SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 16
P922/21

Lord Justice Clerk
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Note of

AMANDA URQUHART and DEANNA URQUHART

Noters

for

an order in terms of sections 130(2) and 167(3) of the Insolvency Act 1986
in the winding up of West Larkin Limited.

Noters: Dean of Faculty (Dunlop, K.C.); T. Young; Currie Gilmour & Co, Edinburgh
Second and third respondents and reclaimers: O'Brien, K.C.; TLT LLP, Edinburgh

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31 March 2023

[1] There is a long running feud between the Sweeney and the Urquhart families over land at Leachkin Brae, Inverness. The first litigation was raised in 2001 and there have been several since. The details are summarised in the most recent previous judgment from this court, see *Joseph Sweeney and Donalda Sweeney, Noters* [2020] CSIH 65. The present case concerns the proper approach to the statutory provisions concerning an agricultural tenant's right to buy the land subject to the lease as set out in Part 2 of the Agricultural Holdings (Scotland) Act 2003.

The circumstances

[2] The background to the present matter is narrated in the opinion now under challenge, see *Amanda Urquhart and Deanna Urquhart, Noters* [2022] CSOH 51. It can be summarised as follows. In 2006 the Urquharts, as agricultural tenants, registered a notice of interest in acquiring the land at Leachkin Brae in terms of the 2003 Act. The notice has been regularly renewed to stop its expiry after five years, the most recent being in 2016 and 2021. In February 2019 the liquidator of West Larkin Ltd, the owner of the land, gave notice under the Act of a proposal to transfer the land. That was met by a timeous counter-notice of the tenants' intention to purchase the land. On the face of it that obliged the liquidator to sell the land to the tenants at a valuation which might well be substantially below the price available if it was placed on the open market with vacant possession. Meanwhile there has been a change of liquidator.

[3] The Urquharts have lodged a Note in the liquidation asking the court to direct the liquidator to transfer the land in accordance with the statutory provisions. The new liquidator has taken a neutral position, stating that the true contradictors are the Sweeneys. They previously owned the company and now contest the validity of the registration of the Urquharts' interest in buying. The Sweeneys have entered appearance claiming title and interest in the company's winding up as creditors and contributories likely to suffer prejudice if the land is sold at a reduced value.

[4] The Sweeneys want a proof aimed at establishing that any agricultural tenancy ended by at latest 2015 and thus the 2016 registration, upon which the former liquidator's notice and the tenants' counter-notice were based, was invalid and thus there can be no right to buy. (The same alleged invalidity would apply to the 2021 renewal of the registration). It is said that since 2006 the land has been abandoned by the Urquharts and left derelict. It not

being used for agricultural purposes, there was no agricultural holding within the meaning of the Agricultural Holdings (Scotland) Act 1991. Although no notice to quit was served, it is contended that the lease expired at its term in October 2015.

[5] The Urquharts' position is that the agricultural tenancy has remained throughout and is continuing by way of tacit relocation. The requisite notices under the 2003 Act were exchanged with the previous liquidator thereby creating an enforceable right to buy.

[6] After a debate the Lord Ordinary directed the liquidator to sell the land to the Urquharts in accordance with the 2003 Act. The Sweeneys have reclaimed (appealed) against that decision.

The 2003 Act

[7] The provisions of the 2003 Act relevant to the current dispute can be summarised as follows. Part 2 regulates when a tenant of an agricultural holding obtains a right to buy the land. Section 24 provides that the Register of Community Interests in Land shall contain a part for registering tenants' interests in acquiring land, all under the auspices of the Keeper of the Register.

[8] Given that the challenge here is to the validity of the registration, the key provision is section 25. It stipulates that a notice of interest must specify the tenant, the owner, others with an interest in the land, and its location and boundaries. On receipt of such a notice the Keeper must register the interest and send an extract to the owner and the tenant. If there is a standard security over the land the owner must so inform the tenant and send a copy of the extract to the creditor in the standard security (section 25(6)). A registration lasts five years but can be renewed at any time (section 25(14)).

[9] If any matter in a registration is disputed the owner can challenge it by notice in writing specifying the alleged inaccuracy (section 25(8)). No such notice has ever been served in respect of the registered interest over the land at Leachkin Brae. If there had been such a notice, the Keeper would have had to make such enquiry as was considered proper and, where appropriate, amend or rescind the registration. Any decision made by the Keeper could be appealed to the Land Court.

[10] The scheme of the legislation is that absent a successful challenge by the owner, a registration has effect according to its terms unless and until one of the circumstances mentioned in section 25(12) occurs.

[11] Section 25(12)(a) states that the registration of a tenant's interest in acquiring land continues to have effect only in relation to such land as remains comprised in the tenancy. Plainly this addresses cases where after registration there is a reduction in the extent of the subjects of the lease, for example if part is relinquished by the tenant or resumed by the owner.

