

FULL COURT

(Lord McGhie, J. Kinloch, D J Houston)

FERGUSON v CROFTERS COMMISSION

(Application RN SLC/3/99 -- Order 18 May 1999)

Croft -- Application for decrofting direction -- Proposed refusal by Crofters Commission -- Appeal to Scottish Land Court -- Area of ground to be sold as amended to ground and the site of an existing shed with the adjacent dwellinghouse - Reasonable purpose -- Inadequate reasons in Crofters Commission decision -- Presumption in favour of decrofting for reasonable purpose -- Section 25 (1) (a) of the Crofters (Scotland) Act 1993

The applicant appealed against the decision of the Crofters Commission refusing to decroft an area of ground. The applicant was the executor of the late tenant who had acquired title to the site of the croft dwellinghouse, adjacent amenity ground and the site of an existing shed. A decrofting direction had been granted in respect of the house site area only and the applicant now sought to decroft the remaining area of ground in order to sell the whole subjects. The Crofters Commission refused to decroft, holding the shed should remain as part of the croft for crofting activities, notwithstanding the fact that the tenant of the remainder of the croft had erected another shed which was used for her crofting activities. The Court in sustaining the appeal held that there was nothing to outweigh the presumption in favour of decrofting with the application arises in terms of section 25 (1) (a) of the Crofters (Scotland) Act 1993.

The Note appended to the Court's order is as follows: --

The applicant appealed to the Court under the provisions of section 25(8) of the Crofters (Scotland) Act 1993 against a decision of the Crofters Commission proposing to refuse to grant a decrofting direction in respect of an area of 0.1095 hectare (hereinafter referred to as "the subjects") adjacent to the house site at the croft 8 Gearradubh, Grimsay, North Uist. The relevant provisions of section 24 and 25 are set out more fully below.

Parties were agreed that we should deal with the appeal by hearing a full proof which we did at Lochmaddy on 29 April 1999. The applicant is the executor nominate of the late Mrs Catherine MacVicar. He is himself a solicitor and he appeared on his own behalf. He gave evidence himself and led evidence from Miss Joan MacKay now tenant of the croft of 8 Gearradubh as described further below; Mrs Lesley Cox, West Kilbride, South Uist, a prospective purchaser of the subjects; Mr John Martin, an Agricultural Officer, Scottish Office, Agriculture, Environment and Fisheries Department; Mr Donald MacAulay, 11 Solas, North Uist, the Area Assessor; and from Mr Alan Campbell the Area Commissioner for North and South Uist, Barra, and parts of Argyll. We inspected the relevant land on 30 April.

The circumstances in which the application arose are unusual. It was suggested that the circumstances could be attributed, in part at least, to the failure of Mrs MacVicar to notify the Commission of her acquisition of the subjects. Plainly the Court will be astute to prevent parties seeking to take advantage, real or perceived, from their own breach of statutory duty. However, as will appear, we were satisfied,

at the end of the day, that in this case that consideration was properly to be regarded as irrelevant.

The following facts were admitted or established in evidence:

1. The applicant is the executor nominate on the estate of his late aunt, Mrs Catherine MacVicar, who died on 7 November 1997. Mrs MacVicar was formerly tenant of the croft 8 Gearradubh. In 1993 she applied for a decrofting direction in anticipation of acquiring part of the croft extending to 0.3015 hectare situated at the north-east corner of the croft and on which stood the croft house and various buildings. The Commission indicated unwillingness to decroft the whole area as it was in excess of the area normally considered appropriate for garden ground in terms of section 25(1)(b). The application was modified and decrofting was granted in respect of 0.192 hectare which included the house site, the garden ground around it, and certain rocky ground included for convenience of fencing. The remaining 0.1095 hectare, the subjects of the present application, contain a large general purpose shed, a disused and dilapidated fank and the roofless remains of an old building the precise purpose of which was not identified.

2. Mrs MacVicar then obtained title to the whole 0.3015 hectare by Feu Disposition dated 24 and 25 August 1994. (It may be noted for completeness, that although the Disposition contained a land obligation restricting use of the 0.3015 hectare to occupation by one family, nothing was made of this in submission. The Disposition also contained a "clawback" provision reflecting the terms of section 14(3) of the Act. This, however, had been discharged by agreement).

3. In August 1994, Mrs MacVicar, with the consent of her landlords, North Uist Estate, assigned the remaining area of the croft, 8 Gearradubh, to her grand-niece Miss Joan MacKay. Mrs MacVicar retained possession of the subjects although she permitted Miss MacKay to share use of the shed. Miss MacKay used part of the shed for storage of feed and shelter for livestock while she built a new house and stabling in the north-west part of the croft. Since completion of the new stabling, she has had no further use for the shed. It is not conveniently situated relative to her new house. She has constructed adequate facilities for her agricultural purposes.

4. Mrs MacVicar did not intimate to the Crofters Commission her acquisition of title to the subjects. This was a breach of section 17(7) of the Act. However, it was not disputed that the subjects thereafter fell to be regarded as a vacant part of a croft. Had the Commission been aware of all the circumstances they would, on receipt of intimation of said assignation to Miss MacKay, have been able to take steps to try to have the subjects, including the shed, let to Miss MacKay. Because of her relationship with Mrs MacVicar, we consider it probable that Miss MacKay would not have taken such tenancy at the instigation of the Commission. (We record, for completeness, that Mr Ferguson in his evidence had explained that the failure to intimate was not deliberate. Circumstances had arisen in which it had been reasonable for Mrs MacVicar to assume that the sellers would be responsible for the necessary intimation on her behalf.)

