

## FULL COURT

(Lord Elliott; D D McDiarmid, A B Campbell)

### **Fox v Crofters Commission**

(Application Caithness RN 178 — Order of 17 April 1991.)

*Croft - Application to Crofters Commission for decrofting direction - Proposed refusal by Crofters Commission - Appeal to Scottish Land court - General interest of the crofting community - Existence of a recognised crofting community - Expressed local demand - Appeal refused*

The Applicant as the owner occupier of a croft at Dunnet, in Caithness appealed to the Land Court in terms of Section 16A(8) of the Crofters (Scotland) Act 1955 against the proposed decision of the Crofters Commission to refuse a decrofting direction in respect of his croft. He appealed on the grounds that after two press notices no objection had been received from anybody in the locality; that there was a large area of unworked land within the Parish including two crofts of similar acreage and there was no crofting community as such. In the area there were various owner occupied subjects but there were also eleven registered crofts albeit owner occupied. The Court held that these crofts constituted the local crofting community and that, on the evidence, there would be a demand for the tenancy of the subjects if it were available to let on the open market. The Court therefore held that it would not be in the general interest of the crofting community for the appeal to be sustained and a decrofting direction granted by the Crofters Commission.

The note appended to the Court's Order is as follows: --

The Appellants, Mr Thomas N B Fox and his wife Mrs Irene Fox of "Newlands", Dunnet, Caithness have applied to the Crofters Commission for a direction in terms of Section 16(9) of the Crofters (Scotland) Act 1955 that their croft should cease to be a croft. In terms of Section 16A(5) of the 1955 Act, the Commission then advertised the Application in a local newspaper to which no objections were received. They also sought observations from their local assessor as well as a report from the Higher Agricultural Officer, DAFS, Thurso. They further sought the advice of their own Chief Technical Officer, Mr Gordon. Thereafter they convened a hearing before the local area Commissioner, Mr H A M Maclean, in Dunnet Village Hall on 25 June 1990. Following thereon, and at plenary session on 26 July 1990 when all the above information was put before them, the Commission, by a majority, then proposed to refuse the Application and intimated their proposed decision to the Appellants.

The reasons then given for the Commission's proposed decision were as follows: -

*'The Commission's understanding is that you wish to decroft the subjects to facilitate sale should you or your successors in due course sell the subjects. The Commission consider this to be insufficient reason to justify issuing a decrofting Direction as they recognise that there is an identifiable crofting community in the district and they consider it to be in the general interests of that community that the holding remain within the ambit of the Crofters Acts. They consider that the decrofting of a holding extending to 6.5 hectares approximately, of well worked arable land with a grazings share might set an undesirable precedent where insufficient reason for decrofting was adduced'.*

The Appellants have now appealed to the Land Court against this proposed decision on the following grounds: (i) that after two press notices one of which advertised the public hearing, not one objection was received from over 52 owner/occupiers in the Townships of Dunnet and Brough. (ii) that there are 80 acres of unworked land in the Parish of Dunnet, including two crofts of similar acreage to the Appellants which have not been worked in 15 years and which are adjacent to the northwest. (iii) that there is no crofting community as such and theirs is the only registered croft in Dunnet. iv) that Mr Fox is now in ill health and disabled with rheumatoid arthritis and in November 1989 had surgery on his throat (voice box) since when his health has deteriorated. He is nearing 70 years of age and in the event of something happening to him, he would like to leave the holding free to be sold, outwith the crofting Acts. All their capital has been invested in the holding and Mrs Fox might want to realise these assets and move back to her own family.

The case was heard before the Court in Wick Sheriff Court on 27 February 1991 when Mr Fox appeared on his own behalf and gave evidence. Mr Donald Smith, Solicitor to the Crofters Commission, appeared on their behalf and led evidence from Mr Gordon their Chief Technical Officer, and Mr Raymond Edwards, the Executive Officer responsible for the administration of this part of Caithness.

In giving evidence, Mr Fox explained that he comes from Cleveland where he practised as a master butcher until his retirement. His son now carries on the business, He emphasised that the local Agricultural Officer, Mr Drummond and Mr Houston, the Area Assessor, had all recommended decrofting. These, he said, were people who really knew the area. He had purchased the holding in 1979, being unaware that it was a registered croft. Mr Fox also said that he had spent £25,000 on improvements to the house and steading and he had also erected a new Dutch barn. He had also drained and fenced the surrounding fields and installed a water-supply with troughs. On inspection the croft, which extends to 16 acres, was seen by the Court to be well cultivated and maintained. It presently carries 11 Cheviot ewes and 5 cattle beasts. Recently Mr Fox has started producing turkeys for the Christmas market. The croft also has shares in West Dunnet Common Grazings.

