Court. In light of the express provisions, I do not consider it necessary to embark on a detailed analysis of the authorities on jurisdiction. In relation to section 25(12), a notice under section 25(13) about termination of the tenancy or reduction in the land comprised in it falls within the province of the Keeper, who may make a decision under section 25(15) to remove

any registration which no longer has effect. There is no express provision that such a decision can only be appealed to the Land Court. But as the second and third respondents' grounds are not the true form of challenge under section 25(12) no further comment is needed in relation to jurisdiction on that matter.

(4) The position of the current liquidator

[39] On behalf of the noters, it was submitted that as the present liquidator has not challenged the order sought, that suffices to allow it to be granted. The position for the second and third respondents is that the present liquidator considers that matters are best resolved between them and the noters, but that did not mean that he was entirely neutral and in fact he was considering his position. It was submitted that if the court felt that the current challenge should fail, the case should not be determined now and the liquidator should be allowed to make a challenge, if so advised. I see no basis for that proposal. Senior counsel for the liquidator, at the procedural hearing, advised the court that he did not wish to appear at the debate. The liquidator has had ample time to consider his position and reach a view on what steps, if any, he wishes to take. His entirely candid pleaded position is that he neither opposes or supports the first order sought by the noters and that the proper contradictors are the second and third respondents.

Issue 2: Crystallisation of the right to buy

[40] There is no time limit for a challenge under section 25(8) and the wording in Part 2 does not expressly require any such challenge to be made before the notices on either hand have been intimated. However, the legislation is clear that once the notice from the owner has been intimated the right to buy exists (section 28(1)) and the tenant can take it forward to

completion (section 29(1) and (2)). So, if the tenant gives a notice in response that he intends to buy the land, the right becomes enforceable. There was of course no challenge under section 25(8) by the landlord or liquidator here. I conclude that the noters' right has crystallised by virtue of the exchange of notices. The scheme has been followed through to its final stage by the owner and the tenant. The deal has in effect been done, subject to valuation. It cannot now be recanted by a challenge under section 25(12). Even if the interpretation put forward by the second and third respondents in relation to section 25(12) had been correct, it would come too late to seek to interfere with the crystallised right to buy. On this ground alone, the noters' claim succeeds. I would, however, observe that this decision is made on the basis of a purported challenge under section 25(12). No question was raised about whether another form of challenge seeking positive orders, outwith the scheme, could succeed in prohibiting the enforcement of the right to buy and I reserve my position on that matter.

Issue 3: Personal bar

[41] In light of the decisions I have reached, the issue of the relevancy of the noters' averments on personal bar does not arise. However, it is appropriate that I express my views on it. The noters contend that the first respondent (the present liquidator) and, insofar as relevant, the second and third respondents are personally barred from seeking to challenge the noters' registration and/or the existence of the tenancy as an agricultural holding. The conduct relied upon is the former liquidator voluntarily acting in a manner inconsistent with any intention to challenge the noters' registration and/or the continuing existence of the tenancy as an agricultural holding, particularly by accepting payment of rent from the noters and by serving the notice of proposal to transfer. In reliance on those

actions, the noters are said to have acted to their prejudice. This argument appears to proceed on the hypothesis that the second and third respondent are able to mount a successful challenge under section 25(12). If that is so, and the tenancy ended in 2015, the personal bar claim is effectively about giving rise to a right that could never have arisen, just as a result of the former liquidator serving a notice and accepting a single payment of rent.

[42] The cases principally relied upon by the noters (*City Inn Limited* v *Shepherd Construction Limited* 2011 SC 127 and *McMullen Group Holdings Limited* v *Harwood* [2011] CSOH 132) do not assist. These concerned waiver being asserted in an existing contractual relationship, to cause something which did not come within the terms of a contractual provision to be treated as if it did. That is quite different from (if the second and third respondents' case on interpretation had succeeded) the creation of a right which could not legally have come into existence. One cannot use personal bar to set up a contract which no longer existed at the time when the alleged actings took place: *Cantors Properties (Scotland) Ltd* v *Swears & Wells Ltd* (Lord Cameron at p 322). If, contrary to my decision, the registration was ineffective for the reasons argued on behalf of the second and third respondents, I would have endorsed their position that personal bar could not create a right that had already been extinguished.

[43] Further, this is not a case where the noters contend that the words or conduct of the former liquidator justified them in believing that a certain state of facts existed and they acted upon such belief to their prejudice, as is required for personal bar: *Gatty* v *Maclaine* 1921 SC (HL) 1, Lord Birkenhead (at p 7). The noters already believed that they had a right to buy and that the owner would require to give notice. It has not been suggested that the noters felt they had no such right or that it was only a possibility.

They were therefore not induced into that belief by the words or conduct of the former liquidator (see *Cantors Properties (Scotland) Ltd* v *Swears & Wells Ltd*, Lord Johnston, at p 326). Moreover, no averments are made about conduct on the part of the present respondents which could give rise to personal bar in relation to them.

[44] For all of these reasons, had the second and third respondents succeeded in relation to interpretation, I would have held the noters' averments on personal bar to be irrelevant.

Conclusions

[45] The noters' application for decree *de plano* succeeds because (i) the second and third respondents' interpretation of section 25(12) of the 2003 Act fails and hence they have no valid defence; and (ii) in any event, the noters now have a crystallised right to buy the land.

Disposal

[46] I shall therefore repel the pleas-in-law for the second and third respondents and grant the first order sought by the noters. That order is, under section 167(3) of the Insolvency Act 1986, to direct the first respondent (the present liquidator) to conclude missives on behalf of WLL for the sale of the land to the noters, in accordance with the provisions of Part 2 of the 2003 Act. All questions of expenses are reserved.