5. There are nine crofts in the Gearradubh Township. These crofts lie generally within two distinct areas with some situated at Gearradubh and others at Seannabhaile. Four of the crofts have land in both areas. The two areas, broadly speaking, are about half a kilometre apart. They are linked by a causeway. Little or no cropping is now carried out on either part of the township. Sheep are the main enterprise. The crofts are all actively used. There would be a demand for suitable vacant bare croft land.

6. Although the area which was decrofted in 1994 includes some precipitous rocky ground, there is ample space to provide garden and amenity ground for the house. There is a partially walled vegetable garden and dilapidated greenhouse. There is an area of hard standing intended to provide a turning area for large vehicles delivering agricultural supplies to the shed. If the shed was not occupied along with the house the need for the turning circle would be reduced. A suitable domestic garage and storage shed could be accommodated on the decrofted ground.

7. The subjects are situated to the south east of the decrofted site. They are accessed by a track from the public road. The subjects can fairly be described as a rocky outcrop with little intrinsic agricultural value. It was not disputed that, but for the shed itself, there would have been no reason not to make a decrofting direction.

8. The shed was built on that outcrop in about 1970 by Mr and Mrs MacVicar without grant assistance. It is a block construction with fibre cement roof sheeting.. It is about 11 metres by 6 metres in size. At the north gable and facing generally towards the house, the wall has a garage type sliding door. The shed was constructed to replace the original byre which, we were told was situated close to the house. It was used partly as a garage by Mr MacVicar and partly in connection with their crofting. Internally the shed is divided by walls into three equal sections. The north most was obviously used as a workshop and tool shed as well as for the car. The central section was used for purpose of storage of foodstuff etc. in connection with crofting activities. The south section is a byre with doors to south and west. If the turning circle was not available, large vehicles would require to reverse back down the track and on to the public road following deliveries to the shed. The subjects do not provide easy alternative turning space.

9. Following the death of Mrs MacVicar, the executor sought to dispose of the whole heritable property owned by her. He advertised the property as a "traditional 1½ storey property with a large garage/outbuilding set within 0.30 hectare of garden ground".

10. Mr and Mrs Cox had, in fact, been made aware that the house was vacant following the death of Mrs MacVicar. They had looked at it before it was advertised. They formed the view that the house with its associated ground and outbuildings, including the said shed, would be ideal for their purposes. They had moved to the Western Isles in 1997. Both are employed. Mrs Cox is a primary school teacher. They have twin boys aged 10 and a daughter of 28 who has now left home. They planned to establish a family home where they could grow vegetables and keep chickens and pigs. The site meets their needs. The house itself will require substantial expenditure to modernise but no particular figure was spoken to. They will require to fund improvements to the house and outbuildings by borrowing.

11. Mrs Cox gave evidence that it would be necessary to decroft the subjects in order to provide, with the original house site, maximum security for the necessary mortgage. This evidence was based on advice given to her. However we heard no detail of the figures involved. We were not satisfied that the subjects, or any part of them, required expenditure on repair as matter of urgency. We do not find, as a fact, that decrofting is necessary in order to raise suitable finance to fund acquisition of the heritage.

12. On 31 July 1998, the executor applied for a decrofting direction in respect of the subjects. The stated reason was simply: "As additional amenity ground annexed to the existing site of the dwellinghouse (already decrofted)". After suitable enquiries,

the Commission intimated their proposed decision to refuse the application by letter of 1 December in the following terms:

"I refer to the decrofting application which you submitted on behalf of the Executor of the late Mrs C MacVicar for a decrofting Direction in respect of part of the above croft for the purpose of providing amenity ground.

We have fully considered the information available and propose to refuse this application. It may be helpful if I explain that the Crofters (Scotland) Act 1993 provides for decrofting for a reasonable purpose such as providing amenity ground as in this case. We are inclined to approve such applications unless we find that the extent of the area requested is excessive or that the granting of the application would have a detrimental effect on the viability of the croft or the general interest of the local crofting community.

While providing amenity ground for a dwellinghouse is not specifically mentioned in the Act as being a reasonable purpose for decrofting we do regard it as such. However, we usually consider an area of between 0.1 hectare and 0.2 hectare provides sufficient amenity area for a dwellinghouse.

In this particular case we took the view that the area applied for contains an agricultural building which constitutes a permanent improvement of the croft, although this building is not grant aided. Although the croft has in effect a new agricultural building on the part tenanted by Miss MacKay, the shed situated on the part now owned by the late Mrs MacVicar is functional and still in use.

We understand that the site is in the process of being sold to a Mrs Cox, and that it is the prospective purchaser's intention to utilise the agricultural building as a boat shed. Mrs Cox would have to obtain planning consent for a change of purpose of the building to enable her to carry out her plans and it is our understanding that to date this has not been obtained. We believe that it is not necessary to remove the land from crofting tenure to enable the prospective purchaser to carry out her plans for this additional area of land".