Mr Fox explained that, although he has been in poor health, he and his wife have now decided to stay on at Newlands at least until it becomes too much for them. Hence they would like the croft to be decrofted so that it can be more easily sold when necessary. Mr Fox had previously advertised the croft for sale down south but the local office of a building society refused to provide a full mortgage when informed that the holding was still subject to crofting tenure. This had led to the prospective purchaser of the croft having to withdraw his offer. This had unfortunately happened at a late stage in negotiations and Mr Fox was of opinion that others interested had also all withdrawn at this point in time. He then decided to apply to decroft his holding but had not considered decrofting the house site alone.

There was produced on behalf of the Commission (Production 18) a map showing all the crofts or former crofts in the Townships of West Dunnet and Brough. Mr Gordon who is Chief Technical Officer to the Commission spoke to this map and explained that there are still 11 registered crofts in West Dunnet and Brough townships all as shown marked in red. Those shown in yellow were unregistered landholdings numbering about 80. West Dunnet grazings extended to 1,817 acres and has 25 shareholders. The adjoining Dunnet Head grazings have 44 shareholders and extend to 1,000 acres. Mr Gordon explained that these grazings are grazed by the sheep belonging to the occupiers of registered crofts as well as the occupiers of

unregistered holdings. All the registered crofts, however with one exception, are now owner-occupied. Many of the latter are occupied by incomers, like Mr Fox himself. Some work at the Dounreay Nuclear Power Station.

Various communal activities also centre around Dunnet Village Hall such as the bowling, badminton, and rifle clubs.

In support of his case Mr Fox relied heavily on the decrofting by the Commission in March 1990 of a croft at West Mey, Canisbay. The Commission produced, at Mr Fox's behest, Production 19 being a report prepared for the plenary session of the Commission which gave the decrofting direction. From this it appears that Mr Ross, the owner-occupier, was in his late 70s and had been a widower for several years. His family had no interest in the croft which extended to 6.2 hectares arable with no common grazing share. Mr Ross was anxious to move as he was getting on in years and wanted to move near his family so they could keep an eye on him. The report also contained the observations of the Higher Agricultural Officer as follows: *"there are a few isolated crofts surrounded by fairly large farms. There is no grazings share effeiring to the croft and no community working whatsoever. The Officer's impression was that initially Mr Ross was reluctant to sell the croft but the loneliness and fear of ill-health forced him into this position. His family have no interest and there is no way he would let the land. Re requires a substantial amount of capital to buy a house near his family, selling the subjects is therefore his only alternative."*

On the question of demand the report states: *"there have been conscientious attempts by the applicant to dispose of his owner/occupied croft for at least 2 years, However direct interest has been conditional on decrofting and to date, attempts to sell have been without success."* The final conclusion was: *"In the absence of manifest or latent demand, and given the difficulty of identifying the particular community, one cannot marshal arguments readily for adducing a threat to that latter interest in this decrofting application."*

It therefore appears to this Court that West Mey was allowed to be decrofted by the Commission for the reasons that there was no demand for the croft and also no readily identifiable local crofting community which would in any way be harmed by a decrofting direction. However much one may sympathise with someone in Mr Fox's predicament, neither compassionate circumstances nor a crofter's simple desire to be freed from the Crofters Acts are statutory grounds for granting a decrofting Order, see Steven v Crofters Commission 1984 SLCR 30 and Sutherland v Crofters Commission 3 October 1990 Caithness RN 175 (not yet reported.)

Section 16A2) of the 1955 Act directs the Commission to have regard to the general interest of the local crofting community as their main consideration; and, in particular, to the demand, if any, for a tenancy of the particular croft from persons who might reasonably be expected to obtain the tenancy if the subjects were available for letting. In the recent case of Mackintosh v Crofters Commission (so far unreported) the Court held that there was in reality no local crofting community at Broomhill beside Invergordon. We added: *"Demand can come from outside but must nevertheless still relate to a croft which is part of a genuine local crofting community which could therefore be adversely affected if the particular croft were to be taken out of crofting tenure."* We therefore concluded in that case that decrofting was appropriate.

In the present case, in contrast to Broomhill, the croft at Newlands appears to be situated within a distinctive local crofting community comprising the two townships of West Dunnet and Brough. One has only to stand in the middle of this area to see that

it gives every appearance of being a traditional crofting community with evenly scattered croft houses, each croft with its own inbye lane and share in nearby common grazings. However, all is not quite what meets the eye for practically all of these crofts or former crofts are now owner-occupied. Only 11 still remain as registered crofts. Those holdings which are now unregistered were, so we were informed, purchased from the Sinclair and Freswick Estates prior to the passing of the Crofters (Scotland) Act 1955. In the result it appears that the Landholders Acts have now ceased to apply to the majority of holdings.