[12] Section 25(12)(b) sets out three ways in which a registration "ceases to have effect". They are (i) rescission of the registration, (ii) the tenancy "is terminated", and (iii) the expiry of five years from the date of the registration. Where a tenancy is terminated during the five year period or there is a reduction in the land comprised in it, the owner must give notice in writing of that fact to the Keeper (section 25(13)). The Keeper must remove any registration which no longer has effect (section 25(15)).

[13] If the owner or the holder of a standard security proposes to transfer land subject to a registration, notice in writing of that fact must be sent to the tenant with a copy to the Keeper (section 26). When such a notice is served by either the owner or the holder of a standard security the tenant has the right to buy the land (section 28). Section 29 allows for

the right to be exercised if within 28 days the tenant gives the owner (or the standard security holder) a notice under section 29(2) that the tenant intends to buy the land, failing which the right is extinguished. The Keeper must be sent a copy of the notice.

The judgment under challenge

[14] The Lord Ordinary's reasons for granting the order sought by the Urquharts can be summarised as follows. The statutory scheme is a discrete set of provisions introducing a right to buy for the benefit of the tenant, subject to certain contingencies and restrictions. If it is to be asserted that a tenancy has ended this must be raised as a challenge to registration by the owner under section 25(8) or, if there is a termination after registration, by a notice of this under section 25(13). Failing such, the combination of an extant registration and the exchange of the appropriate notices by the owner and the Urquharts crystallised an enforceable right to buy which cannot be usurped by an offer in another process to prove that there is no agricultural holding. The owner could have challenged any of the registrations over the years but has never done so. Nor has there been service of a notice of termination. The owner at the time (the former liquidator) gave notice of his intention to transfer the land. The tenants having made the appropriate counter-notice of intention to buy, no relevant defence to the right to buy has been presented.

[15] In any event the Sweeneys, who are third parties to the lease, cannot invoke the provisions of section 25(12). If their propositions had been correct they would have required to seek reduction of the section 26 and 28 notices, which they have not done. The Lord Ordinary saw no merit in the fall-back submission that the current liquidator, who had adopted a neutral position on the dispute, should be given time to consider whether he now wanted to make a challenge under section 25(8).

The grounds of appeal and the submissions to this court for the Sweeneys

[16] Many of the grounds of appeal are variations on a theme. The Lord Ordinary should have held that section 25(12)(a) and/or (b) applied with the result that by operation of law the registration automatically had no effect. No further procedure was required. The ineffectiveness of a registration does not require to be resolved under the provisions in the Act but can be addressed in any competent forum. A registration cannot have effect in the absence of a subsisting lease, and here the offer is to prove that it ended at latest by October 2015. That is a relevant defence to the direction sought in the Note. In the absence of an agricultural lease the exchange of notices between the owner and the tenants could not create a right to buy. The Lord Ordinary erred by holding that the Sweeneys had no title and interest to raise these matters. They had such as contributories to and creditors of the company. Failing all else the liquidator should be given an opportunity to consider whether he now wants to mount a section 25(8) challenge. (The reduction of the notices issue has been addressed by an amendment to the pleadings seeking such an order.)

[17] The submissions for the Sweeneys relied heavily on the proposition that it was clear that only a tenant of a tenancy governed by the Agricultural Holdings (Scotland) Act 1991 could register an interest to buy, see section 25(1) of the 2003 Act. Emphasis was placed on section 25(12)(a) which states that a registration "continues to have effect only in relation to such land as remains comprised in the tenancy". If there is no tenancy and no such land, a registration can never have any effect, even if it is on the register. It was not being argued that there was a termination in terms of section 25(12)(b)(ii), but the provision did demonstrate that a registration can remain on the register yet have no effect. Section 25(15) presupposes that a registration can lose effect before it is removed from the register. The

same is inherent in the wording of section 25(12)(b)(iii). There is no policy reason why once a lease is terminated the owner should be unable to transfer the property as he pleases merely because the termination is disputed. The tenant should not receive a windfall simply because the owner forgets to notify the keeper of the termination. If a registration is ineffective the same must apply to notices served in reliance upon it.

[18] A challenge to a registration cannot be exclusive to the owner of the land. Others may have an interest such as a standard security holder or a person with a competing claim to be the tenant. Given that a standard security holder is mentioned more than once in the relevant provisions it would be odd if that person had no remedy in the ordinary courts if he had concerns. There must be some mechanism whereby an interested third party can challenge a registration. Under reference to *Barraclough* v *Brown* [1897] AC 615 and *Grubb and Others* v *The Perth Educational Trust* 1907 SLT 492 it was acknowledged that the matter turns on the words used in the statute. Any ruling by a court that the lease did not exist would establish that any registration was of no effect. Reference was made to *Serup* v *McCormack and Others* 2012 SLCR 189 at paragraph 60.