The letter concluded by advising of the applicant's right to make written representation or to request a hearing. Detailed representations were then made by the applicant stressing, in particular, that the shed was not used in connection with the croft tenanted by Miss MacKay and seeking also to correct the impression that the shed was to be used simply as a boat shed. These representations included detail that the prospective purchasers were both Mr and Mrs Cox and said that they did not propose to utilise the building as a "dedicated boat shed", that, in fact the building was to be used by Mr and Mrs Cox as an adjunct to the dwellinghouse for general use as such and for the storage of garden implements, tools etc. It narrated that the dwellinghouse had a large vegetable and produce garden with greenhouse and in part consisted of a flower and shrub garden. It gave more detail of the proposed use. Mr and Mrs Cox had indicated that from time to time they would store a dinghy in the building. They also proposed to keep poultry and might utilise part of the building for purposes connected with that. It was contended that a "change of use" in terms of planning legislation was not required and that, in any event, that aspect of the decision letter was based on the fact that the building was to be used as a dedicated boat shed which was incorrect.

By letter of 16 December 1998 the Commission wrote to say that no new information had been presented which would alter their view that the application should be refused. They repeated, verbatim, the reasons set out in the last two paragraphs

quoted above from their letter of 1 December. They did not comment in any way on the detail provided about the proposed use of the shed. As it stood, therefore, the decision appeared to be based on a finding that the proposed use was to be as a boat shed; that this would require planning permission; and that in any event it was a purpose which the proposed purchaser could exercise without need for decrofting.

13. Following the appeal to this Court, the Commission were granted an extension of time to lodge answers, in order to permit the matter to be considered by the Commission in Plenary Session. The proposed decision was confirmed at a meeting on 18 February 1999. No further reasons were given to the applicant. However, shortly before our hearing, the Commission's assessor, Mr MacAulay, ascertained that "if the shed was available", there would be a positive demand from the present tenant of croft 4 Gearradubh.

14. The south part of croft 4 is effectively bare croft land extending to about 2.30 hectares and only about 50 metres by track from the shed. The walls of a dilapidated building stand near the main road on this part of croft No. 4. The larger part of that croft at Seannabhaile is some 900 metres from the shed by road or track. Some of that part is low lying ground which may be liable to encroachment by the sea at some times of the year. The croft house is situated on this north part. It is derelict but is to be renovated. The walls of an old steading adjacent to the house are still standing but it is roofless. Both this old steading and the old building on the south part could, no doubt, be provided with some form of roof to provide adequate storage for animal feed. There is space on both the Gearradubh and Seannabhaile portions of croft No. 4 for erection of a new shed.

15. The subjects could not be operated in any meaningful way as an independent croft. Demand for crofts or for additional croft ground would not justify an inference of demand for a shed remote from the base croft. However the shed could well be a useful addition to croft 4. It could provide a base for activities on the Gearradubh portion. It is unlikely that any form of grant or financial assistance would be available to the incoming tenant to assist in payment of compensation for the shed as a permanent improvement. However, as the shed is now a landlord's improvement the incoming tenant would not necessarily require to take it over. Its value might simply be reflected in fair rent. Grant assistance would be available for erection of new sheds or repair of existing sheds on croft 4.

The Commission's approach

Three witnesses gave evidence bearing upon the Commission's approach to assessment of the application. Mr Martin, who is employed by SOAEFD, Balavanich, was asked by the Commission to investigate the circumstances and to report. He was provided with a copy of the application and with the Commission's policy paper on decrofting. He carried out general investigation. In course of this, he learned from Mrs Cox that they would use the shed as a "boat shed". He himself did not regard this as playing any part in his consideration of the matter. He told us that it did not affect his approach. He reported, on 6 November 1998, to the Commission that the extent proposed was reasonable for additional amenity ground but not "necessary" for enjoyment of the property as a domestic residence. (He had not, however, regarded it as any part of his remit to consider aspects such as privacy when considering the amenity of the house.) He reported that the proposed decrofting would have little or no effect on the local community. The Grazings Committee had had no representations on the subject and no views, for or against. However he referred to the views of Mr MacAulay, the area assessor, to the effect that ample ground had already been decrofted to allow reasonable enjoyment of the house and that Mr MacAulay was "very worried" that a functional agricultural building

would be removed from crofting if the application was approved. Mr Martin recommended refusal because: "there are permanent improvements on the area applied for namely the functional agricultural building and the dilapidated sheep fank and these should remain as part of the croft".

In evidence before us he confirmed that the dilapidated fank was not in use and said that he did not regard it as an agricultural improvement. The shed, however, could be used for storage of fodder. He had made no attempt to carry out an overall assessment weighing the position of the owner. His recommendation was based on the understanding that the shed would be used along with the rest of croft 8 Gearradubh.

Mr Wilson, Mr Martin's superior sent his recommendation, dated 10 November 1998, based on Mr Martin's investigations. It was in the following terms: "Although the croft is adequately equipped now with a new agricultural building the old building is functional and still in use. It could cater for future expansion.

