

FULL COURT

(Lord McGhie, J Kinloch, D J Houston)

GAMMIE v CROFTERS COMMISSION

(Application RN SLC/113/97 - Order of 25 March 1998)

CROFT - APPLICATION FOR DECROFTING DIRECTION BY CROFTERS COMMISSION - REFUSAL TO GRANT DIRECTION - APPEAL TO SCOTTISH LAND COURT - QUESTIONS OF POTENTIAL DEMAND AND INTEREST OF CROFTING COMMUNITY - WHETHER A CROFTING COMMUNITY EXISTED

The owner occupier of a vacant croft appealed to the Court against the refusal by the Crofters Commission to grant a decrofting direction in respect of the subjects owned by him. In sustaining the appeal the Court considered the question of the interest of the crofting community and the relevant factors to be taken into account when considering whether a crofting community existed.

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 to refuse to grant a decrofting direction in respect of his croft at 2 Kinbeachie on the north of the Black Isle. As is discussed more fully below, section 24(3) of the Act gives the Commission power to make such a direction and section 25(2) directs then to have regard to the general interest of the crofting community in the district and the demand, if any, for a tenancy of the croft from persons who might reasonably be expected to obtain that tenancy if available on the open market.

Parties were agreed that we should deal with the appeal by hearing a full proof which we did at Inverness on 22 January 1998. The applicant, Andrew Gammie, was represented by Mr P F Macdonald, Solicitor, Inverness. The respondents were represented by Mr Donald Smith, Solicitor. Of consent, the respondents led at the proof. Mr Smith, led evidence from the applicant; from Mrs Dennis, the Area Commissioner for East Inverness, Easter Ross and East Sutherland; from Mr Grantham, the Secretary of the Crofters Commission; and from Mr David Wright, a Higher Agricultural Officer (Technical), Scottish Office Agriculture Environment and Fisheries Department. Mr Macdonald took evidence from the applicant and led his son Peter Gammie, Wester Balloan, Ladybank; and Kenneth Munro, 20 Station Crescent, Fortrose.

There was no serious dispute between the parties as to the facts and circumstances bearing on the croft and adjoining holdings and the following facts were admitted or established:

1. The croft owned by the applicant at 2 Kinbeachie, Resolis and Kirknichael was one of a group of eight crofts forming the Kinbeachie Land Settlement Estate which was created by the Department of Agriculture in about 1920.
2. Apart from one small field at the south-east corner forming part of No. 8 Kinbeachie, the crofts all lay within an area which can be described, very approximately, as about 1.3 kilometres square. They are surrounded by farmland. They have never had any shares in a common grazing. All the crofts are well worked.

Many of the original internal field boundaries have been removed. The soil is good quality arable (believed to be Macaulay Grade 3.1 or 3.2) and is predominantly south facing.

3. No. 1 Kinbeachie lies to the north of the public road. The others lie to the south. No. 1 was decrofted in 1991. The purpose of that application was to enable the owner-occupier of the subjects to use them as a security for a loan. This was regarded, at that time, by the Crofters Commission as a reasonable purpose falling within what is now section 25(1) of the Act.

4. No. 3 is owned and occupied by the applicant's son, Peter Gammie, who lives at Wester Balloan some ten miles from it. He bought the land from Hr McKay in 1990. The former croft house had previously been sold. There are no buildings on the retained croft ground but he has a share in the steading, across the road, opposite to the south west corner of his croft.

5. Nos. 4 and S are owned and occupied by Mr Kenneth Munro. His mother lives in the house pertaining to No. 4. The house at No. 5 has been decrofted and is rented out. Mr Munro has lived in Fortrose for about 20 years.

6. The croft No. 6 is owned and occupied by Mr John Fraser who resides on the subjects. He works the ground in conjunction with other nearby land at Muir of Cullicudden and Easter Cullicudden.

7. No. 7 is owned and occupied by Mrs Jack who lives at Culbokie which is within 16 kilometres of the croft. Her son Robert lives on the croft. The fields were understood to be rented out to a neighbouring farmer.

8. The former croft No. 5 lies in the south-east corner of the square. It was decrofted when vacant, by direction of the Secretary of State in March 1967. It became part of Culbo Mains Farm.

