

FULL COURT

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

Hastings v Crofters Commission

Application Lochaber RN 241 - Order of 16 July 1991)

Croft - application to Crofters Commission for decrofting direction - proposed refusal by Crofters Commission - appeal to Scottish Land Court - whether Crofters Commission entitled to be a party to Land Court hearing - section 16A(8) of the Crofters (Scotland) Act 1955

The owner occupier of a croft applied to the Crofters Commission for a decrofting direction in respect of part of her croft. The Crofters Commission proposed to refuse to grant such a direction and the owner occupier appealed to the Scottish Land Court. As a preliminary matter, the owner occupier maintained that the Crofters Commission were not entitled to be a party to any proceedings or hearing before the Land Court. The Court, after a legal debate on the preliminary plea held that the Crofters Commission were entitled to be a party to the hearing before the Land Court and continued the Application for a hearing on the merits.

The Note appended to the Interim Order of the Court was in the following terms: -

Mrs Jennifer Hastings, 13 Inverroy, Roy Bridge, applied to the Crofters Commission under Section 16(9) of the Crofters (Scotland) Act 1955 (as amended) for a direction (commonly known as a "decrofting direction") directing that part of her croft should cease to be part of a croft. As she did not request a hearing on her application under section 16A(6) the matter was delegated to the Local Area Commissioner to make a recommendation as to the decision to be taken. His recommendation to refuse the decrofting direction was thereafter adopted at a meeting of the Full Commission.

In terms of section 16A(7) the Commission then gave notice in writing to the Applicant of their proposed decision specifying the nature of and reasons for such decision.

Section 16A(8) provides that an applicant may appeal against a proposed decision of the Commission to the Land Court who may hear or consider such evidence as they think fit in order to enable them to dispose of the appeal, Mrs Hastings has now appealed and the Crofters Commission have lodged representations in answer thereto. As a preliminary question, the Appellant has now requested the Court to determine whether the Crofters Commission are entitled to become active parties to any hearing before the Land Court on the above matter; and in particular, whether section 16A(8) of the Crofters (Scotland) Act 1955 so entitles them?.

This is a question of law which the Court has jurisdiction to determine under Section 4(1) of the Crofters (Scotland) Act 1961.

The Court have now heard legal debate on this preliminary question at which the Appellant was represented by Mrs J. A Seymour, Advocate, and the Commission by their own solicitor, Mr Donald Smith.

Counsel for the Appellant pointed out that in Gray v Crofters Commission 1980 SLT (Land Ct) 2, where the Court overturned the Commission's proposed decision to refuse a decrofting application, the Commission had declined to appear as a party. More recently, however, following the case of McCull v Crofters Commission 1985 SLCR 142, they had chosen to appear as a party and also to lead evidence. Counsel conceded that the Commission could not be regarded as functus when they had still to give effect to the determination of the Land Court in terms of Section 16A(9). She also referred us to the decision in Hutcheon v Hamilton District Licensing Board 19T8 SLT (Sh Ct) 44, where the Sheriff Principal held that a licensing board could not be a party to an appeal against its own decision. The licensing board, so she submitted did not need to give reasons for its decision and the Sheriff on appeal, could deal summarily with the whole matter - although she recognised that Section 16A(8) might give this Court less leeway.

Counsel further submitted that the Commission had been acting in a quasi-judicial capacity when conducting a local hearing in reaching their proposed decision. Hence it was incompetent for them to be parties to the appeal against the same decision. Nevertheless, she conceded that they could be present at an appeal hearing in an informational role in order to provide the Court with any help or information needed as indeed was the course adopted in the case of supra. In any event the Court should only have been looking at the actual evidence before the Commission hearing and, if there was none, then merely at parties' written representations. But they were not entitled to hear new evidence.

Mr Smith, solicitor, in reply on behalf of the Commission, pointed out that the Commission's present proposed decision not to grant the decrofting direction had been taken on the advice of their Local Area Commissioner as the Appellant had not asked for a hearing under section 16A(6). He submitted that it was entirely within the option of the Commission whether to appear or not at a hearing on an appeal to the Land Court against their proposed decision. But, in most cases, they did so. The Commission were fully entitled to be parties as the local community interest was paramount to their decision and would often need explaining to the Court. Furthermore the adequacy of the reasons given by the Commission might be under dispute which they must again be allowed to explain and support. Over the last year the Commission had thus been represented in all five appeals against refusals to grant decrofting directions. The procedures then adopted seemed to work well. Furthermore they could cause no prejudice whatsoever to appellants while also saving the Court from otherwise having to conduct their own inquisition. The Commission could hardly be regarded as functus when they still had to give effect to the Court's determination under Section 16A(9). It was also helpful in a complex case to have a proper contradictor as had been recognised by the Second Division in Duke of Argyll's Trustees v Shareholders in Catchean Common Grazings 1990 SLCR 103 and also by the Second Division in Joe Coral (Racing) Ltd v Hamilton District Licensing Board 1981 SLT (Notes) 106.