My opinion is that decrofting should be refused for two reasons, i.e. (1) that its addition to the original croft house site and garden ground would make the whole site excessive, (2) fragmentation of croft land via sales should not be encouraged or seen as a back door way of achieving decrofting. No planning permission exists for non-agricultural use of the shed."

Mr MacAulay, the area assessor, had also reported his views to the Commission on 20 August 1998. His first comment in answer to the pro forma question of whether he supported the decrofting application was to the effect that sufficient ground had already been decrofted for the dwellinghouse. To the question of how decrofting would affect the remainder of the croft he made clear his view that the land concerned should continue to be regarded as part of the croft 8 Gearradubh. He left blank the space for detail of demand. He commented at some length on the need for legal advice having regard to the whole background. In evidence, he explained his reasons for being "on balance" against decrofting. His reason for considering the addition excessive was "arithmetical" in that 0.1 to 0.2 hectare was usually adequate and this had already been decrofted. It was an important part of his thinking that the subjects were part of the original croft. They should have gone with the tenancy of No. 8. He thought the situation where an attempt was being made to sell before decrofting was unusual. He had not been aware that Miss MacKay had positively said that she did not want the subjects now. He thought that "the waters were muddy" as to her real views.

He had made further enquiries and now knew that the tenant of No. 4 would want to take the subjects if available and at a reasonable price. No figures were mentioned. He said that the tenant was actively using her croft for cattle. He agreed that the issue turned solely on the shed. The agricultural value of the subjects as bare land would be little or nothing.

Mr Allan Campbell, the local Commissioner, gave evidence of the general approach and procedures followed by the Commission in relation to such applications. He accepted that use as additional amenity ground was a reasonable purpose. They regarded 0.1 to 0.2 hectare as sufficient depending on topography but examined each case on its merits. However the Commission were very concerned about the pressures on crofting. He stressed that once land was taken out of crofting it was away for ever. He confirmed that the second and third paragraphs of the letter of 1 December 1998 were simply statements of general policy or approach. The reasons specific to this case were to be found in the following two paragraphs. The subjects

should still be seen as part of the croft. The shed was plainly functional. The expression “in use” reflected the understanding that it was in use by Miss MacKay. The final paragraph could be taken to include a finding in fact that the intention was to use the building as a boat shed.

Mr Campbell accepted explicitly that it was the existence of the shed as a valuable crofting resource which was the important factor in this case. The land itself was of no particular value. He said that, when considering an application for decrofting, an important factor for the Commission was to try to establish the degree of interest there would be in a new tenancy. It was very important to encourage new active crofts. It was also important to take the opportunity to enhance existing crofts. A steading was a very valuable resource.

Asked whether he would distinguish between the importance of attracting a new crofter to crofting on the one hand and enhancing an existing croft on the other, he stressed that both were very important. He was unwilling to distinguish between a resource necessary to allow a croft to function and one desirable for the functioning of a croft: each was an important justification for preserving a crofting resource. In terms of the proposed use of the ground he said that he would draw no distinction between ground intended as garden ground and ground which would permit rearing of poultry.

Statutory background

Section 24(3) of the Crofters (Scotland) Act 1993 provides: “Where a croft is vacant, the Commission may, on the application of the landlord, direct that the croft shall cease to be a croft or refuse to grant the application”.

Section 25 provides as follows:

- “(1) The Commission shall give a direction under section 24(3) of this Act that a croft shall cease to be a croft if –
- (a) subject to subsection (2) below, they are satisfied that the applicant has applied for the direction in order that the croft may be used for or in connection with some reasonable purpose (within the meaning of section 20 of this Act) having relation to the good of the croft or of the estate or to the public interest and that the extent of the land to which the application relates is not excessive in relation to that purpose; or
 - (b)
- (2) Without prejudice to subsection (1)(b) above, the Commission, in determining whether or not to give such a direction, shall have regard to the general interest of the crofting community in the district in which the croft is situated and in particular to the demand, if any, for a tenancy of the croft from persons who might reasonably be expected to obtain that tenancy if the croft were offered for letting on the open market on the date when they are considering the application.
- (3)
- (4) The Commission may, on the application of a crofter who is proposing to acquire croft land or the site of the dwelling-house on or pertaining to his croft, give a direction under the said section 24(3) as if the land were a vacant croft and the application were made by the landlord, that in the event of such acquisition of the land it shall cease to be a croft, or refuse the application; but such a direction shall not have effect until the land to which it relates has been acquired by the crofter or his nominee and unless the acquisition is made within 5 years of the date of the giving of the direction.....
- (5)

- (6)
- (7) The Commission shall give notice in writing to the applicant of their proposed decision on an application made to them under the said section 24(3) or subsection (4) above, specifying the nature of and the reasons for such decision.
- (8)
- (9)

Submissions

Mr Ferguson submitted that the Crofters Commission decision was vitiated by errors of fact and of law. The notice they had to give in terms of section 25(7) was important and of a quasi-judicial nature. It ought to be very clear. He suggested that it should set out the decision as separate findings of fact and findings in law but he accepted that there was no statutory justification for this. There was a requirement to specify the “nature of and reasons for” the decision. He submitted that by “nature” the Act meant whether the decision was made in respect of section 24(3) or section 25(1)(a). The former was discretionary; the latter mandatory. The reasons could not properly be understood unless it was clear which category was in question.