9. The croft house at 2 Kinbeachie was decrofted in 1978. It was then sold by the applicant in order to raise funds to help him when he was acquiring the tenancy of the farm at Wester Balloan. When the croft house was sold he moved to live on the farm. Thereafter the croft land at No. 2 was farmed by hi in conjunction with his farming activities at Wester Balloan. There are no buildings on the croft itself. However the occupiers of crofts Nos. 2, 3, 4 and 5 share the use of a steading, situated at the south east corner of No. 2. The applicant now lives at Drumnamarg, Urray which is within ten miles of the croft.

10. Evidence of relationships between the various occupiers of crofts and houses was given by the applicant; his son Peter, and Kenneth Munro. This evidence was substantially consistent and unchallenged. We are able to make the following findings on the basis of that evidence.

11 The applicant and his son carry on a farm contracting business in partnership as A Gammie & Sons. The firm works throughout the Black Isle. Included in their customers are Mr Munro and Mr Andrew Fraser. The business provides labour and machinery to carry out farming work on Mr Munro's crofts, No. 4 and 5, and, also, on No. 1, Mr Fraser's decrofted holding. A full commercial rate is paid for the work. The business is based at Wester Balloan. It is possible that the original reason for Mr Munro and Mr Fraser using the applicants business was because they happened to know of him as a neighbour. There was no reason to doubt that they continued to employ the applicant simply because of the quality of his firm's work. The firm carries

out work on crofts 2 and 3. There was no evidence of how this was treated in their accounts,

12. There was evidence of some co-operative work at Kinbeachie in the 1&EOs when the threshing was done communally in the days of threshing mills. Apart from the work carried out by A Gammie & Sons and the evidence of the shared steading there was no evidence of any form of communal activity since that time.

13. There was no evidence of any social community centred on Kinbeachie. None of the witnesses knew who was currently residing at No. 8. None had any contact with Mr John Fraser the occupier of No. 6 except to exchange a wave as vehicles passed and, perhaps, a few words if they met on the road or when working on the land. They were not sure who actually lived at No. 7 but accepted that it was probably Robert Jack.

14. Although it is admitted in the pleadings that the croft No. 2 is "technically part of a township of six crofts" there was no further evidence bearing on this.

Reasons for refusal

In his application for a Decrofting Direction, the applicant gave as his reason for decrofting: "To remove the subjects from the scope of the Crofting Acts". In evidence he amplified this a little by explaining that he wished to keep the ground in the family. He had no intention of using the ground in any different way or developing it. He pointed to the risk that, as a vacant croft, the Crofters Commission could compel him to let it. It admittedly was not their policy to do so when an owner actively used it and resided locally. However he foresaw a time when he might wish to leave it to a grandchild. Such a child might well live and work in Inverness, for example, and in that situation the current policy might lead to the subjects having to go to a third party tenant. He did indicate that his main purpose was to free the subjects from restriction. He might, at some stage wish to use them as collateral in security for a loan. There was no specific purpose at present. His evidence was not challenged and we had no reason to doubt it.

By letter of 26 May 1997 the Crofters Commission intimated that they proposed to refuse the application. They took the view that there were no sound reasons why the croft should cease to come under the control of the Crofters (Scotland) Act 1993. The croft was part of a crofting township of six crofts and it would therefore be in the interest of the crofting community that the croft be retained for future generations of prospective crofters. It was thought that there would be local demand for the croft. The applicant's solicitors, by letter of 11 June 1997, made certain submissions in response. In essence they disputed the existence of a crofting community in the area; contended that there was no demand in respect of the tenancy; and argued that, as No. 1 had been decrofted without any proposed change of use, there was no reason why a direction should be refused in respect of the appeal subjects. By letter of 2 July 1997, the Commission intimated refusal of the application for the reasons set out in their previous letter.

Evidence

The contentious evidence bearing on the reasons for refusal covered the two separate matters of the existence of a relevant local crofting community and the potential demand for the subjects. The evidence for the applicant on these matters

can be dealt with shortly. Mr Gammie gave evidence that he was not aware of any hint of a demand for his croft despite the Notice given by the Commission of his application for a decrofting direction, Peter Gammie and Kenneth Munro were unaware of anyone looking for crofts in the area

There was no evidence of any of the proprietors, occupiers, or residents regarding themselves as part of a community at Kinbeachie. Mr Gammie said positively that he would not describe the area as a crofting community. He pointed out that there was a lot of new housing in the area. There was no fear of the wider social community dying out. However this was not because Kinbeachie was a crofting community.