This Court's appellate jurisdiction under section 16A(8) of the 1955 Act includes express power to "hear or consider such evidence as they think fit in order to enable them to dispose of the appeal." It may sometimes be possible to dispose of an appeal against a refusal of a decrofting direction without hearing evidence where, for instance, the sole ground of appeal is that the Commission failed to state proper reasons for their decision in terms of Section 16A(7). But in most cases the issue is wider, such as whether in terms of Section 16A(2), proper regard has been had "to the general interest of the crafting 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." Whether this test has been properly applied in most cases requires evidence and also an inspection to confirm, in the light of the evidence, that there is indeed an identifiable local crofting community in existence. In the recent case of Mackintosh v Crofters Commission (Ross RN 409 -- Order of 17 April 1991) for instance, the Court found that there was none. The Court could hardly reach a proper decision in such cases were it only to hear evidence from the Appellants. Hence we interpret the words "who may hear or consider such evidence as they think fit" appearing in section 16A(8) as enabling the Court to hear evidence not only from appellants but also from the Commission itself as contradictor.

This view is also reinforced by the reservation of the final decision to the Land Court itself, for it is provided under section 16A(9) that "the Commission shall give effect to the determination of the Land Court on an appeal under subsection (5) above". Until then the Commission's decision is thus described as only a 'proposed decision' and it is agreed not to be functus until that event.

No similar provisions appear in the Licensing (Scotland) Act 1976. This has led to differences of opinion in the Sheriff Courts as to whether a licensing board has a locus to appear in appeals to the Sheriff against the board's own refusal to grant a licence. In Joe Coral (Racing) Ltd v Hamilton District Council supra the Second Division, overruling the Sheriff's decision in Hutcheon v Hamilton District Licensing Board supra said: "The board carries out an administrative function. In an appeal of this nature it is clearly desirable that in the public interest there should be a proper contradictor. Unless the board had the right to be a party to such an appeal, there could in many cases be no contradictor on contentious matters. The varied nature of matters which could be contentious and the board's position as an administrative body require that the board should have the right to defend its decision if so minded. We find support for this view in the fact that the relative Acts of Sederunt provide for a copy of the initial writ instituting the appeal being served inter alios on the clerk to the board. The only purpose of that provision would seem to be to enable the board to enter appearance and lodge answers if so advised. A similar view was taken by Sheriff McVicar in Lighthouse v City of Edinburgh Licensing Board 1978 SLT (Sh Ct) 41 and we approve of the reasons which he gave for his decision at the foot of the second column on page 43 of the report." The latter passage reads as follows: -- "On the whole matter, I conclude that the board has a right to lodge answers, if so advised, and to take part in the appeal as respondents. I have considered whether this right should be restricted to cases involving questions of jurisdiction or ultra vires or in which the conduct of the hearing before the board is the subject for criticism by the appellant but I am of opinion that to do so would cut across the basic principle that the board's interest is not personal to itself but is based on its capacity as protector of the public interest. Accordingly, I am disposed to allow the board the opportunity to lodge Answers in this, and all similar appeals, without reference to the particular ground of appeal."

The Crofters Commission is an administrative body set up under the Crofters (Scotland) Act 1955 to exercise various mainly administrative functions, some of which were previously exercised by this Court. Their main function, for instance, under Section 1(1) of the 1955 Act is reorganizing, developing and regulating crofting in the crofting counties of Scotland, of promoting the interests of crofters there. And of keeping under review matters relating to crofting and such other functions as are conferred on them by or under this Act and the Crofting Reform (Scotland) Act 1976. While the Commission may exercise some functions of a quasi-judicial nature, we cannot see that the present one of deciding whether or not to grant a decrofting

direction differs materially from that of a licensing board having to decide whether or not to grant a licence.

The Court therefore answer both branches of the Question of Law in the affirmative and continue the Application for a hearing.

Counsel for Applicant: Mrs J A Seymour, Advocate, Messrs A J W Hastings & Co, Fort William

Solicitor for Respondent: Mr D I Smith, Solicitor, Inverness