

Holmehill Ltd. v Scottish Ministers

Preliminary Analysis of the Sheriff's ruling published Friday 28 April (1)
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INTRODUCTION

This is a Preliminary Note summarising the outcome of the case of Holmehill Ltd. v Scottish Ministers and is published to assist citizens to understand both the ruling and the implications for the Community Right to Buy. A fuller account, including the implications for the future of the Act and amendments that may now be needed, will be produced as soon as possible.

BACKGROUND

Holmehill Ltd. is a community company based in Dunblane. In February 2005 they submitted an application under Part 2 of the Land Reform (Scotland) Act 2003 to register an interest in Holmehill, a small wooded hill in the centre of Dunblane. The site is owned by Stakis Ltd. who had put it up for sale in December 2004.

The application was deemed a "late application" since it was submitted after the land was put on the market. In order for a successful registration in these circumstances, applicants have to satisfy three additional tests to those of a timeous application (that is one received before the land is put up for sale). These tests are contained in Section 39 of the Act and are (paraphrased): -

- (a) that there were good reasons why the applicant did not secure a timeous application
- (b) that there exists significantly greater support for the application among the community (compared to a timeous application)
- (c) that the application is even more in the public interest (compared to a timeous application).

Scottish Ministers refused the application on the grounds that the reasons given in (a) were not good reasons and because they asserted that the applicant was using the Act to "thwart the planning process" and thus the test at (c) was not satisfied.

Holmehill appealed the decision on the basis that the reasons at (a) were indeed good ones and that at (c) it was in the public interest since, among many things, the site was already designated as green space in the Local Plan and that in any event, a registration under the Act cannot "thwart of the planning process".

RULING

Sheriff McSherry refused the appeal and awarded costs against Holmehill Ltd. The appeal was refused not because of the merits or otherwise of the decision that Scottish Ministers had taken, but because the Sheriff concluded (based on precedents in other cases) that

he should not interfere with the decisions of Scottish Ministers. An extract from pages 54-55 of the Ruling sums up the argument: -

I am not of the view that the appeal in this case should be 'open' in the sense that I may from the outset treat the application de novo by disregarding the reasons given for the decision of the Scottish Ministers and proceeding to ascertain the facts surrounding the application in order to make a fresh decision. Even if I were to do treat the application de novo, following the above authorities, I could not lightly reverse the decision of the Scottish Ministers, who are duly constituted and elected and I would have to be satisfied that the decision was wrong not simply that I was not satisfied that it was right. I am also persuaded that if this were an "open" appeal in the sense used by Mr Campbell, I could look at the whole evidence presented and make a decision to allow or refuse a late application in terms of section 39. To do so would involve me in exercising my discretion in a matter within my local jurisdiction in determining what are 'good reasons' for the late application and what is in 'public interest'. I would be substituting my opinion for that of the Scottish Ministers. Further, this would not sit well with ensuring consistency of decision making throughout Scotland and I do not believe that this is the proper approach. This discretion is best left to elected representatives such as the Scottish Ministers, who are in possession of relevant information and who are charged with exercising such discretion in respect of late applications made throughout Scotland in terms of section 39.

and then at 57,

I am of the view that the merits may be considered by me in order to satisfy myself whether the decision appealed against is plainly wrong. There would need to be a very strong case for me to interfere and substitute my judgement for that of the Scottish Ministers as parliament has presumed special information and capacity on their part. It is not enough that I might have reached a different decision on the same facts.

As a consequence, the Sheriff dismissed the appeal on the (a) good reasons test.

He then went on to discuss the public interest very briefly at pages 70-71. Since all three tests must be met he states that it is not necessary for him to consider (c) but had he had to he concludes (at page 71) that he would have dismissed the appeal on these grounds also.

The public interest factor at issue in this case that was taken into account by the Scottish Ministers is attempts to frustrate development. The purpose of the community right to buy is that of sustainable development of communities. If the purpose of an application to register a community interest in land is the desire to prevent or frustrate development by a potential purchaser, I would agree that it is not unreasonable for the Scottish Ministers to take this into account and regard the application as being incompatible with the policy aims of the legislation. The effect of registration is to give a right of pre-emption over all other potential buyers to purchase land. It prevents the landowner dealing freely with the land, and any sale is subject to the procedure under the Act to allow the community to activate its right to buy. The right of pre-emption is designed to enable the community body to become owners of the land if it comes on the market. The practical effect of ownership, once accomplished, is to give the owner control over land use and a veto over development on land that the owner does not like. The community right to buy had the potential to subvert the planning process. Mr Campbell argued that the planning system is separate from the

community right to buy, and planning considerations are therefore irrelevant. However, in the real world, I would think it unlikely that the planning process would be commenced or continued with, for example, in respect of an application to allow housebuilding, if the developer was aware that the land was subject to a community right to buy.

ANALYSIS

The Sheriff did not in the end feel that he was in any position to review the decision that Scottish Ministers had taken and it was this reluctance, based on legal precedents, that led to the failure of the appeal. This outcome strengthens the discretionary powers of Ministers by rendering them relatively immune from interference.

In fact, it is not Ministers' powers that are increased, but the powers of a small group of civil servants. This is potentially worrying since this group has no professional expertise in the areas of land tenure, community development, planning or sustainable development and Ministers in practice follow their recommendations. This contrasts with the planning system where decisions are made by democratically elected local politicians based upon recommendations from a professional cadre of planners.

This leaves the land reform process vulnerable to the inadequacies of a decision making process that lacks any kind of structured and analytical decision making and to the political whims of Ministers who can write their own guidance and determine their own policy intentions.

A number of immediate implications arise for communities who are considering using this legislation.