In evidence Mrs Dennis gave further detail of the reasons for refusal. She set out her own background and we had no difficulty in accepting her as a witness with wide and long experience of crofting generally and covering the Black Isle in particular. She made it clear that the starting point of consideration had been that the applicant's reason for seeking a decrofting direction was "inadequate and unreasonable". No change of use was proposed. Although she accepted that one possible use the applicant might wish to make of the subjects was as collateral or security she thought this was not a reasonable purpose. It was no longer regarded as a sufficient reason for granting a decrofting direction. The policy towards applications was that the purpose had to be reasonable. They would, however, look at every aspect including the existence of a local community.

Mrs Dennis had inspected the subjects - along with Mr Wright - and formed the impression that there was still a crofting community of six contiguous croft units. They were all being well worked. She had no doubt there would be an enormous local demand for the ground. She believed that a crofting tenant would be eligible for crofting housing grant and that there would be no difficulty in obtaining permission to build a house.

Mr Grantham, Secretary of the Commission since 1992 gave evidence to the same effect. He, too, has a wide relevant experience of crofting. He had looked at the holdings at Kinbeachie. There was, in his view, no such thing as a typical crofting community. He accepted there was no crofting community in the traditional Western Isles pattern but thought that the situation was similar to crofts in Caithness. There was wide variation throughout the crofting counties.

Mr Grantham had experience of demand for crofts. He was in no doubt that there was now a demand by suitable applicants for all crofts in the crofting counties. He considered that there would be suitable applicants willing to take a tenancy of the present subjects. He explained why the notice now given by the Commission in respect of applications for decrofting direction, did not invite application by interested potential tenants. The former style of notice had done so. However, it was thought unfair to raise expectation and put potential applicants to the trouble of applying where there was no actual vacancy. In his view it was not surprising that the notice had attracted no specific demand. Any truly interested party would recognise the purpose of the notice and that there was no vacancy.

Mr Grantham gave his view of the policy of the Crofters Commission in relation to applications to decroft. The general policy was that they would not decroft without good reason. They wished to preserve the pool of crofts and to encourage new entrants to crofting.

We also had evidence from Mr Wright. He had worked in crofting counties for over 12 years in Shetland and from Inverness. He had been asked to examine the subjects

and prepare a report in April 1997. He said that he remembered this particular application because no purpose had been stated.

He thought there was a crofting community although not in the traditional style. He explained his reasons for treating it as a community: the units were numbered sequentially and the road into them came to a dead end. The pattern was common in this part of Scotland. A similar pattern could be found in Shetland. There was frequently a mixture of crofts and local authority housing.

He was sure there would be demand for the ground. This was an impression based on his general local experience. There was undoubtedly a demand for grass lets and for short term lets requiring special permission from the Secretary of State under section 2 of the Agricultural Holdings (Scotland) Act 1991.

Mr Wright's report was not produced but both parties had copies. He accepted in cross-examination that he had said in the report that it would make no difference to the local community whether the application was approved or not. The reason for saying this was that there was no proposal to change the working of the land. It would, of course, mean that the number of crofts in a crofting community would be reduced. The Commission would not be able to relet.

In course of the evidence various other matters were explored. We heard evidence of Mr Gammie's on attempts to obtain the tenancy of No. 6 when it was available in 1977. This seemed to be relied on as part of the evidence of demand and in light of the view we have taken it is unnecessary to deal further with this material.

We heard evidence that the Commission are anxious to encourage new entrants to crofting and currently promote various schemes to facilitate this. The Commission seek to maintain as large a pool of crofts as possible and to encourage young crofters. The witnesses expressed their views as to the nature of crofting communities. It was plain that crofting was carried out in different ways in different parts of Scotland. There was no typical crofting community.

Mrs Dennis said that when looking for suitable tenants they would seek to identify someone who would be of benefit to the community. The social fabric of a crofting community was important. The fact that croft houses had been decrofted did not prevent these being considered, in a social sense as part of the crofting community. They were part of the wider community even although they were not necessarily agriculturalists. The Commission wished to see integration of the crofting community and the wider social community.

The policy of the Crofters Commission in relation to vacant crofts was discussed. They would not seek to relet it the subjects were being worked by the owner or a member of his family. However it was accepted that if the occupier was not resident locally they could not exclude the possibility of seeking to compel reletting. This would depend upon all the Circumstances prevailing at the time. Their general policy was to try to put pressure on absentee tenants to maintain availability of crofts for those who would be actively involved.

