SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT TAIN

[2018] SC TAI 22

Case ref B86/15

JUDGMENT

by

SHERIFF CHRISTOPHER DICKSON

in the cause

(FIRST) ALLISDAIR GOW MACKAY

(SECOND) DONALD FORBES MACKAY

Pursuers

against

CHARLES EDWARD MACKAY

Defender

Pursuers: Bartos, Advocate, Brodies LLP
Defender: Burr, Advocate, R.W. McClurg & Co

Tain, 12 July 2016

The sheriff, having resumed consideration of the summary application, finds the following facts admitted or proved:

FINDS IN FACT

1. The pursuers are Allisdair Gow Mackay and Donald Forbes Mackay. The defender is Charles Edward Mackay. The pursuers and the defender are brothers. The defender is sued in his capacity as executor-nominate of the late Donald Forbes Mackay and in his personal capacity.

2. The late Donald Forbes Mackay (hereinafter referred to as "the deceased") is the father of the pursuers and the defender.

3. The deceased died on 2 February 2005. An inventory of the deceased's estate was given up and recorded in the Court Books of the Commissariot of the Sheriffdom of Grampian Highland and Islands at Dornoch on 17 June 2005 and, on the same date, the defender was approved and confirmed as executor nominate of the deceased in terms of the deceased's Will, which was dated 2 February 2005.

4. The deceased's Will directed his executor (the defender) to divide the whole residue of his estate equally among the pursuers and the defender.

5. On 21 July 2009 an additional / corrective inventory of the deceased's estate was given up and recorded in the Court Books of the Commissariot of the Sheriffdom of Grampian Highland and Islands at Dornoch. On 28 July 2009 the defender was, of new, approved and confirmed as executor nominate of the deceased.

6. Item of 3 in the inventory of the confirmation dated 17 June 2005 (hereinafter referred to as "item 3") was described as follows:

> "Croft at 214 Lower Talmine and 237 Torrinacudigan held on Crofting Tenure including permanent improvements."

The value recorded for item 3 was £20,000. The additional / corrective inventory of the deceased's estate made no change to item 3.

7. Item 3 was undervalued. The true value of the croft at 214 Lower Talmine at 2 February 2005 was £67,500. The true value of 237 Torrinacudigan at 2 February 2005

was £29,500. The true value of item 3 at 2 February 2005 was £97,000. Accordingly, item 3 was undervalued by £77,000.

FINDS IN FACT AND LAW

1. The estate of the deceased was undervalued in both the confirmation of 17 June 2005 and 28 July 2009 by item 3 being undervalued by £77,000 and therefore the pursuers are entitled to an order ordaining the defender to lodge a duly executed corrective inventory or eik to the said confirmation by adding, in respect of item 3, a corrected value of £97,000.

THEREFORE sustains plea in law 2 for the pursuers; repels plea in law 2 for the defender; grants decree in terms of part (1) of crave 2 (as amended); and fixes a procedural hearing on 23 August 2016 at 12 noon to consider the question of expenses and further procedure.

NOTE

Introduction

[1] This is an unusual summary application which was heard on 31 May and 1 June 2016 at Tain Sheriff Court. The pursuers were represented by Mr Bartos, Advocate. The defender was represented by Mr Burr, Advocate. The application concerns the estate of the late Donald Forbes Mackay (hereinafter referred to as "the deceased"). The pursuers and the defender are brothers and the deceased is their father. The deceased died on 2 February 2005 (hereinafter referred to as "the date of death"). An inventory of the deceased's estate

was given up and recorded in the Court Books of the Commissariot of the Sheriffdom of Grampian Highland and Islands at Dornoch on 17 June 2005 and, on the same date, the defender was approved and confirmed as executor nominate of the deceased in terms of the deceased's Will, which was dated 2 February 2005 (the deceased's Will directed his executor (the defender) to divide the whole residue of his estate equally among the pursuers and the defender). On 21 July 2009 an additional / corrective inventory of the deceased's estate was given up and recorded in the Court Books of the Commissariot of the Sheriffdom of Grampian Highland and Islands at Dornoch. On 28 July 2009 the defender was, of new, approved and confirmed as executor nominate of the deceased.

[2] Item 3 in the inventory of the confirmation dated 17 June 2005 (hereinafter referred to as "item 3") was described as follows:

> "Croft at 214 Lower Talmine and 237 Torrinacudigan held on Crofting Tenure including permanent improvements."

The value recorded for item 3 was £20,000. The additional /corrective inventory of the deceased's estate made no change to item 3.

[3] The pursuers aver that item 3 was undervalued. The pursuers go on to aver that the true value of the croft at 214 Lower Talmine was £67,500 at the date of death and the true value of 237 Torrinacudigan was £29,500 at the date of death. As such, the pursuers claim item 3 ought to have been valued at £97,000 (£67,500 + £29,500 = £97,000).

[4] The defender disputes the pursuers' valuations and avers that the true value of the croft at 214 Lower Talmine was £15,000 at the date of death and the true value of 237 Torrinacudigan was £10,500 at the date of death. The defender therefore accepts that item 3 is slightly undervalued but claims that it ought to be valued at £25,500 (£15,000 + £10,500 = £25,500).

[5] Both parties are therefore in agreement that the value of item 3 ought to be corrected upwards but they are in dispute as regards what the increased value should be. Therefore the issue in this case is what the correct value of item 3 should be as at the date of death.

Procedure

[6] Parties were also in agreement as regards the procedure to be followed in relation to achieving a correction to the value of item 3. Counsel for the pursuers explained that there seemed little in the way of reported decisions on the appropriate procedure and that it was therefore necessary to go back to Erskine, *An Institute of the Law of Scotland* (hereinafter referred to as "Erskine") to find the answer. Erskine at 3.9.36 provides as follows:

> "36. Though the words of the act of sederunt, *Nov.* 14. 1679, above quoted, seem to import, that proper executors, who hold office for all interested in the moveable succession, are obliged by law to make their inventories full, it is certain that, let the inventory be ever so defective, the executor is liable in no penalty for that omission, at the suit of creditors or others who are entitled to any part of the executry; *Durie, June* 18. 1629, *Peebles,* (Dict. P.3494). Where therefore the executor confirmed has either omitted out of the inventory any effects belonging to the deceased or has estimated them below their just values, the only remedy left to any person interested, is to apply to the commissary, that he himself be confirmed executor to the deceased *ad omissa vel male appretiata.* Where one applies for a confirmation *ad male appretiata*, it is competent to him to prove by witnesses, that the goods confirmed in the principal testament are undervalued. This holds though the first executor should have sworn to the values put upon them; both because such an oath is to be looked upon merely as an oath of credulity, *Harc.* 451 (*Hisleside, March* 1683, Dict p.3876,) and because the executor, being truly a party, ought not to have it in his power to fix the values of those goods for which he himself is to be accountable. But if the goods have been apprised under the authority of the commissary, whose office is to name fit persons for that purpose, there is no room for a second apprisement; nor can the commissary in such case interpose, by directing the goods to be put up to a public sale, though the creditors of the deceased should apply for it, unless fraud or collusion appear in the apprisers. …
>
> 37. He who applies to be executor *ad omissa vel male appretiata* must call the principal executor as a party; for the executor in the principal testament is by his office entitled to the administration of the whole moveable estate, and so has an obvious interest to oppose the nomination of another executor who is to deprive him of part of that administration. If therefore it should appear that the first executor has neither left

