

## **FULL COURT**

(Lord McGhie, A MacDonald, J Kinloch)

### **Mr and Mrs John Inkster & Mr and Mrs Michael Inkster v Crofters Commission**

(Record Number: SLC/168/04 -- Order of 25 July 2005)

The Applicants appealed to the Court against the proposed decision by the Crofters Commission to refuse to grant a decrofting direction in respect of croft land extending to 0.37 ha ("the subjects") forming part of their croft Ocracquoy, Cunningsburgh, Shetland for the purpose of sale as three building sites for dwellinghouses. The Court, after hearing the parties and inspecting the subjects granted the appeal, reserving the expenses of the process.

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

This is an application by way of appeal under section 25(8) of the Crofters (Scotland) Act 1993 against a proposed decision of the Crofters Commission declining to decroft. The subjects extended to 0.37 ha situated at the edge of the applicants' croft which extended in total to 10.5 ha, or so – excluding any question of their rights in an apportioned area of common grazings which were thought to have no bearing on the issue before us.

At the hearing, the applicants were represented by Mr Michael Inkster, one of their number, who is himself a solicitor. The respondents were represented by Mr Donald Smith, Solicitor. We heard evidence from Michael Inkster, his brother John, and from Jeanna Inkster. We also heard evidence on behalf of the applicants from two local crofters, Michael Halcrow and Peter Farmer, the latter currently using the croft for sheep.

#### ***Authorities***

*Ferguson v Crofters Commission* 1999 SLCR 77  
*Hastings v Crofters Commission* 1992 SLCR 113

#### ***Statutory material***

Crofters (Scotland) Act 1993

#### ***Inspection***

Before dealing with the detail of the evidence it is appropriate to say a little about the croft, the subjects, and the local community on the basis of evidence and inspection. The communities of Fladdabister, Aithsetter and Cunningsburgh take the form of typical crofting townships in the sense that, for the most part, houses stand in isolation surrounded by fields. There are some small groups of buildings but nothing approximating to an identifiable village centre. There is a good deal of new building. Many houses are occupied by people who do not work locally, but in Lerwick which lies about 10 miles to the north. However, there is clearly active use of the land for agricultural purposes. Some crofters operate more than one holding.

Mr John Inkster and his family live close to the croft subjects in a modern house. He operates this is a guesthouse along with three adjacent chalets. The former croft house lies in the centre of a small complex of buildings some distance from the road. Certain of the immediately adjacent houses and buildings were occupied by members of the Halcrow family, who were prominent objectors in proceedings before the Commission.

The croft itself lies on both sides of the minor road. To the east it stretches from the road to the sea. The land generally is of average grazing quality. Some parts, including the subjects, might have been improved or cultivated in the past and might still be capable of use for silage crops. There was evidence of cultivation of a small area to the west. We were told that this was an attempt to grow vegetables.

The subjects lie at the north end of the croft. The land slopes behind them and housing there will not impede the views from any existing property. The applicants have planning permission for development of three dwelling houses. They propose to sell off individual sites and expect the purchasers to make arrangements for the infrastructure.

### ***Evidence***

In this case we heard a great deal of evidence, led in chief by Mr Inkster, and in cross by Mr Smith, covering the applicants' domestic affairs, their business commitments, the demand for housing in the area and the use they might make of the croft. Ultimately, it was not suggested by Mr Smith that any of this material was directly relevant to refusal of the application to decroft. The scope of the material covered by the parties did, perhaps, convey something of the flavour of the proceedings before the Commission. There may have been a perception that the applicants were not true crofters. However for present purposes we have to consider their status as landlords of a vacant holding: section 24(3). There was no dispute about this and we were not concerned with the question of whether the Commission should seek to exercise any power under section 23(5) or otherwise, to compel the applicants to let the subjects to a new tenant.

We also heard a good deal of evidence about other building development in the neighbourhood. The applicants' contention in their pleadings was that the relevant plots must have been decrofted and that, by comparison, the present decision was "unfair". For the respondents, Mr Smith sought to show that it could not be assumed that any of these new developments had been on decrofted sites and that any such decrofting would, in any event, have been by a person who had originally been a tenant.

We are not persuaded that this material was of any relevance to our decision under section 25 and we do not attempt to set it out in detail. It may be observed that "fairness" is not a statutory test and in any event cannot easily be assessed by reference to prior decisions. A body such as the Crofters Commission has to look at each case and cannot simply follow decisions which, for all we know, might themselves have been unsound. The applicants, themselves, accepted that there might be circumstances where Commission might properly have to decide that a cut off point had been reached. They freely accepted that, in their own case, while development of three houses on their croft might be appropriate, it would be inappropriate to allow many more. If the Commission had a reason for saying that any further decrofting in the community would begin to have an adverse impact on existing crofters, they would be entitled to proceed on that basis even if they had not formed that view in relation to earlier housing.