The notice here was ambiguous but the Commission appeared to have accepted that the “reasonable purpose” provision applied. The letter did not say that the area sought was excessive. It could be assumed that the case fell into the mandatory category. In other words the case fell under section 25(1)(a). It had to be assessed in light of the factors set out in section 25(2) against that mandatory provision.

He submitted that both the letter and the evidence made no reference to the Commission having considered the general interest of the crofting community in the district. They had looked at demand. In Gray v Crofters Commission 1980 SLT (Land Ct) 2 at page 7, which was a “discretionary” case, the Court had made it clear that the general interest of the crofting community was the overriding consideration. He submitted that acquisition by the Cox family would be in the general interests of the community. The Commission’s decision seemed to be based on demand by Miss MacKay but this was now disproved. He submitted that it was not clear on the evidence that there was any other willing and able applicant.

He disputed the contention that decrofting of the subjects would trigger a need for planning permission for the shed. The shed was to be put to the same use as it had always been put. In terms of the Town and Country Planning (Scotland) Act 1997, section 26(2) there was deemed to be no development in specified circumstances. Section 26(2)(d) specified: “the use of any buildings . . . within the curtilage of a dwelling house for any purpose incidental to the enjoyment of a dwelling house”. In Sinclair-Lockhart Trustees v Central Land Board 1951 SLT 121 at 123 the nature of the curtilage of a dwellinghouse was discussed. That case, he submitted was directly in point. In any event, on the facts there was no change of use. There was no evidence that any planning difficulty would be likely to arise.

The pleadings indicated that the Commission had been influenced by Mrs MacVicar’s failure to intimate her acquisition of title to the subjects in terms of section 23 of the Act. This had plainly been part of the assessor’s concern. No reference was made to this in the decision letters. It was not a relevant part of the decision. In any event, it was irrelevant. Mrs MacVicar was entitled to make the purchase she did. She thereafter became the deemed landlord of a vacant croft. She remained tenant of the main portion of croft land. Her assignation to Miss MacKay could not extend beyond her own tenancy. It was argued that the Commission might have forced her to let the subjects to Miss MacKay. However it was clear that their policy was not to

compel an owner-occupier to let while continuing in occupation and use of the subjects. It was doubtful whether they would have compelled reletting.

The evidence of demand was not satisfactory. It was not clear whether the tenant of No. 4 would in fact wish to take the shed. There was no evidence from her. The Commission could have advertised seeking response from persons who would be interested in the subjects if available. That would have made the matter clearer.

In reply Mr Smith started by dealing with the last point. It had been the practice of the Commission to advertise asking for responses from persons who would be interested if the subjects were available. However in a decrofting application the subjects were seldom, if ever, likely to be available for letting. This was well known and the exercise was seen to be a pointless one.

The present case was unusual because the subjects were in fact unoccupied. Because there had been no intimation of the purchase by Mrs MacVicar the Commission had had no opportunity to consider whether to seek reletting proposals. There was no doubt that her purchase had extinguished her tenancy of the subjects. While she herself was in occupation as owner occupier it would be unlikely that the Commission would have attempted to force a tenant on her. However that was for their discretion. They had not had the opportunity to consider the matter.

In response to questioning Mr Smith said that the Commission regarded the whole of 8 Gearradubh as the croft. They accepted the assignation to Miss MacKay as valid having initially assumed that it included the whole croft land. It was recognised that difficulties arose where a tenant had obtained title to part of the croft land. There was, in effect, a division of the croft although there was, strictly speaking, no breach of section 9 because the division arose not from Mrs MacVicar's actings as tenant but from the fact that her involvement in the croft had become split between her role as landlord and role as tenant. As the Commission was prepared to accept that for the purposes of this case the assignation to Miss MacKay should be treated as valid, it was unnecessary to explore the matter further in this particular case. He recognised that the matter might require further consideration if it arose again.

A consequence of the failure to intimate was that the true position was not properly registered. This could give rise to confusion not only for the Commission but also for other local crofters. The true potential demand could not properly be assessed.

It was made explicit by Mr Smith in his submissions that the Commission would now intend to take steps to see to it that the subjects were made available for letting. If Mr and Mrs Cox agreed to take the house site and the subjects without a further decrofting direction, the Commission would seek to have the subjects let to a suitable crofter. They would wish to give an opportunity to the tenant of 4 Gearradubh. He accepted that this was contrary to the decision letter but said that at that stage there was no evidence of real demand. There now appeared to be a positive demand.

He accepted that if a reasonable purpose was shown for decrofting the presumption was in favour of granting it. This, he said, could be contrasted with a discretionary situation under sec 24(3) where the presumption would be in favour of refusal. He accepted that it would certainly be in the general interests of the community that there was a family in the empty house. He accepted that, if the Coxes were allowed to proceed with their plan, their activities would be indistinguishable from the activities of the local crofting community. He accepted that in practice the interest of the crofting community was the same as the interests of the general community in the district. He submitted, however, that the family had the option to take the house

site alone. He expressly accepted that the primary concern for the Commission was the general interest of the crofting community and that the use proposed for the subjects as additional amenity ground fell within the provisions of section 25(1)(a). However, the application was premature. The actual demand for the shed should be tested. If there was no demand then decrofting might be permitted.