> out of the testament, nor undervalued any subject contained in it, *dolose*, the commissary will, in place of naming a second executor, ordain the subjects omitted, or the difference between the estimations in the principal testament, and their true value to be added to the testament; *Durie, March* 12, 1631 *Duff,* (Dict. P. 2188). If there be ground to presume fraud, a testament *ad omissa vel male appretiata* is not like a principal testament divided into legitem, relict's part, &c. but carries the whole subjects contained in it to him who is thus decerned executor, in so far as his interest in the executry extends, to the utter exclusion of the executor in the principal testament; *Fount, Feb.* 16. 1703, *Roberstons,* (Dict. p. 3498)."

[7] Counsel for the pursuers explained that the procedure set out in Erskine (which was written at a time when an executor only dealt with moveable estate) was touched upon in the modern text books. In Wilson and Duncan, *Trust, Trustees and Executors*, 2nd Ed, the learned authors under reference to the above passages in Erskine state:

> "Confirmation *ad omissa vel male appretiata* is competent where an item of estate has been omitted from, or undervalued in, the original confirmation and the original executors decline to obtain an eik or are not available to do so."

Para 17-26 of Currie on Confirmation of Executors, 9th Ed (hereinafter referred to as "Currie") provides, again under reference to Erskine:

> "If there are grounds to presume fraud, confirmation *ad omissa* (or *ad omissa vel male appretiata*) will be granted to the exclusion of the principal executors. But if it appears that the executor has neither left out, nor understated, any item knowingly, the items omitted, or the difference between the estimations in the principal confirmation and the true value, will be added to the eik to the confirmation in favour of the principal executors, and only if the principal executors do not confirm will confirmation *ad omissa* (or *ad omissa vel male appretiata*) be granted."

[8] In this case, the pursuers crave the court to, first, decern the pursuers as executors-dative *ad male appretiata qua* sons of the deceased, and second (in the alternative to the first crave), to ordain the defender to lodge a duly executed inventory or eik correcting the value of item 3 to the value averred by the pursuers, namely £97,000. Counsel for the pursuers submitted that the above passages in Erskine made clear that the remedies sought in craves 1 and 2 were competent and that it was competent to lead evidence to prove that item 3 had been undervalued. Counsel for the pursuers sought to prove that item 3 had been

undervalued by leading a single expert witness, Mr Macaulay, Chartered Surveyor. Counsel for the pursuers explained that, at this stage, he did not seek to prove bad faith or fraud and therefore was not moving the court to grant crave 1 presently, and simply sought decree in terms of part (1) of crave 2.

[9] Counsel for the defender was in complete agreement that the appropriate procedure was set out in Erskine and that it was competent to grant decree in terms of part (1) of crave 2, subject, of course, to the court's decision as regards the correct value of item 3. Counsel for the defender confirmed that he sought a decree in line with part (1) of crave 2 ordaining the defender to lodge a duly executed inventory or eik correcting the value of item 3 to the value averred by the defender, namely £25,500. Counsel for the defender accepted that it was competent to lead evidence to prove the correct value of item 3 and sought to lead a single expert witness, Mr Mackintosh, Chartered Surveyor.

[10] I agree that appropriate procedure is set out in Erskine and consider that it is competent, in this case, for the pursuers, in the first instance, to seek a decree in terms of part (1) of crave 2 and to lead evidence to prove that item 3 was undervalued in the confirmation.

Evidence

[11] The pursuers led evidence from Angus Macaulay, Chartered Surveyor, and the defender led evidence from Sinclair Mackintosh, Chartered Surveyor. There was a significant dispute between the experts as regard the appropriate basis of valuation. Mr Macaulay valued the crofts in item 3 on the basis of what they might reasonably have been expected to fetch in the open market. Mr Mackintosh valued the crofts in item 3 on the basis of permanent improvements made to the crofts.

Mr Macaulay

[12] Mr Macaulay became a chartered surveyor in 1991. Since that time he had worked in the Highlands. He had worked with the Torrance Partnership LLP (a firm of Chartered Surveyors) since 1989 and was assumed as Partner in 2004. He had a general practice in the Highlands and Islands with experience in valuing crofting tenancies on a regular basis. Mr Macaulay explained that in the 1990s the market for crofting tenancies was fairly flat. However, that market became more active in the years 2003 / 2004. As at the date of death (2 February 2005) the Highland property market, which included crofting tenancies, was very active. From his researches between 2003 and 2005 there was a year on year increase in transactions in the Highlands of about 15% to 20% per annum.

[13] Mr Macaulay explained how he was instructed to provide a valuation of the crofting tenancies at 214 Lower Talmine and 237 Torrinacudigan. They were situated in a remote scattered crofting area, which was within easy car distance from the village of Tongue and some 50 miles or so from Thurso. He noted that he had surveyed the tenancies on 23 March 2013 and explained how he had approached those valuations under reference to his report (Production 5/6). Mr Macaulay explained that the general approach to buying a croft tenancy would be as follows. First, a price would be agreed between the purchasing incoming tenant and the selling outgoing tenant. Second, the purchase price would be placed on deposit in order to await the consent / approval of the landlord of the croft and the Crofting Commission. Once the appropriate consents / approvals had been obtained the outgoing tenant would assign the crofting tenancy to the incoming tenant and uplift the purchase price. If for any reasons the consent / approval of the landlord or Crofting Commission could not be obtained then the assignation would not proceed and the incoming tenant would uplift the purchase price he had placed on deposit.

[14] Mr Macaulay went on to explain that once a tenancy had been assigned it was possible for the new tenant (i.e. the purchasing incoming tenant) to exercise their statutory right to buy their croft from the landlord. Once that statutory right had been exercised the new owner of the croft (who was formerly the new tenant) could then apply to the Crofting Commission to exercise their right to de-croft part of the croft in order to build a property (which would be subject to planning permission) on the de-crofted part of the croft. Mr Macaulay explained that as at the date of death the procedures set out in this paragraph and paragraph 13 (i.e. purchase of tenancy, exercising the right to buy the croft, and de-crofting part of croft in order to build a house) were common for crofts where planning permission could be obtained. Therefore, when valuing crofting tenancies it was appropriate to consider whether these procedures could be used by the purchasing incoming tenant and, if they could, that would increase the value of the crofting tenancy. When approaching the valuation of the two crofting tenancies in question, Mr Macaulay had therefore considered whether the above procedures could have been used and, if they could, how that affected the value of the two crofting tenancies.