For present purposes we think it unnecessary to say much about the evidence. Mr Smith accepted that there was a reasonable purpose which would give rise to a presumption in favour of decrofting. It would be for the Commission to demonstrate the case for refusal. No witnesses were led for the respondents but we have to see whether reasons for refusal can properly be found in the evidence which was before us.

To allow our conclusions to be understood it is necessary to give only brief detail of the background. The croft had been sold to the applicants by a Mrs Manson who, with her late husband, had been an active crofter. The sale had included her dwellinghouse. The property had been advertised as having development potential. Mr John Inkster told us that he and his brother bought the croft because of their desire to obtain an agricultural unit for use by themselves and their children. They had immediately taken steps to sell the house because they both had homes nearby. They had sold it, at valuation, to a couple with children. They had deliberately chosen a suitable development site which would have no impact on existing neighbours houses or on the working of the remainder of the croft. They hoped to get sufficient money from it to reduce their borrowing and have some surplus to invest in the croft. He said that the applicants had discussed a variety of ideas for use of the croft but, because of problems of work and illness, they had been unable, to date, to take active steps to do so. He agreed that both he and his brother were busy people. Michael Inkster was running a solicitor's business single-handed. He, himself, was a self-employed businessman working in the fish trade.

John Inkster was cross-examined at length on material apparently bearing on his motives and intentions but ultimately it was agreed that he should be accepted as a credible and reliable witness. We can rely on that agreement and it is, therefore, unnecessary for us to express any view on the question of whether the true reason for acquisition of the croft was its value as an investment with long term development potential or for use as an agricultural unit. There were, no doubt, grounds for suspecting the former and it may be that the local opposition to the decrofting application was largely based on such suspicion.

We were not persuaded that the applicants' motives had any direct bearing on the issue before us. They might have had an indirect bearing. Had there been evidence that the Commission would seek to compel re-letting under section 23(5), a question would have arisen as to whether an incoming crofter would need a house. However, there was no evidence of any intention by the Commission to neither take such a course; nor evidence that loss of the subjects would be important in this connection.

There was a good deal of questioning which appeared to challenge the idea that there was any public demand for house sites. However, this challenge was not insisted in by the respondents. Indeed, at the end of the day Mr Smith's position was that the subjects could suitably be developed for three houses. He suggested that the Commission might be able to grant decrofting in relation to two of the sites and leave the other for a new tenant of the croft. There was no attempt to argue that the value of the land for agricultural purposes outweighed the benefit of use for housing.

We heard no evidence to suggest that the subjects were the only place on the croft where a house might be situated. We heard no evidence that loss of the subjects, together with loss of a further house site for a new resident crofter, would leave a unit

which was too small to function as a croft. Even with such development, the croft land would remain in excess of 10 hectares. Any incoming tenant might also have the benefit of the apportionment assigned to the applicants by Mrs Manson but there was no exploration of the extent of the applicants' rights to this apportionment and we leave this out of account.

In terms of section 25(1)(a), the first matter for decision is whether an applicant has applied for a decrofting direction in order that the part of the croft in question may be used for some reasonable purpose. This term is further defined but it was not disputed that use of the subjects for housing would be a reasonable purpose. Planning consent had been given. Reference was made by Mr Smith to the decision in *Hastings v CC*. Where there was planning consent a reasonable public purpose could be assumed.

The question then is whether there are reasons to refuse having regard, in particular, to the factors set out in section 25(2). The two specified factors are the general interest of the crofting community in the district and the demand, if any, for a tenancy of the croft. These are not, of course, exclusive but, for reasons discussed in *Ferguson*, considerable weight must be given to the fact that a reasonable purpose has been established. Where the explicit factors set out in subsection (2) are not relevant, some clear alternative reasons for refusal would have to be established.

We heard no evidence of any adverse impact on the general interest of the crofting community which might arise from construction of houses on the subjects. We are aware, from the productions, that there was some suggestion, before the Commission, that the sheer presence of three new households would harm the existing community. However, we heard no examination of possible reasons for this. It is clear that new families might well strengthen the community by positive involvement in local activities, by supporting the local shop and by maintaining numbers at the local school. The houses might, of course, come to be occupied by people without children who might see Lerwick as the focus of their activities in work, leisure and shopping. That situation would, however, seem to be neutral as far as impact on the crofting interests of the community might be concerned. We are not prepared to indulge in unfounded speculation as to how occupation of the three houses might come to have an adverse effect. We must proceed on the evidence. No evidence was adduced of any likely adverse impact on the general interest of the crofting community from having new residents in the wider community.