First

The appeal procedures in the Act are to all intents and purposes useless since it is clear (at least from this ruling) that no Sheriff can question the decisions of Scottish Ministers unless they are "plainly wrong". Those of us who argued for the introduction of an appeals process free of any constraints (as was the case in the draft bill) are now clear that what we had been led to believe was a means to challenge Ministerial decisions is in fact a blind alley up which communities should think long and hard before spending any money on an appeal (and facing the consequences of bankruptcy) should they lose.

Scottish Ministers control this process now and with so much discretion in the hands of Ministers this effectively means that the Community Right to Buy is merely a Community right to apply to register. Scottish Ministers decide who is to have the right and who not.

Second

The late registration provisions of the Act are also to all intents and purposes useless. Jim Wallace, in Parliament on 24 November 1999 claimed that the late registration provisions were being introduced because,

".....we recognise that there may well be circumstances when the idea of community purchase arises only when the opportunity unexpectedly presents itself. Therefore, we will add a procedure for community bodies to apply on an exceptional basis to register interest after land comes on the market....."

It is now clear that where such an idea unexpectedly presents itself, the community can be refused on the basis that they should have secured a timeous registration! Ministers are using the “exceptional circumstances” outlined in the Guidance to narrow the range of late applications deemed admissible to those where essentially the process of making an application has been interrupted by the unexpected advertising of the land for sale or where a community had no knowledge that it was in the process of being sold.

This flies in the face of Mr Wallace’s statement since if the idea only arises after the opportunity unexpectedly presents itself, then logically, the community will not have taken any steps to begin the process of registration. Rather bizarrely, it was claimed by the Scottish Executive witness in the case that being “reactive to a sale” was one of the reasons why Ministers would refuse a late application.

The implication is that all communities across Scotland should consider registering any land in which they or their descendants might be interested in since, if they don’t, they are unlikely to be able to do so if and after it is put up for sale.

Third

Following this unambiguous ruling, it is clear that the Guidance and Ministerial Policy are legitimate sources upon which Ministers may draw when exercising their discretionary powers of decision making. Thus, for example, although the Act simply poses 3 tests to be met, Ministers can refuse since the application may not be deemed to be an “exceptional circumstance”. Communities are in no position to assess what an “exceptional circumstance” since it is not defined anywhere. Other elements of Ministerial policy such as “demonstrating serious intent” and being “reactive to a sale” also now appear to, in effect, circumscribe the plain terms of the tests that Act states should be met. There was even a “hidden policy” revealed in the course of Scottish Ministers’ evidence which clearly communities cannot be aware of.

This has worrying implications since the Guidance and Ministerial Policy are not subject to any democratic oversight. The Guidance was written by civil servants and never debated by Parliament. A future Government that may be hostile to the community right to buy could simply bin the existing Guidance, introduce even more restrictive guidelines and use this to inform their powers of discretionary decision making.

Fourth

Scottish Ministers (and with respect the Sheriff) appear to have an odd idea of what the planning system is about. It is not possible to thwart the planning system by using the Community Right to Buy legislation. The planning system is concerned with decisions as to the permissible uses of land under the Planning Acts, is entirely independent of the Community Right to Buy process and is not concerned with whether or not landowners actually choose to use their land in any number of permitted ways. Only in places such as the former Soviet Union with its Ten Year Plans are landowners forced to use their land according to the Plan.

This point is particularly curious in the case of Holmehill because the land is designated as green space and protected by a Section 75 agreement. Even if it were possible to “thwart the planning process”, it is difficult to see in these circumstances what part is being thwarted since the proposed uses complement the land use designated by the Local Plan.

The implication is clear though. Scottish Ministers regard any hint of any wish to curb or limit development as being incompatible with “sustainable development” even in cases where “sustainable development” has already been determined to be open space!

CONCLUSIONS

The ruling is very clear in what it says and communities now need to make considerably greater efforts to ensure that they seek to register any land in which they or future generations may be interested in. This is likely to involve a substantial effort.

This effort may also now be undermined by the stated “policy intentions” of Scottish Ministers that communities have “serious intent” to pursue the purchase of land. This is difficult to demonstrate when such opportunities may not arise for years or decades to come and when in practice what a community body seeks is simply the option to acquire at some future, indeterminate date.

In light of further consideration of this ruling it is inevitable that there will need to be reform of the Act if it is to achieve anything close to approaching the two advantages associated with it and identified by the late Donald Dewar when it was first proposed in September 1998, namely that it: -

- would greatly empower communities, and
- would effect rapid change in the pattern of landownership (3)

The real irony of this ruling is this. If Ministers (and by their own admission their decision was finely balanced) had come down on the side of Holmehill Ltd. - a community body trying to use the Act for its intended purpose - instead of a multi-national corporate landowner, then any appeal against registration by Stakis Ltd. would have been refused by the Sheriff on exactly the same grounds.

Holmehill’s misfortune may simply have been to have been opposed by a determined corporate landowner who made Ministers (actually civil servants) wobble and come down on the side of refusal. This indeed has happened in a more recent case (Seton Fields). Meanwhile, other communities, with less well argued cases who faced no such hostility, achieved successful registrations.

Finally, this ruling does not only have implications for community bodies. Landowners themselves may wish to reflect on the fact that their right of appeal against decisions to register land or to consent to the right to buy is also now heavily circumscribed. Arguments that owners might wish to pursue relating to the public interest and other tests that the Act lays down may now be purely academic in light of the powers vested in Scottish Ministers.

NOTES

(1) The ruling is available at http://www.scotcourts.gov.uk/opinions/b255_05.html

(2) Andy Wightman is a writer and researcher on land issues and appeared as an expert witness for Holmehill Ltd. in the case.

(3) Identifying the Solutions. Land Reform Policy Group, September 1998. pg. 23.