[15] Mr Macaulay explained that he had investigated the planning position as at the date of death. Mr Macaulay discussed both 214 Lower Talmine and 237 Torrinacudigan with two senior planning officers who were responsible for and in charge of planning decisions, as at the date of death, in the area where both crofts were located. The senior planning officers advised that, at the date of death, their view was that residential development was to be encouraged within crofting communities and, in particular, encouragement was given to the development of gap sites and the creation of housing clusters (237 Torrinacudigan has three dwelling houses close by). The senior planning officers confirmed that 214 Lower Talmine was within the village envelope and that a sensible planning application for a single house

(i.e. that was of a design that was of similar design to the existing houses in the area) would have been more than likely to have been granted. Mr Macaulay received a similar response as regards the likelihood of the granting of a planning application for a single house at 237 Torrinacudigan. From the discussions Mr Macaulay had with the senior planning officers and his observations of the crofts, he was of the view that planning permission would have been easily obtainable for a single house (of a design sympathetic and similar to the existing houses in the area) for both 214 Lower Talmine and 237 Torrinacudigan.

[16] Mr Macaulay confirmed that he had based his valuations on the definition set out in section 160 of the Inheritance Tax Act 1984, which provides:

> "Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold on the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time."

[17] As regards 214 Lower Talmine, Mr Macaulay explained that the subjects comprised a roughly rectangular area of ground extending to 1.63 acres or thereby with a share of common grazing. The site was bounded by post and wire fencing. Upon the site was erected a block barn, of below average condition, which extended to 94 square metres or thereby and a small stone built shed which extended to 18.3 square metres or thereby. There was also a small end terrace cottage which extended to 75 square metres or thereby. The cottage was, by the time of Mr Macaulay's survey, in a poor condition but Mr Macaulay understood that, at the date of death, the cottage was in an average condition and capable of being let out. The site had good costal views to Talmine Bay.

[18] Mr Macaulay explained that he considered that 214 Lower Talmine did not constitute a viable croft size (because it was too small). Given the enquiries he had made with the senior planning officers (see paragraph 15 above), together with his own observations, he

considered that planning permission could easily have been obtained for a single detached bungalow or the like without onerous planning conditions. He therefore valued the crofting tenancy to take account of the fact that it could be developed as a house plot (using the procedures set out above). The gross value of the croft (not including the cottage) was in his view £30,000. He had arrived at that figure from comparing a number of other crofts or crofting tenancies that had been sold around the date of death as house plots (he listed 10 comparators at the end of his report including 104 Midtown, Talmine, which was 0.128 acres, had good views and sold for £28,000 in March 2005). From the gross value of £30,000 Mr Macaulay deducted what he described as typical costs, as at the date of death; these included the cost of forming a bell-mouth, connecting services, fencing the housing plot, creating a title plan and de-crofting expenses (which was fixed at fifteen times the annual rent – which Mr Macaulay understood to be £11 per annum for 214 Lower Talmine). He valued those costs at £5,000, giving a net value of £25,000. Mr Macaulay considered that the plot could have been sold within 2 years (due to good market conditions) and that would then attract a 50% landlord clawback (landlord's clawback only applied to the de-crofted part of the croft). This clawback therefore reduced the valuation by 50% to £12,500. Mr Macaulay valued the barn and the stone built shed at £5,000, which when added to £12,500 gave a value of £17,500. Finally, Mr Macaulay valued the cottage at £50,000. He had again arrived at that figure from comparing a number of similar houses sold around the date of death (he listed 11 comparators at the end of his report including: (1) 48 Braetongue which was a 69 square metre detached cottage with good views but in poor condition which sold for £56,000 in July 2004; and (2) Achineiskich House, Bettyhill, which was not far from 214 Lower Talmine, had a good location, required extensive renovation, had been marketed at offers over £65,000 and sold for £91,000 in December 2004). Mr Macaulay therefore

considered that, as at the date of death, 214 Lower Talmine might reasonably have been expected to fetch £67,500 (£17,500 + £50,000 = £67,500) if sold on the open market.

[19] As regards 237 Torrinacudigan, Mr Macaulay explained that the subjects comprised an area of ground extending to 5.436 acres or thereby. The site was bounded by post and wire fencing. Upon the site was a modern barn of steel frame construction with concrete block infill which extended to 160 square metres (1725 square feet). The barn would have been constructed about 20 years prior to Mr Macaulay's survey. By the time of Mr Macaulay's survey the barn had suffered some impact damage to the rear gable, downpipes and gutters were missing and external rendering was broken in part.

[20] Mr Macaulay explained that he considered that the subjects at 237 Torrinacudigan did not constitute a viable croft size (because it was too small). Mr Macaulay explained that given the enquires he had made with the senior planning officers (see paragraph 15 above), together with his own observations (including the fact that other dwelling houses were close by), he considered that planning permission could have been obtained for a single house adjacent to the modern barn. He therefore valued the crofting tenancy at 237 Torrinacudigan to take account of the fact that it could be developed as a house plot. He considered that 214 Lower Talmine had better views than 237 Torrinacudigan but that 237 Torrinacudigan benefited from an elevated position and was less affected by passing traffic. The gross value of the house plot was, in his view, £28,000, and he had added a further £2,000 for the 5 acres of amenity / grazing land, giving a total gross value of £30,000. He had again arrived at the £28,000 figure from comparing a number of other crofts or crofting tenancies that had been sold around the date of death as house plots (he used the same 10 comparators that he used for 214 Lower Talmine). From the £28,000 (the £2,000 for the 5 acres of amenity / grazing land was not included in the calculation at this stage) Mr

Macaulay again deducted what he described as typical costs, as at the date of death; these included the costs for forming a bell-mouth, connecting services, fencing the housing plot, de-crofting expenses (which, again, was fixed at fifteen times the annual rent, which Mr Macaulay understood to be £21.50 per annum for 237 Torrinacudigan) and creating a title plan. He valued these costs at £5,000, giving a net value of £23,000. Mr Macaulay again considered that the plot could have been sold within 2 years (due to good market conditions) and that would then attract a 50% landlord clawback. This clawback therefore reduced the valuation by 50% to £11,500. When the £2,000 value of the 5 acre amenity / grazing land was added that left a value of £13,500. Mr Macaulay valued the modern barn at £1.75 per square feet (£1.75 x 1725 square feet). Thereafter this was capitalised in perpetuity at 6 years purchase (years purchase is the sum of the present values of £1 at a specified compound interest rate – this converts income flow into a capital figure and allows comparison). This gave a capital value of £18,000. Mr Macaulay had again arrived at this figure from comparing a number of storage barns that were sold around the date of death (he listed 8 comparators at the rear of his report which: (1) varied between £1.50 per square feet to £2.50 per square feet; and (2) varied between 5 years purchase and 8 years purchase). Mr Macaulay then allowed a reduction to the £18,000 to £16,000 to allow for repairs to the impact damage visible on the modern barn. Mr Macaulay therefore considered that, as at the date of death, 237 Torrinacudigan might reasonably have been expected to fetch £29,500 (£13,500 + £16,000 = £29,500) if sold on the open market.