Another possible adverse impact on the general interests of the crofting community might come from loss of agricultural land. This will always be a question of degree. We are entirely satisfied that loss of the area of agricultural ground in question could not have any significant impact.

The other factor - that of demand for "a tenancy of the croft" - raises questions which were not fully explored in the submissions nor addressed by any written material available from the Commission. It was not disputed that the term "croft" in section 25 was to be read as if it expressly included "part of a croft". Thus, the question of demand for tenancy should have been addressed, in the first place, by considering whether there would have been a demand for a tenancy of the 0.37 ha which formed the subjects of the application. There was no suggestion that this had ever been done.

We accepted for the purposes of this case that the Commission - and the Court - would be entitled to look at demand for the existing croft as part of a proper approach under section 25(1) and (2). However, a critical fact is that the application relates only to part and not the whole of a croft. There was no challenge to the evidence led by the applicants that loss of the subjects would have no affect on demand for a tenancy of the croft as a whole and no significant impact on running of the croft. This evidence was consistent with our own impression of the whole evidence and our inspection.

Nothing in the letter of the Crofters Commission intimating their proposed decision to refuse cast any light on these issues. The letter made no attempt directly to address the statutory questions. There was no finding about reasonable purposes. The grounds for proposed refusal were set out as five separate points. However, two of these simply repeated a view that the decrofting proposals would not be in the interests of, or would have a negative impact on, the local crofting community. There was no indication of any reason why that might be. A separate point was a narrative that the community wished to "revisit and amend the Shetland Islands Council Planning Policy". However, there was no indication of what the Commission thought such amendment might mean or what bearing it might have on the crofting community or the demand for a tenancy. Planning consent had been given and review of policy would have no bearing on that. There was a reference at the fourth point, to strong demand for the croft and to "three other parties who offered unsuccessfully at the time of sale". We think this was potentially misleading or distracting. The provisions of section 25(2) relate to demand for the tenancy not to demand for the landlords' interest which was what was offered for sale at that time. However, this point included the assertion that "seven other crofters indicated their interest in obtaining the tenancy". There was no indication of where these crofters lived at present but, as existing crofters it might well be assumed that they were simply interested in having more land to work with their crofts. Mr Farmer was in that position. Local crofters would not necessarily have to build a new house.

We heard evidence that this assertion of interest was based on no more than a show of hands at the public meeting held by the Commission. The applicants thought it unlikely that the seven were active crofters but nothing seems to turn on this. We are satisfied that the important omission was the failure of the letter to address the fact that the proposed resumption related to only part of the croft. There was nothing to suggest that there would ever be demand for a tenancy of the subjects as such and no discussion of the impact of loss of the subjects from the croft as a whole.

The final point was that the land was good arable land and "should remain part of the croft". We did not find this bald assertion persuasive. As we have seen, it was not insisted in. The land was comparatively good land but the public benefit in its use for agriculture would hardly exceed the benefit of use to provide housing for three families.

In short, we are not satisfied that the Crofters Commission dealt properly with the matters relevant to its statutory jurisdiction. The report of the meeting shows some emphasis, by objectors, on matters of public planning policy rather than on issues relevant to the impact on the crofting community, as such. There was concern that the applicants had acquired the land for "speculation" rather than to work it. This is a matter which the Commission was entitled to consider but it is not clear what bearing they thought it had on the question of decrofting. There is nothing inherently wrong with buying land on a speculative basis. Owners of land are entitled to make the most profitable use they can of their property, subject, of course, to statutory controls. It is not

appropriate to use a control designed to protect crofting interests for the purpose of acting as a second planning authority responding to individual expressions of concern about public amenity.

We are aware that this case has been seen in some quarters to represent some test of policy. However, nothing in the decision letter, or in the material before us, gave any proper indication of what policy issues were thought to arise. We think it important to focus on the statutory provisions of section 25. We have no reason to doubt that the local crofting community is active and enthusiastic but we found no reason to think that it would be affected by loss of 0.37 hectares. Obviously, that is a matter of degree and a time may come when any loss of land may be thought to tip some balance. The motive of the developer may possibly become part of the balancing exercise. We were given no basis upon which a conclusion could properly be reached that matters were near the stage of tipping any particular balance. We do not know what view the Commission took either of the evidence bearing on motive or its relevance to the issues before them.

We are satisfied that the application is for a reasonable purpose under section 25(1). We are satisfied that this gives rise to a presumption in favour of decrofting: *Ferguson* page 94. Nothing was established in the proceedings before us to set against that. Accordingly we do not require to embark on any exercise of weighing the reasonable purpose against the possible adverse impact. We have found no basis for a limited conditional decrofting exercise on the lines suggested on behalf of the respondents. We are satisfied that a decrofting direction should be given as requested. We, accordingly, allow the appeal and remit to the Commission to proceed appropriately.