Nevertheless most continue to be worked in the traditional crofting manner and there is certainly a local community engaged in various communal activities. The Court do not entirely agree with Mr Fox that the land is largely neglected or in parts abandoned. There are at most one or two holdings which were seen on inspection to be overgrown and hardly cultivated at all. Other crofts, however, around Dunnett appeared to be as well tended as Newlands itself.

The adjoining common grazings of West Dunnet and Dunnet Head continue to remain in separate estate ownership, with the now owner-occupied crofts in Dunnet and Brough retaining servitude rights of grazing thereon, equating to their erstwhile croft souming before purchase. In 1989 the new owner of West Dunnet, now living at Northern Gate House, tried to exclude the owners of the holdings (whether registered or unregistered) from access thereto. Mr Fox himself, as newly appointed Grazings Clerk, however, successfully led the opposition and reasserted the graziers' rights therein. There are current plans for fencing and otherwise improving these little utilised grazings. Last year a stock club was formed by certain graziers and attempts are now being made to obtain a grant for fencing from the Highlands and Islands Development Board; but this has not so far been successful. Attempts to have the grazings regulated by the Crofters Commission are also now being investigated.

Many of the occupants of the holdings in this area are incomers, like Mr Fox himself, who is, however, providing considerable initiative.

The Court therefore conclude that, unlike in the case of Mackintosh supra, there is still a sufficiently distinctive local crofting community albeit a very reduced one, with shares in common grazings which are presently being attempted to be brought back into use. We also consider that this community embraces more than just the one legal crofting tenant and also includes the owner-occupiers of the registered crofts. The term 'crofter' is defined in Section 3(2) of the 1955 Act as meaning the tenant of a croft. But in connection with Section 16A(2) (as also Section 17(1)(b)) one requires to know what Parliament meant by the words "*the crofting community in the district in which the croft is situated.*" In the case of MacKintosh we have indicated that "*crofting community*" implies some sense of communal identity and activity among persons practicing crofting agriculture. Nevertheless, as sections 16 and 17 involve the jurisdiction of the Crofters Commission we do not consider that the concept of a crofting community can be extended to include persons or holdings over which the Commission have neither jurisdiction nor control. Hence, in the present case, the legal crofting community can strictly only be regarded as embracing those croft holdings which are registered as such. We do not consider however that it matters whether these holdings are occupied by crofting tenants or owner-occupiers -- providing always that the holdings are still subject to the Crofters Acts as tenanted or as vacant crofts and therefore still subject to the jurisdiction of the Crofters Commission.

Of these there are still 11 registered crofts congregated in the same area which we consider to constitute a crofting community engaged in communal activities and with shares in nearby common grazings.

The Court turn next to the question of potential, demand for Newlands from persons who might reasonably be expected to obtain the tenancy if the croft were now offered for letting on the open market. At the Commission hearing held in Dunnet Village Hall on 25 June 1990, a Mr D Broughton of 'Lochview' which is another of the holdings said there would be demand for a lease if Newlands became available for letting. He added that there was unofficial letting going on in Brough and that if land or crofts came up for sale there would be demand. He added there was also family letting on a yearly cash basis

The Appellant himself in his written submissions in this appeal said: *"I agree with the Crofters Commission view that the holding could be let on the open market since it is now well fenced, well drained and well cultivated with buildings to a high standard."* But, in giving evidence, he endeavoured to qualify this statement by saying that if his house and steading were excluded from the lease the holding would be unlettable for reasons related to the state of the approach road and the lack of an adequate water supply which would put off any prospective tenant for the land alone. However the present Application for decrofting assumes a letting of the entire croft. The land is indeed well farmed and there are apparently, at present, auxiliary jobs to be had in the area.

The Court therefore conclude on the evidence that if the whole croft was actually available for letting at the present time it would be likely to attract a new tenant, There is indeed no evidence to the contrary as there is in the recent case of McCormick v The Crofters Commission 14 January 1991 Strathclyde RN 374 (not yet reported).

In our judgement therefore the Commission were entitled to conclude that it would not be in the general interest of the local crofting community were the local pool of crofting land to be further depleted by the decrofting of the Appellants' croft; and also that there would be demand for a lease thereof if it was offered for letting on the open market.

We therefore refuse the appeal.

For Applicant: --	Party
For Respondent: --	Mr D I Smith, Solicitor, Inverness