It may be noted that in course of the submission Mr Smith raised the question of whether the rearing of pigs on the subjects was compatible with use of adjacent subjects for sheep. However we heard nothing of this on the evidence. We consider that it is not a sufficiently clear or obvious proposition to allow us to deal with it as part of the judicial knowledge of an "expert" court. We accordingly must disregard this submission.

Mr Smith also made reference to the value of the subjects as providing direct access to the sea. We heard no direct evidence about the comparative position of other crofts. In particular we heard no evidence that this would be regarded by the tenant of croft No. 4 as being in any way a benefit. It appeared on inspection that there would be no shortage of opportunity locally for crofters to gain access to the sea although it would be easier at some places than others. In the circumstances we consider it unnecessary to give further consideration to this matter.

Decision

Although we do not accept Mr Ferguson's submission as to the obligation to specify the "nature" of the decision, we accept his submission that the reasons given for the decision were inadequate.

We consider that the term "nature of decision" must mean no more than the "effect" of the decision. The Commission must make clear whether the decision is to grant or to refuse or is a decision to grant subject to modification. It will also be necessary for the Commission to state expressly whether the decision is conditional under the provisions of section 25(4). We see no purpose to be served by requiring that a special status be given to a particular stage in the reasoning. We see no justification for interpreting "nature" in that way. In any event, as appears below, we do not find the label of "mandatory" to be a secure description of the effect of section 25(1)(a) and we cannot accept that Parliament intended by section 25(7) to require a specific reference to such a term.

We do think it clear that, as part of the reasons for the decision, the Commission should say whether or not they accept that an application is one which falls within the provisions of section 25(1)(a). The decision should also show how they have approached the assessment under section 25(2). It should show expressly what factors they have taken to be in the general interest of the crofting community in the district having regard not only to demand but to the whole circumstances of the case. They should show what conclusion they have reached as to demand. Setting out matters clearly would allow applicants and the Court to see which factors were properly questions of fact and which were the exercise of the Commission's discretion.

We consider that the decision of 1 December 1998 does not, adequately, set out how the Commission weighed the various elements. For practical purposes the letter of 16 December 1998, which was the final stage in their decision making progress prior to appeal, does not add anything to the letter of 1 December. That letter does not say whether the Commission accepted that in the particular circumstances of this case, having regard to the topography, the agricultural value of the land, and its relationship to the rest of the croft, the area proposed as amenity ground could be

accepted as not being excessive in relation to that purpose. It is only if the Commission is satisfied as to both purpose and extent that the case will fall under section 25(1)(a). The third paragraph deals with the Commission's general approach to these two points. There is no decision specific to the present application.

Even in evidence before us, the two elements were not clearly distinguished but it was accepted that the application came under that subsection and it is unnecessary for us to say more. The effect of that subsection together with subsection 25(2) was taken by the Commission to be that if a case came under the former, there was a presumption in favour of decrofting.

In seeking to find the proper approach to section 25 we think that little assistance is to be derived from contrast with section 24(3). It is not necessary for determination of the present case for us to consider whether the Commission's apparent approach to discretionary decisions under section 24(3) is correct. We heard that in such cases they apply a presumption against decrofting. We are not entirely satisfied that such an approach is consistent with dicta in Gray v Crofters Commission 1980 SLT (Lands Ct) 2, at page 7 and 8. This matter may, however, require clarification.

Assistance in interpretation of section 25(1)(a) might possibly be expected from consideration of the operation of the provisions of section 20. Although we heard no submissions on that point, we have had in mind the Court's established practice in the operation of that section.

The provisions of section 25 are a comparatively unusual statutory formulation in that they seek to combine the familiar mandatory term "shall" in subsection (1)(a) with an instruction in subsection (2) that "in determining whether or not to give a direction" the Commission should "have regard" to certain specified factors. Plainly a balancing exercise is required. That is akin to the exercise of a discretion. Section 25(1)(b), on the other hand, is a classic example of a so-called "mandatory" provision directing the Commission positively to do something if satisfied of certain facts.

Doing the best we can to give effect to these two subsections we consider that the appropriate approach to section 25 must be to apply a strong presumption in favour of decrofting where an application comes within subsection 25(1)(a). Without attempting detailed comparison, we consider that this would tend to reflect the approach of the Court in relation to applications for resumption under section 20. There is, of course, no express equivalent to section 25(2) in relation to resumption and the Court can exercise a broad discretion. By far the majority of such applications relate to common grazings and to situations where the land to be resumed is of very modest size compared with the overall croft or grazings. The provisions of section 25(2) would not normally be appropriate to such a situation. However it would be surprising if it was intended, in principle, to be easier to take land out of crofting by way of resumption than by way of direction.

The general interests of the crofting community in the district may outweigh the presumption. This will turn on the specific circumstances of each case. However, explanation will normally be required in the proposed decision as to how the demand, and any other identified factors bearing on the interests of that community, were weighed against the reasonable purpose. However, each case must turn on its own facts and the relative weight to be given to each factor is primarily a matter for the discretion of the Commission.