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(1) provides:

"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 sub-section (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 sub-section (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. ..."

There was no dispute in the present case that the croft was vacant within the meaning of section 24(3). Equally it was not contended that the applicant had ever attempted to satisfy the Commission that he sought the direction in order that the croft be used for some reasonable purpose within the meaning of section 25(1)(a). There is, accordingly, no question of decrofting being mandatory and no need to attempt to explore the relationship between section 25(1) and section 25(2).

In other words it was clear that this was a case where the Commission required to exercise the discretion given to it under section 24(3) having particular regard to the factors specified in section 25(2), namely, the general interest of the local crofting community and any demand for the tenancy.

The principles to be derived from the statutory provisions were discussed in some detail in the case of Gray v Crofters Commission 1980 SLT (Land Ct) 2. The Court made plain its view that the overriding consideration for the Commission in the exercise of their discretion is the general interest of the crofting community in the district. This involved social considerations of community interest (page 7). Under reference to the situation where there was no local crofting community, the Court said:

"We do not think that Parliament ever intended the Commission in such a situation positively to encourage new tenants who may be expected to be numerous or that it contemplated crofters who had purchased their crofts being subsequently ousted by the substitution of new tenants from elsewhere...

The Court prefer therefore to adopt the different interpretation already advanced leading to more workable results and under which decrofting directions would normally follow - unless against the general interest of a local crofting community which actually exists".

Submissions

Mr Macdonald submitted that there was no basis upon which it could be held that there was a crofting community at Kinbeachie. Contrary opinions had been based on observation of land and buildings but a community was a matter of people and their activities. There was no evidence of community in that sense. Under reference to Gray supra and to MacIntosh v Crofters Commission 1992 SLT Land Ct) 8, he submitted that there was no proper evidence of demand but that this was, in any event, irrelevant in absence of a local crofting community. He also submitted that the Crofters Commission appeared to have proceeded from a wrong basis. They had a presumption against decrofting without good reason. However Gray established that unless there was prejudice to a community there was a presumption in favour of decrofting.

In the present case it was accepted by Mr Macdonald that if there was a crofting community, removal of a croft from it could be taken by the Commission to be against the interests of that community. We understood it to be accepted as following from this, that, as the applicant had advanced no specific reasons, evidence of a crofting community in the district could be enough to justify refusal in this case.

Mr Smith made various points in support of his submission that there would be a demand from the croft from suitable tenants. For present purposes, we can accept that this was adequately established by the evidence of Mrs Dennis, Mr Grantham, and Mr Wright. We do not consider it essential to have positive evidence of suitability of identified potential tenants and we consider that some of the dicta in, for example, MacIntosh v Crofters Commission, supra, are misleading in that respect. It is, of course essential to be satisfied that a demand exists from suitable tenants. Where there is no question of any actual vacancy, it is unrealistic to require detailed evidence from individuals who might have obtained the tenancy had it been available in fact. Evidence from experienced witnesses as to the existence of a body of suitable tenants anxious to obtain crofts may be sufficient. It should be noted, however, that it is plainly necessary for the Commission in assessing demand, to distinguish between demand for tenancy of a croft and simple demand for ground. This distinction might be of significance at the stage of making assessment of impact on the interests of the community. It is demand for the tenancy by persons who would be suitable tenants which requires to be established. We were satisfied of this although the evidence was somewhat confused on the point.

Mr Smith also made a full submission on the history of the crofts. They had been set up as part of a group of holdings. They were still occupied individually by their owners or members of their families. Mr Gammie, in fact, worked four of the crofts. This was evidence of shared labour. He submitted that the fact that it was paid for at commercial rates was irrelevant. Shared labour had traditionally been paid for by exchange of services. When that was not possible payment in cash did not, in his submission, change the nature of the sharing. Mr Gammie was in fact the neighbouring croft owner. That was important. There was also evidence of four crofts sharing one steading. This too showed an element of community.

He submitted that if dicta in MacIntosh (at page 14 O-H) meant that a crofting community only existed in a traditional crofting township, this was too narrow an approach. The Act had not said township. We must look at a wider concept of crofting community. We readily accept this submission.

Although there had been some reference in evidence to neighbouring crofts at Culbokie, Mr Smith made no attempt to go beyond the crofts at Kinbeachie as constituting the relevant district. We observe that this is a comparatively small "district" but in absence of evidence covering a wider area, we must accept it as the relevant unit for the purposes of this case. He submitted that, looking at all the circumstances, the Commission were entitled to reach the view that there had not ceased to be a crofting community there.