The submissions for the Urquharts

[19] The Urquharts had three main submissions. First, the Lord Ordinary correctly held that section 25 of the 2003 Act provided for an exclusive statutory method of challenging a registration of a tenant's interest in buying the land. Secondly, he was right in concluding that the exchange of notices between the then liquidator and the tenants created a crystallised right to buy. Thirdly, there was no obligation to give the current liquidator time to reconsider his position.

[20] On the first matter it was stressed that section 25(12) does not set out pre-conditions for registration. It addresses how subsequent changes in circumstances can impact upon a registration, for example a reduction in the extent of the land subject to the tenancy (section 25(12)(a)). It is registration for the "time being" which confers the right to buy (section 28(1)). Neither an owner nor anyone else can treat the statutory methods of challenge to or ending a registration as optional and pursue some other route.

[21] Having previously argued that the liquidator should be ordered to challenge the registration in terms of the Act (*Joseph Sweeney and Donalda Sweeney, Noters* [2020] CSIH 65), it is now suggested by the Sweeneys that this was unnecessary all along. On any view third parties can be in no better position than the owner, yet that would be the outcome here if the Sweeney's approach is correct. Standard security holders are protected in that standard condition 4(c) allows for an owner being forced to make a challenge under section 25(8). It can be assumed that the Parliament was aware of the rights of security holders. On behalf of the Sweeneys it was suggested that condition 4 applies only to planning notices. This is not correct. It also covers "any other notice or document affecting or likely to affect the security subjects". (For the standard conditions see schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970.)

[22] The point of registration is to ensure publicity and certainty for parties relying on the register. For example section 25(13) imposes a duty on the owner to notify the Keeper of the termination of the tenancy or a reduction in the land covered by it. The general rule is that if Parliament has conferred statutory rights and associated remedies that ousts other courts or jurisdictions: *Barraclough* v *Brown* [1897] AC 615, Lord Herschell at 620; *Grubb and Others* v *The Perth Educational Trust* 1907 SLT 492, Lord Guthrie at 493; *Dante* v *Assessor for Ayr* 1922 SC 109; and *British Railways Board* v *Glasgow Corporation* 1976 SC 224.

[23] There is no dispute that the appropriate notices in terms of sections 26 and 29 were exchanged at a time when the Urquharts' interest in buying was on the register. The Lord Ordinary correctly identified a crystallised right to buy. Furthermore the Sweeneys cannot mount a challenge when the owner has chosen not to do so and has served a section 26 notice. Third parties will often lack standing to challenge matters which indirectly affect them. As to whether to allow further time to the liquidator the Lord Ordinary reached an unimpeachable discretionary case management decision. He noted that the liquidator did not wish to appear at the debate and had made it clear that he neither opposed nor supported the order sought by the Urquharts.

Decision

[24] We agree with the judgment of the Lord Ordinary. Part 2 of the 2003 Act provides a coherent self-contained statutory scheme. If the Sweeneys' submissions are correct it would be wholly undermined. It provides certainty and achieves an appropriate balance between the respective competing interests.

[25] There has been no challenge under section 25(8) to the timeous repeated registration of the Urquharts' interest as tenants in acquiring the land. There has been no notice of termination under section 25(13). The owner and the Urquharts exchanged the requisite notice and counter-notice. The Urquharts now enjoy an enforceable right to buy in terms of the valuation provisions in the Act. It would now be too late for the owner to try to avoid this by raising a challenge under section 25(8). If, contrary to our view, an interested third party did have standing to dispute the registration, likewise it would be trumped by the tenants' right to buy. A standard security holder's position is protected by the 1970 Act, but even he could not sit on his hands and then at the eleventh hour seek to intervene.

[26] If a registration is unchallenged it may subsequently cease to have effect according to its terms if in the meantime the land covered by the tenancy is reduced. It may cease to have any effect at all if it is rescinded; is terminated; or five years has passed without its renewal. None of these have happened. We agree with the submission that section 25(12) addresses post-registration changes of circumstances. If a notice of a tenant's interest in acquiring the land is inaccurate, for example by claiming that there is an agricultural tenancy when it has already ended, the remedy is for the owner to challenge it in terms of section 25(8) and hope to so persuade the Keeper, whom failing the Land Court.

[27] There is nothing inherently wrong or nonsensical in the proposition that an owner or a third party might be able to prove that there has never been a tenancy or that it has ended, but nonetheless an extant registered interest plus the operation of the notice provisions has created an enforceable right to purchase. In other words, a tenant's right to buy is a statutory right wholly dependent on an application of the scheme in Part 2 of the Act. It can be assumed that the restriction on those permitted to challenge a registration was deliberate. If an owner neglects his own interests then he must take the consequences. It does not open a route for others claiming to be adversely affected to interfere.

[28] The above is sufficient to deal with the various grounds of appeal. The reclaiming motion is refused and the court adheres to the interlocutor of the Lord Ordinary. The court hopes that it is not overly optimistic to expect that this will mark the end of litigious disputes between these families over this area of land.