

All titles to land are fetishes. In this country they are the fetishes of discarded and dead divinities. But such is the power of ignorance and superstition when established and maintained by *law and order* that these fetishes are held much more sacred now than in the so-called dark ages.

– D.C. MacDonald (1891)

THE Cuillin mountain range on the Isle of Skye has been put on the market by its landlord John MacLeod of MacLeod. On May 18, under increasing political pressure – exerted especially by Brian Wilson MP, the Minister of State at the Scotland Office (the UK level of Scottish Government) – the Crown Estate announced that it would, after all, formally investigate MacLeod's title to the Cuillin.

The widely-welcomed announcement constituted a U-turn on the Crown Estate's previous statement. The perhaps surprising rationale behind the investigation seemed to be that "if the MacLeods do not own the Cuillins, the Crown does by default". Brian Wilson, it was reported, was painting an even bigger picture – he hoped the investigation "could be the starting point for a much wider inquiry into the validity of ancient title deeds".

However, in spite of public statements of general intention, and public and political enthusiasm and hope for the outcome, worryingly, there seemed to be no explicit, formal, publicly announced terms of reference for the investigation.

Brian Wilson was still hopeful. He said: "This is a significant moment in the whole debate about the ownership of land in Scotland. It is recognition that many questions about title, which have hitherto been shrouded in the mists of time, require to be answered on the basis of research and investigation."

THE CROWN Estate Commission decided to meet the public's expectations of it by obtaining the Opinion of Senior Counsel. The terms of its brief asks Counsel to advise whether "the Crown Estate could properly challenge Mr. MacLeod's claim of ownership of the Cuillins, with the intent of securing an order that the Cuillin Mountains are the property of the Crown".

This brief did not really hit the point. The predominant public feeling was that the Cuillin could not be owned at all; simply that they existed, unowned, as a part of Scotland, for the enjoyment of all, and the responsibility of all. "One question which the Scottish Parliament must address is whether it is right that any private individual or company should own what should be regarded as national assets," wrote Richard Lochhead MSP. A pitch for ownership between two parties – Crown and landowner – would prove nothing. And it seemed certain, in any case, on historic precedent, that the landlord would have the upper hand in any such contest.

There seemed to be a divide opening between the stated political intentions of the Cuillin investigation, and the apparent course of action of the Crown Estate Commissioners. The Crown Estate's public statement of intent

Skye Blues:



the seven challenging questions that need answers

Peter Gibb on ancient titles to land

only broadly set out the task ahead; and its brief to counsel seemed too exclusively focused. Concerned that the right questions would be answered by the investigation, Land Reform Scotland (LRS) wrote to the Crown Estate. LRS was keen to establish not the whether of MacLeod's title, but rather the *nature* of that title. That is to say, they were much less interested in the issue of whether the land was 'owned' by MacLeod or the Crown Estate, than by the reciprocal and conditional nature of any title.

LRS's starting point was founded, firstly, on the *de facto* legal position in Scotland regarding land tenure, and, secondly, on the specific legal research work of historian Alan Blackshaw, funded by the Ramblers Association Scotland.

LRS wrote: "We...understand that the deeds upon which Mr MacLeod is resting his claim, make reference to conditional, periodical, reciprocal payments in money and/or services, and/or the meeting of other duties, in return for the grant of land".

In an attempt to undermine any possibility of obfuscation of the issue, the letter then set out seven closely inter-related questions that needed to be answered:

- ◆ To what extent were the original or early grants of land or other interests conditional on such reciprocal payments and/or other duties?
- ◆ What was the nature of these conditions, and whom did they favour?
- ◆ To what extent is any current title to the land or other interests conditional on such reciprocal payments and/or other duties?
- ◆ What is the nature of these conditions, and whom do they favour?
- ◆ By what processes have, over time, any such conditions been discharged, extinguished, replaced, transferred, allowed to lapse, or otherwise been varied or removed?
- ◆ What compensation terms were negotiated, by whom and favouring whom; and to what extent have they been met?
- ◆ What arrangements are in place for meeting the terms of any extant conditions?

On July 4 the Crown Estate confirmed that the interests of Land Reform Scotland were within the scope of its investigations, writing: "The Crown Estate is currently awaiting Senior Counsel's opinion on [the points raised in your letter]."

On July 18, the Crown Estate announced that it had "completed a thorough, legal investigation into the title of the Cuillin mountain range in Skye and has found no evidence to support a legal challenge against John MacLeod of MacLeod's title."

TO SOME, the result came as no surprise. The Crown Estate wrote to LRS to explain its position: "The Crown Estate undertook to investigate...whether or not it was considered that the Crown Estate had a proper basis on which to challenge the claim by Mr MacLeod that he is the legal owner of the Cuillins...You will appreciate that this is not the same as inquiring on what conditions (if any) the property is held by Mr MacLeod and/or whether these conditions still apply."

However, interestingly, the letter concludes: "The existence of conditions...will not assist in determining legal ownership. The existence of Conditions of title, by definition, requires there to be legal title in the first place. The application of conditions is a matter between the relevant parties and not a matter of legal ownership of land and thus it is not within the enquiry that has been completed by the Crown Estate."

The Crown Estate's argument seems contrary to good sense. If the title to the land in question places obligations on the landholder – i.e. the holding of the land is dependent on the meeting of certain conditions; and if these conditions favour the Crown, which holds them in trust for the public interest; and if the landholder has not discharged those obligations or met those conditions; then is not the landholder in breach of contract? has he not broken his agreement with the Crown (that is to say the public)? does the other side of the title contract not then fall too (i.e., the grant of land); and, is there not a duty on the Crown to, firstly,

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enforce those conditions, and secondly, if those conditions are not met, then, in the name of the public interest, to claim back for the public what the landlord has forfeited by his breach of contract?

Counsel's Opinion is that, due to their vagueness, MacLeod's titles are only "capable of including the Cuillins", and that "Consequently the extent of the subjects conveyed depends upon the extent of the possession [and that therefore Mr MacLeod] must rely on the positive prescription...of 20 years." This is to say, that if the laird's claim of lordship over the estate has not been substantively challenged within the last 20 years – if he has "possessed the land ... openly, peaceably and without judicial interruption" – then it is his. It is notable that the general law of reset is not so limited in time.

The old law is read to sustain the status quo. That is what this investigation has confirmed. Reform requires new law, written in the full light of burgeoning social wisdom and justice. For, otherwise: "The commer-

cial landlord...is of all citizens the most pernicious, who burkes all inquiry into the foundations of his right, and who with the aid of lawyers and priests, fills the eyes of mankind with the dust of ignorance".

THE SCOTLAND Office response concluded that the investigation proved the need for the current land reform proposals to be only a beginning – that ongoing legislative proposals would be needed.

Brian Wilson was satisfied by the result, and he explained why: "This has been a worthwhile exercise. It is the first occasion on which such a claim of ownership has been subjected to this kind of scrutiny. The conclusions highlight the fact that any meaningful challenge to such claims of ownership will only come through legislative change rather than interpretation of existing Scots law."

And that is what our new Parliament is for.