[21] In the cross examination it was suggested to Mr Macaulay that his valuations involved a considerable amount of speculation. Mr Macaulay rejected this suggestion on the basis that any speculation or assumption of his part would be relatively small given the statutory right to buy and de-croft part of the croft. It was put to Mr Macaulay that the

appropriate way to value the two crofting tenancies was to value them on the basis of permanent improvements. Mr Macaulay accepted that valuing on the basis of permanent improvements was a method of valuing crofting tenancies but he rejected it was an appropriate method in this case because it airbrushed out the statutory right to buy and de-croft part of the croft and did not follow the basis of valuation set out in section 160 of the Inheritance Tax Act 1984. Mr Macaulay explained that the statutory right to buy and de-croft were valuable and that the market would pay for them. Valuation on a permanent improvements basis was essentially valuing on an agricultural basis only and did not give the full value of the crofting tenancy. Mr Macaulay did not consider that valuation on the basis of permanent improvements was the correct approach unless the topography of the land was such that planning permission would not be granted to develop a house.

Mr Mackintosh

[22] Mr Mackintosh qualified as a chartered surveyor in 1969. He had operated his own firm of chartered surveyors for the last 28 years. He had over twenty years experience of acting as a factor to estates in North West Sutherland. Many of those estates were crofting estates. In particular, he had acted as a factor for the Melness Estate (both crofts are situated on the Melness Estate).

[23] Mr Mackintosh explained how he was instructed to provide a valuation of the crofting tenancies at 214 Lower Talmine and 237 Torrinacudigan and had surveyed both properties on 22 April 2016. He discussed his approach to valuation under reference to his reports (productions 6/2/2 and 6/2/3). He did not take issue with Mr Macaulay's description of the crofts or the procedure to purchase a crofting tenancy and then go on to exercise the statutory right to buy and de-croft part of the croft (see paragraph 13 and 14 above). He did, however, highlight that if the landlord or the Crofting Commission refused consent /

approval to assign a crofting tenancy the purchase of the crofting tenancy would not be able to proceed. He also noted that the Crofting Commission would only grant consent / approval of a new tenant if they demonstrated an ability to work the croft and that they were either going to live on the croft or within 16 kilometres of it (hereinafter referred to as "the distance restriction"). He also made clear that in order to be in a position to exercise the statutory right to buy and de-croft part of the croft one would have to have had the crofting tenancy assigned to them.

[24] Mr Mackintosh explained that he had not valued the two crofting tenancies on the basis of market value. That was because there were too many complicating factors. Rather he had approached the valuation on the basis of permanent improvements because that was the approach set out in section 8 of the Crofters Holdings (Scotland) Act 1886 (hereinafter referred to as "the 1886 Act"). He considered that that was the appropriate approach in this case. He accepted that there was a "big difference" between market value valuation and a permanent improvements valuation (with the permanent improvement valuation likely to be less).

[25] As regards 214 Lower Talmine, Mr Mackintosh explained that the cottage was now in a very poor condition and was in need of total renovation. He did, however, accept the cottage may have been in an average condition as at the date of death. He did not consider that there was much scope for developing the cottage beyond its existing footprint. He considered the barn to be of sub-standard construction. He noted that the barn may have been built using a 50% grant from the Crofters Commission but went on to explain that he did not know: (1) if such a grant had been made; (2) when it would have been made; or (3) if it had been made, whether it still required to be repaid. Mr Mackintosh explained that the distance restriction would reduce demand. He also noted the croft was positioned within

the Kyle of Tongue National Scenic area and he was therefore of the opinion that there would be a presumption against development that would impinge the views of the Kyle of Tongue. Mr Mackintosh explained that he had not considered any comparators because he was valuing the croft on the basis of permanent improvements, however, he did recall a quarter of an acre croft that was for sale for about £10,000 on Melness Estate about 10 years ago that could not attract a buyer. Taking all matters into account his professional opinion was that the value of 214 Lower Talmine, at the date of death, was £15,000. Mr Mackintosh also noted that even if he was valuing the cottage at a market value he considered the £50,000 valuation by Mr Macaulay to be inflated, although he did not offer an alternative valuation.

[26] As regards 237 Torrinacudigan, Mr Mackintosh explained that he considered the modern barn to be in poor condition. At the time of his survey a section of the concrete block infill had collapsed, the high level door had been removed and the roughcast had spalled and the remainder was boss. Sea sand had been used in the construction of the modern barn and this was likely to lead to deterioration. He again noted that the modern barn may have been built using a 50% grant from the Crofters Commission but went on to explain that he did not know: (1) if such a grant had been made; (2) when it would have been made; or (3) if it had been made, whether it still required to be repaid. Mr Mackintosh again explained that the distance restriction would reduce demand. He also again noted that the croft was positioned within the Kyle of Tongue National Scenic area and he was therefore of the opinion that there would be a presumption against development that would impinge the views of the Kyle of Tongue. Indeed, he considered that planning was more likely to be refused for 237 Torrinacudigan (than 214 Lower Talmine) because it was higher up and the scenic impact would have been greater. Mr Mackintosh again explained that he

had not considered any comparators because he was valuing the croft on the basis of permanent improvements but again referred to his recollection of the croft on the Melness Estate where a buyer could not be found. Taking all matters into account his professional opinion was that the value of 237 Torrinacudigan, at the date of death, was £10,500.

[27] In cross examination Mr Mackintosh agreed that if section 160 of the Inheritance Tax Act 1984 applied in this case then an assumption required to be made that the crofting tenancy had been sold (i.e. the tenancy had been assigned). He also made clear that he would bow to any case law and accepted that if the case law said factors such as the refusal of consent / approval from the landlord or Crofting Commission were irrelevant he would accept that.

[28] Mr Mackintosh was asked questions about section 8 of the 1886 Act, which is in the following terms:

> "**8. Compensation to crofter for improvements on removal**
>
> When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that-
>
> (a) The improvements are suitable for the holding;
>
> (b) The improvements have been executed or paid for by the crofter or his predecessors in the same family;
>
> (c) The improvements have not been executed in virtue of any specific agreement in writing which the crofter was bound to execute such improvements."

Mr Mackintosh insisted that the appropriate basis of valuation was set out in section 8 of the 1886 Act and suggested that the deceased had been "removed from his holding" by his death. Mr Mackintosh made clear that he had not valued the crofting tenancies on the basis of either section 160 of the Inheritance Tax Act 1984 or market value defined by the Royal Institute of Chartered Surveyors.