In the present case, the reason given was intended to be specific although it was not expressed in terms of outweighing any presumption. As we heard from Mr Campbell,

the first paragraph dealing with reasons specific to the application was the fourth paragraph of the letter of 1 December. This can be seen to amount to no more than that the area applied for contained an agricultural building which was still functional. The reference to the building still being “in use” does not, itself, add to the word “functional”. It was not said that the use as such was important for crofting. Although the building was described as a permanent improvement of the croft – which was apparently intended as a reference to the croft as tenanted by Miss MacKay - the following paragraph implicitly acknowledged that the use which was being considered was use by the owner of the decrofted dwellinghouse. The only clearly expressed reason for refusal is that it was not necessary to remove the land from crofting tenure. The purchaser could continue to use it for purposes associated with the dwellinghouse.

We think it important to recognise that the effect of that paragraph was equivalent to saying that a formal direction was unnecessary and should be refused, because the Commission accepted that the land should be treated as if it was not subject to the provisions of the Act. The building could continue to be used for amenity purposes and not as part of a croft tenancy. In other words the subjects would in practice be accepted as amenity ground but would remain, in theory, subject to the provisions of the 1993 Act.

We consider it plain that this is not a good reason for refusal in a section 25(1)(a) case. It was a reason which was expressly departed from in the course of submission. The decision appealed against, therefore, cannot be supported as it stands.

However, by agreement of parties, we heard evidence de novo. We, and the applicant, have had the benefit of a full exposition of all possible reasons for declining to make a direction. It is unnecessary for us, in this case, to examine the nature and scope of our role as a court of appeal from an administrative body. We have proceeded on the basis that matters are now at large for us.

It was accepted before us that the case could be treated as falling under section 25(1)(a). The matter therefore turns on assessment of the factors specified in subsection 25(2). We do not think the evidence relating to these factors outweighs the presumption in favour of granting the direction.

It was not disputed that the sticking point was the existence of a serviceable agricultural building. Had that building been required for use by the tenant of 8 Gearradubh, of which it was originally an integral part, we think it would have been difficult to avoid the conclusion that this was a clear relevant demand and that it was strongly in the general interest of the community in the district that the croft be supported as a working unit by providing the building for it. The building, while reasonable as a domestic shed, is not necessary for reasonable enjoyment of the dwelling and the balance, even allowing for the presumption would probably tip against decrofting.

However, it is clear that Miss MacKay does not require the shed, and, indeed, that she does not want it. We had some reservation about this evidence on the view that a sound building situated effectively on the croft, would always be an asset. We recognised that for family reasons she would not wish to seem opposed to Mrs MacVicar’s wishes. However, on inspection, it was clear that she had established adequate facilities conveniently placed at her home and that, having regard to the overall layout of her croft and the topography, the additional building would be of no significant benefit to her.

The objection to grant was based in essence on the second-hand evidence that the tenant of No. 4 would take the shed if available. We said in Gammie v Crofters Commission 1998 SLCR 49, that evidence of experienced members of the Commission may be sufficient to establish a general demand and that it is not necessary to lead detailed evidence from specific witnesses. However when reliance is placed on a demand from a particular individual it is plainly very difficult to assess the weight to be given to it without direct evidence. In fairness to Mr Smith, it appeared that he was taken by surprise by this chapter of evidence. He was driven to suggest that the direction should be refused, meantime, to allow the genuineness of the demand to be assessed by making the tenancy of the subjects available. However, it must be recognised as an important principle of justice that there be an end to litigation. We heard no reason why evidence of this demand could not have been available sooner. It emerged because Mr MacAulay had taken positive steps to make enquiries in preparation for our hearing, and not because the prospective tenant had just appeared. Such steps could have been taken before the original decision. At the stage of an appeal it will normally be inappropriate for the Court to exercise its own powers to make enquiries or to call witnesses. Proper presentation is a matter for parties. We must normally proceed on the evidence before us.

We do not know what understanding the tenant of No. 4 has of the present situation. We do not know how the matter was put to her. We heard that she would wish to take the shed if it was "available". There was no evidence that she knew that what was contemplated was that it would only be available against the wishes of the owner. Would she be prepared to face the risk of creating a source of potential discord in the community in order to get the shed? Would she be happy to intrude on the privacy of the dwellinghouse in order to use the shed? We have no difficulty in accepting that she might very well have a need for the shed which would take priority over such considerations. There might, indeed, be no real likelihood of discord in the community over this particular issue. On the other hand it is equally possible that she would consider that the benefit to the community of having the house lived in full-time by an active couple with a young family would outweigh the possible benefit to her. We simply do not know. We do not know what use she would make of the shed. We do not know how she runs her existing crofting activities. We were told that she is to renovate a derelict house which we examined. There is room there for adequate steading facilities to be constructed.

There was no suggestion that the tenant of No. 4 had attempted to avail herself of the chance to use the shed by enquiry of Mr Ferguson when it became vacant. It is plain that she did not respond spontaneously to the "decrofting" advertisement. On the basis of Mr Martin's evidence it is clear that she did not make informal representations to the Grazings Committee.