He also submitted that the Commission had a duty to protect and promote the interests of crofting. There was always a demand. The pool of crofts should not be depleted without good reason. Refusal of the application would not harm Mr Gammie. If he ever had a particular purpose which required decrofting he could apply again in reliance on it.

Decision

No attempt was made to argue that the dicta in Gray, supra, should not be followed. We consider that their plain effect is that, unless there is a local crofting community whose interests might be adversely affected, the Crofters Commission need not be concerned with the applicant's reasons for seeking to decroft. The presumption then is in his favour for the reasons discussed more fully in that case.

We accordingly agree that the question of whether or not Kinbeachie can now properly be considered to be a crofting community is at the heart of this case, at least in the sense that if answered in the negative the application will fall to be granted. If there was no community interest to be protected the Commission ought not to have placed any weight on the absence of specific reason for decrofting. The presumption favoured the applicant.

If, on the other hand, there was a local crofting community it may be assumed that it would be adversely affected by removal of any croft from the pool.

Mr Smith's opening submission on this aspect of the case included the proposition that the Crofters Commission were entitled to conclude that there was a crofting community. The use of the word "entitled" may suggest a contention that if there was evidence upon which the Commission could have reached that view, this was sufficient for him. We can accept that dicta in cases such as McCormick v Crofters Commission 1992 SLT (land Ct) 2 at 6D may be thought to give support to such an approach. However the existence or non-existence of a local crofting community must be recognised to be primarily an issue of fact even although it may depend to a degree on impression or evidence of expert opinion. Reaching a conclusion as to whether or not there is a local crofting community is not an exercise of a discretion. Although the court should, perhaps, be slow to interfere with the exercise of discretion by the Commission if the evidence discloses no error in their approach we consider that on a matter of fact upon which evidence has been led in full, it is necessary for us to reach our own conclusion. We may be able to have regard to evidence of expert opinion from Commission members or staff.

We are satisfied that there is no longer a crofting community at Kinbeachie. We accept Mr MacDonald's submission that this turns on the relationship between people rather than on assessment based on land or buildings. Inferences may, of course, have to be drawn from the nature and condition of the land, the size and shape of the fields, or the disposition of buildings but community is essentially a social concept rather than a physical one. Although it has been said that a crofting

community is easier to recognise than to define, we think it important to realise that recognition will turn on assessment of a wide range of factors and is not primarily, if at all, dependent on visual recognition.

Relevant factors for consideration include sharing of common grazings, sharing in the physical work of the crofts or, perhaps, sharing in buying and selling of materials or produce. Some form of social connection bearing upon the occupiers' role as crofters could be expected. How the occupiers actually see themselves is of importance. See generally MacIntosh, supra, page 14 and Steven v Crofters Commission 1984 SLCR 30 at 39. It is plain that owner-occupiers may see themselves as 'crofters' and can be treated as part of the crofting community. This, perhaps, is less likely to occur where, as here, the system of agriculture practised is predominantly based on arable cropping.

In the present case we conclude that it has not been established that there is now a crofting community at Kinbeachie. We do not accept that the work done by the firm of A Gammie & Sons for the Kinbeachie crofts is equivalent to neighbours sharing resources as part of a community, although we accept that payment for work done is not itself fatal to the concept of "neighbouring". The respondents did not attempt to lead evidence from local residents and there was no positive evidence of any community in a social sense. Indeed the direct evidence of the occupiers pointed positively to an absence of such a community. There was a split between residential and agricultural activities. In more remote areas, geographical constraints may impose a sense of community despite such a split. However, in a comparatively densely occupied agricultural area like the Black Isle, the effect of such a split is substantially to weaken, or remove, any sense of local crofting community. Houses and lands tend, instead, to merge into the wider community. The absence of any special local crofting community interest to be served by retention of a crofting tenant as a specific type of occupier is, perhaps, another indication of the absence of any truly crofting element in the community. In absence of an identifiable crofting community in the limited district of Kinbeachie we can find no relevant factors to be weighed against the presumption in favour of decrofting described in Gray, supra. It follows that the appeal must be allowed.

Mr Macdonald moved for expenses in the event of success and we see no reason not to make such award.

For applicant: Mr P F Macdonald, Solicitor, Inverness

For respondent: Mr D I Smith, Solicitor, Inverness