[29] Mr Mackintosh advised that he had spoken to the planning officers in the area of the two crofts and they had said there would be a presumption against development that would impinge on the views over the Kyle of Tongue. In his opinion, there may be less difficulty with obtaining planning permission at 214 Lower Talmine. He did not consider that planning could have been obtained at 237 Torrinacudigan although he could not recall one of the houses that Mr Macaulay had explained was situated close to the modern barn.

Pursuers' Submissions

[30] Counsel for the pursuers, under reference to section 8 of the Probate and Legacy Duties Act 1808, Currie at paragraph 10-89 and sections 216 and 261 of the Inheritance Tax Act 1984 (hereinafter referred to as "the 1984 Act"), identified the requirement on executors to prepare a full and true inventory of the deceased's estate and make the fullest enquiries that are reasonably practicable in the circumstances to ascertain the exact value of property falling within a deceased's estate. It was only after such enquires were made that executors could provide a provisional estimate of the value of the property. If an executor was providing a provisional estimate they required to make that clear on the inventory by using words such as "estimated by executors" and by providing an undertaking to deliver a further inventory as soon as the value of the property had been ascertained. In the present case there had been no such undertaking and no indication that item 3 had been estimated by the defender (there was no dispute that a professional valuation had not been obtained to support the £20,000 valuation of item 3).

[31] Counsel for the pursuers submitted that section 160 of the 1984 Act required that each croft be valued on the basis of the price which they might reasonably be expected to fetch if sold on the open market at the date of death. Under reference to the Lands Tribunal

for Scotland case of *Baird's Executors v Inland Revenue Commissioners* 1991 SLT (Lands Tr) 9 he submitted that the proper basis of valuation in a case where section 160 of the 1984 Act applied (*Baird's Executors* considered section 38(1) of the Finance Act 1975 which was in similar terms to section 160 of the 1984 Act) was to disregard any restriction preventing the application of the open market criterion for the purposes of the hypothetical open market sale, but thereafter to value the property in the hands of the hypothetical purchaser as subject to the same restrictions. Therefore, even if the consent / approval of the landlord and Crofting Commission of the new tenant could be regarded as restrictions preventing the application of the open market criterion, they ought to be disregarded.

[32] Counsel for the pursuers submitted that the evidence of Mr Macaulay ought to be preferred to the evidence of Mr Mackintosh for a number of reasons. First, and most importantly, Mr Macaulay had correctly used section 160 of the 1984 Act as his basis of valuing the two crofts. Mr Mackintosh has based his valuation on section 8 of the 1886 Act, which was not appropriate because that was concerned with compensation when a crofter was removed. There had been no removal in this case. Second, Mr Macaulay had taken a reasonable and realistic view as regards what could be done with the croft and how the statutory rights could be utilised to develop the crofts. Mr Mackintosh had had no regard to those statutory rights even though he accepted that they would be available to be utilised by a new tenant. Third, Mr Macaulay had carried out a comparative valuation and the valuations he had arrived at were consistent with the comparators. Mr Mackintosh had not conducted a comparative valuation and it was submitted that where a finder of fact was faced with a choice between a comparative valuation and valuation not based on comparators, the comparative valuation should usually be preferred. Fourth, Mr Macaulay had conducted a careful valuation where he had taken time to discuss the planning situation

with the senior planning officer, as at the date of death, and had carefully considered if and how the statutory rights could be utilised and the effect that would have on the market value of the crofts.

Defender's Submission

[33] Counsel for the defender submitted that section 8 of the 1886 Act set out the appropriate basis for valuation in this case. He accepted that the death of the deceased would not constitute him being "removed from his holding" but maintained that section 8 of the 1886 Act was the appropriate basis of valuation in this case. He sought to support his argument by reference to MacCuish and Flyn, *Crofting Law*, 1990 at para 7.01 and 7.04, where the authors state:

> "7.01 …Notwithstanding the number of cases of successions to crofts which must have been settled since 1968, there remain areas of potential dispute for which the ground rules have not yet been judicially established. Other problems include the division of the value of deceased's interest when more than one person is entitled to share it, and what becomes of the tenancy when there is no bequest and no-one is confirmed as executor.
>
> The Land Court have reluctantly refused to deal with executor's problems of valuation and division for lack of statutory jurisdiction. They have pointed out that if agreement cannot be secured amongst the beneficiaries it is open to the executor to renounce the tenancy and to claim compensation [*reference is made to MacLennan's Exrs v MacLennan* 1974 SLT (Land Ct) 3]…
>
> 7.04 …The deceased's interest as tenant of a croft is heritable estate and should be entered as such in the inventory of the deceased's estate when applying for confirmation. The entry should show that interest as a separate item sufficient to identify it. The value of that item will of course include the permanent improvements on the croft provided by the deceased. However, the principles for valuing a croft tenancy on the death of the tenant are not at all clear and there has in the past been a tendency to undervalue and to allow the administration to proceed without the bother of obtaining a valuer's report when such a process would be costly and time-consuming… The only guidance given by the 1955 Act regarding the value of a croft tenancy at death is indirect. Where a tenancy, which is part of the estate of a deceased crofter, is terminated the crofter is entitled to compensation for permanent improvements. But the 1964 Act also contemplates the transfer of the

> tenancy by the executor to a person not entitled to share in the estate. Such a transfer would no doubt demand a consideration for which there is no statutory formula and might even be a market price albeit the 'market' is restricted."

Counsel for the defender also referred to Agnew QC, *Crofting* Law, 2000 at p76 and 125 and sections 30 and 58A of the Crofters (Scotland) Act 1993. He submitted that although he could find nothing which expressly provided that the crofts should be valued on the basis of section 8 of the 1886 Act, the authorities he had referred to made clear that there was ambiguity and provided some support for section 8 of the 1886 Act as being *one* appropriate way of valuing a deceased's interest in a crofting tenancy with section 160 of the 1984 Act being another way of valuing the deceased's interest in a crofting tenancy.

[34] Counsel for the defender accepted that the case of *Baird's Executors* was considering section 38(1) of the Finance Act 1975 which was the predecessor to section 160 of the 1984 Act. However, he submitted that the present case was different from the situation in *Baird's Executors,* because in that case the executors contended that the lease in question should be valued at nil and did not put forward any alternative valuation of the lease. In this case, it was accepted that the two crofts had a value and an alternative valuation had been advanced. Counsel for the defender also contended that *Baird's Executors* was authority for the proposition that the valuation should be discounted to take account of the restrictions that were present (i.e. the need for the consent / approval of the landlord and the Crofting Commission). In that case, the expert valuer giving evidence on behalf of the Inland Revenue (whose evidence was ultimately accepted) had first valued the open market value for vacant possession of the farm; he had then considered the open market value of the tenant's interest in the farm and came to the opinion that it would amount to 25 per cent of the open market value of the farm. That therefore meant, according to Counsel for the defender, that the expert valuer had in fact discounted the value of the tenancy to take

account of the restrictions on the tenancy. In the present case it was submitted that the same discount should be applied (i.e. a 75% discount). Therefore, even if Mr Macaulay's valuation was accepted, it was appropriate to apply the 75 per cent discount to the £97,000 total value of two crofts arrived at by Mr Macaulay, which then reduced the valuation to £24,250. Counsel for the defender noted that this reduced valuation was in fact very close to the £25,500 total value of the two crofts arrived at by Mr Mackintosh.