This is, of course, an application by an executor to extend the amenity ground. His underlying purpose is to sell. That would not be a purpose falling within section 25(1)(a). However, it is plain that the Commission have taken a realistic view that the application can be assessed as if it was the prospective purchaser's purpose which was in issue. That is a sensible approach. However, the logic of it cannot be pushed too far. In particular, it cannot be assumed that the Cox family would take occupation of the dwellinghouse if the subjects were not to be decrofted. Mrs Cox made clear her attitude to that matter. We recognise, of course, that intentions can change. The existing garden and amenity ground are not in any sense cramped. The location is attractive. There is direct easy access to the sea. It is possible that they might change their minds if decrofting was refused. However it is plain that, for the moment, their hearts are set on the whole concept of house together with the

subjects of application. Their plan is to use the subjects for rearing of poultry and, possibly, pigs. Whether or not that will ever come to fulfilment, it is a factor in their present thinking. It is now plain that the reason for refusal is so that the subjects will be occupied by a third party. (If we were not satisfied of that there would be no reason not to decroft) The Cox family will have no control of the use to be made of the subjects – beyond that given by the statutory conditions of tenure. They would face not only the certainty of some active occupation involving, no doubt, occasional heavy vehicles and movement of stock but also, for example, the risk that a caravan or two might come to be sited there. Whatever the precise use to be made of the subjects there is plainly a risk of a use which would have a significant effect on privacy and the general amenity of the dwelling. In the whole circumstances, therefore, we accept, on balance of probabilities, that the Cox family would not take up the house if decrofting was refused.

We recognise, of course, that despite its condition and these disadvantages, the house would be likely to attract a purchaser. It is plain that references in submissions to it presently standing empty are misleading. We heard that there were four offers when it was advertised by Mr Ferguson. However the advertisement included the subjects. We do think it likely that a purchaser would be found for the decrofted house and ground. However, we are not satisfied that the house and garden would necessarily find a market amongst potential full-time occupants.

Matters before us focused on the position of the Cox family and we consider that was a realistic approach to the particular circumstances of this case. However, it is important in considering decrofting to have regard to the long term. Land once lost to crofting will be unlikely to return. There is no certainty that they will remain at Ardnasaltrach. Two factors, however, justify concentration on the circumstances of the Cox family. In the first place, we accept that they are not unusual in their thinking. The unit they seek to acquire is one which is likely to attract a family with an interest in outdoor activities. It offers an opportunity to supplement a budget by growing vegetables and keeping poultry on a reasonable scale. On balance it can be said that the house is more likely to find a full time family occupier with the subjects than if the subjects were in active occupation by a tenant. A second important factor is the very limited evidence of demand. Even if the tenant of number 4 was to take the shed we think she could be expected to provide more convenient facilities for her operations in due course. Accordingly, it is likely that the value of the subjects to her would decrease. While it might prove temporarily convenient, it would be a far from ideal long-term solution for that croft. It is not inconceivable that she would be “bought out” one way or another by a landlord occupying Ardnasaltrach. The evidence does not suggest any realistic likelihood of demand from anyone else. Accordingly, the crofting demand which we have to consider in this case is a very specific and potentially limited one.

In short, we think that the realistic factors for assessment here are the potential benefit of the shed to an existing crofter who has not, to date, had any use of it and the potential benefit of full-time residence by an active couple and young family. We think the benefit of the latter is clear. It was accepted that this would be a benefit to the local crofting community. The benefit to the existing crofter may be real but the extent is unknown. It is plain that it would be of little benefit as a main steading when it is remote from the intended croft house and when grant assistance will be available for construction of a modern building there. Once such a building is in place the benefit of the shed to operation on No. 4 might well be slight.

We heard submissions as to a need for planning permission if there was a change of use. However the material put before us in submission did not make it clear that this

was so. Having regard to the probable use to be made of the subjects and their existing use as partly domestic, we do not think the possibility of planning difficulty is of much weight. It may be noted, however, that we were not satisfied that the subjects can properly be described as falling within the present curtilage of Ardnasaltrach. This is ultimately a matter of impression. However it follows that the provisions of section 26(1)(d) of the 1997 Act were not of assistance.

The Commission's initial decision did not rely to any extent on the question of the failure by Mrs MacVicar to intimate her acquisition of the subjects under the provisions of section 17(7). This matter was explored in submissions and appears to have been an assumption underlying the recommendations for refusal made to the Commission. However, we are satisfied that it has no direct bearing upon the matter now before us. The Commission expressly accepted that for the purposes of the present case the assignation of the croft to Miss MacKay should be treated as valid. (It was recognised that the issue might require further exploration in other circumstances.) It was not suggested that any breach of obligation necessarily vitiated the application. We do not consider that it has any direct bearing on the factors to be assessed under section 25(2).

This is an unusual case because, as we have noted, it was not disputed that the real stumbling block to decrofting was the building, not the land as such. The building had, of course, been provided by the former crofter for her own purposes. There is no doubt that it was used in connection with the house as well as the croft. Although we consider that the Commission were entirely justified in placing weight upon the existence of the building as a potentially valuable crofting resource we consider that it is also relevant, in balancing the whole circumstances, to have regard to the fact that the building in question was provided entirely by the party whose representatives now seek to have the subjects decrofted.

In the whole circumstances we find nothing to outweigh the presumption in favour of decrofting which arises in the present case from the Commission's acceptance that the application falls within section 25(1)(a). We accordingly allow the appeal and remit to the Commission to proceed appropriately.