[35] Counsel for the Defender submitted that Mr Macaulay had made assumptions that were too speculative. There was no evidence to suggest the consent / approval of the landlord or the Crofting Commission would have been obtained. Counsel for the defender submitted that Mr Mackintosh had huge practical experience and, in particular, experience of the Melness Estate where the crofts were situated. He had stood up to cross examination and had avoided speculative assumptions. In such circumstances his evidence should be preferred to that of Mr Macaulay.

Discussion

[36] In my opinion there are three issues that require to be resolved:

1. Whether the two crofts should be valued on the basis of section 160 of the 1984 Act or section 8 of the 1886 Act?
2. If the crofts should be valued on the basis of section 160 of the 1984 Act, what is the proper approach to that section? and
3. Applying the proper approach to valuation, what is the value of the two crofts?

Issue 1 - Whether the two crofts should be valued on the basis of section 160 of the 1984 Act or section 8 of the 1886 Act.

[37] Before a person shall be confirmed executor or executors, testamentary or dative, he must exhibit upon declaration in the proper commissary court in Scotland a full and true inventory of all the estate and effects of the deceased already recovered or known to be existing (section 38 of the Probate and Legacy Duties Act 1808).

[38] Section 216 of the 1984 Act has been amended on a number of occasions since the date of death. The version of section 216 of the 1984 Act in force as at 17 June 2005 (the date of the first inventory) was as follows:

> "**216. – Delivery of accounts**
>
> (1) Except as otherwise provided by this section or by regulations under section 256 below, the personal representatives of a deceased person […]
>
> shall deliver to the Board an account specifying to the best of his knowledge and belief all appropriate property and the value of that property.
>
> (3) Subject to subsections (3A) and (3B) below, where an account is to be delivered by personal representatives (but not where it is to be delivered by a person who is an executor of the deceased only in respect of settled land in England and Wales), the appropriate property is—
>
> > (a) all property which formed part of the deceased's estate immediately before his death, other than property which would not, apart from section 102(3) of the Finance Act 1986, form part of his estate; and
> >
> > (b) all property to which was attributable the value transferred by any chargeable transfers made by the deceased within seven years of his death.
>
> (3A) If the personal representatives, after making the fullest enquiries that are reasonably practicable in the circumstances, are unable to ascertain the exact value of any particular property, their account shall in the first instance be sufficient as regards that property if it contains—
>
> > (a) a statement to that effect;
> >
> > (b) a provisional estimate of the value of the property; and

(c) an undertaking to deliver a further account of it as soon as its value is ascertained.

[…]"

The version of section 216 of the 1984 Act in force as at 28 July 2009 did not, for the purposes of the present action, materially alter the above version.

[39] Section 261 of the 1984 Act has remained the same since the 1984 Act was brought into force on 1 January 1985. It provides:

"**261. Scotland inventories.**

In the application of this Part of this Act to Scotland, references to an account required to be delivered to the Board by the personal representatives of a deceased person, however expressed, shall be construed as references to such an inventory or additional inventory as is mentioned in section 38 of the Probate and Legacy Duties Act 1808 which has been duly exhibited as required by that section."

When the above statutory provisions are considered together they make clear that: (1) the inventory must be a full and true inventory; (2) that the executor shall deliver to the Board an account specifying all appropriate property and the value of that property; (3) the appropriate property is all the property that formed part of the deceased's estate immediately before his death; (4) if the personal representatives, after making the fullest enquiries that are reasonably practicable in the circumstances, are unable to ascertain the exact value of any particular property, their account shall in the first instance be regarded as sufficient if it contains: (a) a statement to that effect; (b) a provisional estimate; and (c) an undertaking to deliver a further account as soon as the value of the property is ascertained; and (5) references to an account required to be delivered to the Board by personal representatives of a deceased shall be construed as references to such an inventory or additional inventory as is mentioned in section 38 of the 1808 Act.

[40] Section 160 of the 1984 Act has not changed since the 1984 Act was brought into force. It provides:

> **"160. Market value.**
> Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time."

Neither section 216 or 261 of the 1984 Act provide for a valuation otherwise in accordance with section 160 of the 1984 Act. Accordingly, section 160 of the 1984 Act applies to those sections and therefore the appropriate basis for valuing the property of a deceased in an inventory or additional inventory is, reading short, the price, immediately before the death of the deceased, that the property might reasonably be expected to fetch if sold in the open market.

[41] Section 8 of the 1886 Act does not, in my opinion, apply in this case. Section 8 of the 1886 Act is concerned with compensation payable to a crofter when he renounces his tenancy or is removed from his holding. Section 30(1) of the Crofters (Scotland) Act 1993 (hereinafter referred to as "the 1993 Act") is a similar provision to section 8 of the 1886 Act. Section 30(1) of the 1993 Act provides that where a crofter renounces his tenancy or is removed or the tenancy of a croft, being a tenancy the interest of the tenant under which is comprised in the estate of a deceased crofter, is terminated by the executor in terms of section 16(3) of the Succession (Scotland) Act 1964, the crofter or, as the case may be, the executor of the deceased crofter, shall be entitled to compensation for any improvements made on the croft. Counsel for the defender conceded that neither section 8 of the 1886 Act or section 30(1) of the 1993 Act were of direct application in this case (the interplay between section 8 of the 1886 Act and section 30(1) of the 1993 Act was not explored in argument). I

agree with that concession. In my opinion neither section 8 of the 1886 Act nor section 30(1) of the 1993 Act provide a basis of valuing a croft in an inventory or additional inventory. By contrast, section 160 of the 1984 does provide a basis of valuation in such circumstances and I therefore consider that it is that basis of valuation that should apply in this case.

Issue 2 - The proper approach to section 160 of the 1984 Act.

[42] In *Baird's Executors* the tenancy of a farm was relinquished by the transferor in favour of his daughter in law and grandson. The transferor subsequently died. The Inland Revenue determined that the renunciation constituted a chargeable transfer for the purposes of the then capital transfer tax. The executors denied that the renunciation involved a transfer of value or could have any open market value as the tenancy interest then renounced, in terms of the lease, could not have been transferred without the landlord's consent (the lease was non-assignable). The Inland Revenue argued that the tenancy should be valued at open market value and relied on section 38 of the Finance Act 1975 which provided:

> "Except as otherwise provided by this Part of this Act, the value at any time of any property shall for the purposes of Capital Transfer Tax be the price that the property might reasonably be expected to fetch if sold in the open market."

[43] The Lands Tribunal, during the course of their decision, helpfully summarised, at p17K to 19K, a number of important cases decided in both the House of Lords and the Second Division:

> "In the tribunal's opinion, it is therefore the valuation s. 38 which alone directs how a chargeable transfer is actually to be valued, namely at the price at which the property might reasonably be expected to fetch if sold in the open market at the time of the transfer.
>
> Under s. 38 (1) Parliament has also directed that the valuation of any property at any time shall be made upon the hypothesis that the property was then offered for sale in

a hypothetical open market. This is a clear statutory direction, however difficult it may sometimes be to apply, and it is that direction itself which requires us to disregard any prohibition against sale so as to enable a sale in the hypothetical open market to take place. The basic flaw in the appellants' approach is therefore in their failure to give effect to the statutory hypothesis contained in s. 38 (1).

Section 7 (5) of the now repealed Finance Act 1894 similarly introduced the open market criterion for determining, for the purposes of estate duty, the value of property passing or deemed to pass on death. In *Crossman*, the House of Lords required to decide what was the proper basis of valuation under s. 7 (5) of shares in a limited company where the right of transfer was restricted by its articles of association. The House decided (by a majority of three to two overruling the Court of Appeal), that the restriction on transfer had simply to be disregarded for the purposes of assuming a hypothetical sale; but that the resultant valuation should nevertheless still take account of the same restriction continuing in the hands of the purchasers. In so doing they approved *Attorney General for Ireland v. Jameson* (1905) 2 I.R. 218 and *Salvesen's Trs. v. Commissioners of Inland Revenue, 1930 S.L.T. 387*.

In *Crossman*, Viscount Hailsham L.C. in commenting on the contrary decision of the Court of Appeal said (at p. 41): "it seems to me that this construction involves treating the provisions of s. 7, sub-s. 5, as if their true effect were to make the existence of an open market a condition of liability instead of merely to prescribe the open market price as the measure of value. The right to receive the price fixed by the articles in the event of a sale to existing shareholders under sub-cl. 14 *a* is only one of the elements which went to make up the value of the shares. In addition to that right, the ownership of the share gave a number of other valuable rights to the holder, including the right to receive the dividends which the Company was declaring, the right to transmit the share in accordance with art. 34, sub-cls. 1, 2, and 3 and the right to have the shares of other holders who wished to realise offered on the terms of art. 34, sub-cl. 14 *a.* All these various rights and privileges go to make up a share and form ingredients in its value. They are just as much part of the share as the restriction upon the sale. The construction placed upon the statute by the Court of Appeal seems to me to ignore all these elements in the value of the share and to treat as its value what, in truth, is only the value of one of the factors which go to make up that share. But the purpose of s. 7, sub-s. 5, is not to define the property in respect of which estate duty is to be levied, but merely to afford a method of ascertaining its value. If the view entertained by the Court of Appeal were correct, it would follow that any property which could not be sold in the open market would escape estate duty altogether." …

An attempt was made in *Lynall*, supra to persuade the House of Lords to reverse their previous majority decision in Crossman in a case which also dealt with the valuation for estate duty purposes of shares in a private company. There was also a similar restriction on transfer. The House, however, unanimously approved *Crossman*, as also the preceding Irish decision of *Jameson*, *supra* and the Scottish decision of *Salvesen's Trs.*, *supra*. Lord Pearson, in particular, approved the following passage from the judgment of Lord Fleming in *Salvesen's Trs*. at p. 391: "if the articles

of association be complied with, a sale in the open market in a reasonable sense seems to be impossible. The petitioners argued that the maximum price the shareholder can obtain for his shares in the open market is determined by the best price he can obtain in the closed market viz. £1. But it appears to me that if this argument is well founded, it merely demonstrates that there cannot be a real sale in the open market under the articles. The Act of Parliament requires, however, that the assumed sale which is to guide the Commissioners in estimating the value, is to take place in the open market. Under these circumstances, I think that there is no escape from the conclusion that any restrictions which prevent the shares being sold in the open market must be disregarded so far as the assumed sale under section 7 (5) of the Act of 1894 is concerned. But on the other hand, the terms of that subsection do not require or authorise the Commissioners to disregard such restrictions in considering the nature and value of the subject which the hypothetical buyer acquires at the assumed sale. Though he is deemed to buy in an open and unrestricted market, he buys a share which, after it is transferred to him, is subject to all the conditions in the articles of association, including the restrictions on the right of transfer and this circumstance may affect the price which he would be willing to offer." …

Crossman and *Lynall* have since been followed by the Second Division in *Odeon Associated Theatres Ltd. v. Glasgow Corporation, 1974 S.L.T. 109*, in a case which was not concerned with company shares. This was an appeal from this tribunal and involved the assessment of compensation on the compulsory purchase of a disused cinema under "rule 2" (s. 12 (2)) of the Land Compensation (Scotland) Act 1963, being "the amount which the land if sold in the open market might be expected to realise". The disused cinema had been bought by a wholly owned subsidiary of a holding company who then leased it back on a 55 year lease for an annual rent of £3,500. The dispute was as to the effect of this continuing lease on a hypothetical open market sale and whether the presence of the lease would increase the value of the interest acquired. The land element had otherwise, been agreed at £1,000. The court followed *Crossman*, *Lynall* and *Salvesen's Trs*. Lord Kissen said (at p. 114): "I return to rule 2. A hypothetical sale of the subjects on the open market has to be assumed. While the personal restrictions may not enable Ranks to prevent a sale, the attitude of Ranks is of considerable importance… . The correct view is, I think, that while restrictions are disregarded for the purposes of the hypothetical sale taking place, the hypothetical buyer takes his purchase with the restrictions still attached to them." Lord Fraser (later Lord Fraser of Tullybelton) after referring to *Crossman* and *Lynall* also said (at p. 117): "But although the estate duty cases are not directly in point, they do, in my opinion, indicate the principle which should be applied in this case. I have reached the opinion that the value of the dominium utile on the open market should be estimated subject to the existing lease to Ranks, but on the terms that the rent and the tenant's other obligations would be exigible only if the purchaser were a subsidiary of Ranks and that they would cease to be exigible if the purchaser were an outside third party. …

What the case of *Crossman*, followed by *Lynall* however, decided was that any such restriction which prevents the application of the open market criterion must be

> disregarded for the purposes of the *hypothetical* open market sale; although on such a sale, the property has thereafter to be valued in the hands of the hypothetical purchaser as subject to the same restrictions. This is hardly an unfair test to apply for, as already remarked, such a restriction could be deliberately inserted into articles of association or, as here, into a lease extinguishing its value for tax purposes whereas in many cases it may in reality be readily transferable with the landlord's consent."

The above passages make clear that the Lands Tribunal followed an established line of authority when holding that the proper basis of valuation, under section 38 of the Finance Act 1975, was to disregard any restriction preventing application of the open market criterion for the purposes of the hypothetical open market sale, but thereafter to value the property in the hands of the hypothetical purchaser as subject to the same restrictions.

[44] I was not referred to the recent Scottish Supreme Court case of *Grays Timber Products Ltd v Commissioners for HM Revenue and Customs* 2010 SC (UKSC) 1, however that case is worthy of note because it is a recent example of the Supreme Court following the line of authority that was followed in *Baird's Executors* (in such circumstances I did not think it necessary to invite further submissions from parties in the present case on *Grays Timber Products Ltd*). In *Grays Timber Products Ltd* the Supreme Court were concerned with section 272 of the Taxation of Chargeable Gains Act 1992 which was in the following terms:

> "In this Act "market value" in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market".

At para 49 to 52 Lord Hope stated:

> "[49] …But I think, with respect, that this approach fails to address the crucial question under sec 272 of the Taxation of Chargeable Gains Act 1992 which defines the expression 'market value'. In estimating the market value attention must be focussed on the asset that requires to be valued. In this case it is the rights attached to the shares acquired by the purchaser, no more and no less. I agree with the majority that what has to be considered, to determine their market value for the purposes of the statute, is what the hypothetical purchaser would pay to acquire those rights at the relevant date …. Mr Gibson's right to an enhanced payment had a value to him, but that right was not the subject of the transaction as it

did not transmit to the purchaser. What the purchaser acquired and paid for was the rights attached to the shares themselves and nothing else. ...

[51] … In *Attorney-General for Ireland v Jameson* (pp 226, 227) the question was what market value should be attached to shares in a private company on the death of the shareholder. The directors had power under the articles of association to refuse to register a transfer and there was a right of pre-emption in favour of the other members of the company. The argument was that the shares should be deemed to be sold subject to these conditions and restrictions, but it was rejected. The court held that the shares should be valued at the price that they would fetch in the open market on the terms that the purchaser would stand in the shoes of the deceased — in other words, that he would take the shares subject to the restrictions and conditions on transfer in terms of the articles. …

[52] In *Salvesen's Trs v Inland Revenue Commissioners*, in which the same point was contended for by the taxpayer, Lord Fleming followed the decision in *Attorney-General for Ireland v Jameson*. As he said (p 391) if the taxpayer was right, it would mean that there could not be a real sale in the open market at all. The shares should be valued at the price which they would fetch if sold in the open market on the terms that the purchaser would be entitled to be registered as the holder of the shares and should take and hold them subject to the provisions in the articles. Those decisions were approved and applied in *Inland Revenue Commissioners v Crossman* and the same reasoning was adopted in *Lynall v Inland Revenue Commissioners*. Counsel said that in the light of these decisions and the others mentioned by Lord Walker the hypothetical purchaser must be assumed to have had the benefit of the rights vested in Mr Gibson under the subscription agreement at the time of the transaction, whether or not they were real or personal. But I do not find anything in these cases that supports that approach. It is the terms subject to which the purchaser will take and hold the shares that must be considered. In this case they did not include Mr Gibson's rights under the subscription agreement, as they were extinguished on settlement of the transaction. Their purpose was to enable Mr Gibson to enhance the benefits available to him in recognition of his services as managing director of Timber Products. That purpose was served when he received the enhanced share of the consideration that he was entitled to. All the shares in Group that Jewson acquired were of equal value to them from and after the date of settlement."

In my opinion the approach taken in both *Baird's Executors* and *Grays Timber Products Ltd* is the proper basis to approach a valuation under section 160 of the 1984 Act.

[45] In this case the restrictions potentially preventing application of the open market criterion were the need to obtain the consent / approval of the landlord and the Crofting Commission. They were not as significant as the restriction in *Baird's Executors* (where the

lease was non-assignable) because the evidence in this case was that in reality there were reasonable prospects of obtaining the necessary consents / approvals. In any event, I consider that the proper approach in this case is to disregard the need to obtain the consent / approval of the landlord and the Crofting Commission (hereinafter referred to as "the disregarded restrictions") because an open market sale of a crofting tenancy would not take place if the appropriate consents / approvals could not be obtained. Thereafter, I consider that the crofts must be valued at the price which they would fetch on open market taking into account all the restrictions and conditions (including the disregarded restrictions) under which the new hypothetical tenant would be subject to.

[46] For avoidance of doubt, I do not accept Counsel for the defender's submission, in relation to *Baird's Executors,* that the expert valuer on behalf of the Inland Revenue, had in fact discounted the value of the tenancy to take account of the restrictions on the tenancy. On the contrary he had simply arrived at the market value of the tenancy by assessing what the open market value for vacant possession of the farm would be and then what percentage of that value the tenancy would achieve. It was, in my opinion, simply his method of calculation and had nothing to do with discounting the valuation of the tenancy to take account of the restrictions with the lease. As is plain from the passages referred to above, the crofts must be valued at the price which they would fetch on the open market taking into account all the restrictions and conditions (including the disregarded restrictions) under which the new hypothetical tenant would be subject to.

Issue 3 - Applying the proper approach to valuation, what is the value of the two crofts?

[47] In my opinion Mr Macaulay applied the proper approach to the valuation of the two crofts. He has assumed that the consent / approval of the landlord and Crofting

Commission would have been provided. He has then taken into account all the restrictions and conditions under which the new hypothetical tenant would be subject to. These include the distance restriction, the planning restrictions, the potential use of the statutory rights to buy and de-croft part of the croft, the potential of landlord's clawback being applicable, and the disregarded restrictions (these restrictions and conditions, to use the words of Viscount Hailsham L.C. in *Crossman,* form a number of the ingredients in the open market valuation of the two crofts). Mr Macaulay has then considered what such a hypothetical tenant, in that open market, would be willing to pay for the crofting tenancies. He has supported his opinion by reference to a number of comparators to show what buyers in that market were, in fact, willing to pay on the open market around the date of death. For those reasons, and the reasons given by Counsel for the pursuers at para 32, I am of the view that Mr Macaulay's valuation of the two crofting tenancies were the prices which might reasonably have been expected to fetch in the open market at the date of death.

[48] I would therefore hold that: (1) the true value of the croft at 214 Lower Talmine at 2 February 2005 was £67,500; (2) the true value of 237 Torrinacudigan at 2 February 2005 was £29,500; and (3) the true value of item 3 at 2 February 2005 was £97,000. Accordingly, item 3 was undervalued by £77,000. In such circumstances I will therefore sustain plea in law 2 for the pursuers, repel plea in law 2 for the defender and grant decree in terms of part (1) of crave 2 (as amended) which, reading short, ordains the defender, within 14 days, to lodge a duly executed corrective inventory or eik to the confirmation of the deceased by adding, in respect of item 3, a corrected value of £97,000.

[49] I will also fix a procedural hearing to consider the question of expenses and further procedure.