FULL COURT

(Lord McGhie, D M Macdonald, J. Kinloch)

KNIGHT v CROFTERS COMMISSION

(Application RN SLC/15/99 -- Order of 29 June 1999)

Croft -- Application to Crofters Commission for decrofting direction -- Proposed refusal by the Commission -- Appeal to Scottish Land Court -- Crofters Commission's discretion -- Form of appeal -- Presumption in favour of decrofting for a reasonable purpose -- Otherwise no presumption in favour of or against the crofting -- General interests of the community -- Existence of a local crofting community -- Sections 25 (1) (a) and 25 (2) of the Crofters (Scotland) Act 1993

The applicants appealed to the Scottish Land Court against a proposal by the Crofters Commission to refuse to decroft the croft on the island of Eday, Orkney. The Court in considering the form of such an appeal agreed to hear evidence and particularly on the question of whether a local crofting community existed. The Court indicated that there was a presumption in favour of decrofting where decrofting was sought for reasonable purpose in terms of section 25(1)(a) of the Crofters (Scotland) Act 1993 but otherwise there was no presumption in favour of or against decrofting.

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

The applicants 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 their croft at Burnside, Cusbay on the island of Eday, Orkney.

Parties were agreed that we should deal with the appeal by hearing a full proof which we did at Kirkwall on 21 April 1999 and at Eday on 22 April 1999 when we took the evidence of Mrs Sullivan and also carried out a general inspection.

The applicants appeared on their own behalf, both gave evidence and made submissions. The respondents were represented by Mr Donald Smith, Principal Legal Officer employed by the Crofters Commission, Castle Wynd, Inverness. He led evidence from Mr Raymond A. Byres, Upper Stenaquoy, Eday; Mr James W. Thomson, Heathercow, Calf Sound, Eday; and Mrs Patricia M. Sullivan, South Linkertaing, Cusbay, Eday. Mr Smith explained to the Court that he had intended to lead evidence from Dr Jessie Watt, the local Commissioner. Her flight had been cancelled at the last minute. Rather than seek adjournment to hear evidence from her, he gave evidence himself dealing with certain aspects of the Commission's practice.

At the beginning of the week following that hearing, we received a letter from Mr Smith giving more detailed explanation for Dr Watt's absence and enquiring whether it would be possible to take Dr Watt's evidence on commission. We declined to do so. This is, in substance, a request to hear additional evidence. The applicants would clearly wish to be involved. Had such motion been made before conclusion of the hearing we would have explored with parties the circumstances and the range of alternatives open. Mr Smith took a proper decision as to how to present his case at the time.

The following facts were admitted or established to our satisfaction on the balance of probability:

1. The applicants' croft, Burnside, is situated in Cusbay at the north-west end of Eday.
2. Eday is a narrow island about 12 kilometres long. It narrows to about 600 metres at the mid point. The southern half is generally wider than the north. The north portion is about 3 kilometres at its widest. The settlements of Cusbay on the west and Calf Sound at the east are of the order of 1.5 kilometres apart as the crow flies and some 4 kilometres apart by road.
3. The township of Cusbay consists of some fifteen adjacent holdings or former holdings which generally slope from the edge of Vinquoy hill westwards down to the seashore. It is similar in appearance to a typical crofting township, the individual holdings being very small livestock rearing units, between ten and twenty acres in size and of indifferent quality. The associated hill common grazings of Linkertaing Park, 167 acres, lie adjacent, to the north-east. There are nine shareholdings. Three shareholdings relate to crofts; five to subjects outwith crofting; and the other share is held by Mrs Joy who was, formerly at least, landlord of the grazings. There was confused evidence as to the current ownership of the grazings.
4. Two of the Cusbay subjects are held by crofter tenants, North Linkertaing and South Panhouse. The tenant of the former was said to be an absentee living on Mainland. It appeared on inspection that the in-bye ground had recently been ploughed. We understood that this had been done by a son of the witness, Thomson, but Mr Thomson was unable to tell us precisely what his connection was with the croft or the basis upon which this work was done. The tenant of South Panhouse is an elderly lady. She lets her land for grazing to a farmer.
5. Of the remaining Cusbay subjects, some seven are owner occupied crofts and some six are accepted by the Commission as effectively outwith the ambit of the Crofters Acts having lost croft status, for whatever reason prior to 1955.
6. The subjects of Burnside lie in a long, narrow wedge-shaped strip and amount to 10.54 acres. They have a south-westerly aspect and are divided by the public road. They consist in the main of moderate grassland, with the potential to produce winter keep. The uppermost part of the croft opens out to Linkertaing Park. The access down to the house is shared with the adjoining property of North House also owned by the applicants. The house and its outbuildings lie on the broad base of the croft, close to the sea. There is a substantial, serviceable shed some 20 yards from the house, with the ruinous remains of a traditional windmill behind the house. The croft is generally well fenced and worked. There is a small concrete jetty which might serve a small boat in good weather. However, it is habitually obstructed by boulders which are driven into it by strong tides. The common grazing share which formerly effeired to Burnside has been retained by the landlord, Mrs Joy.
7. The adjoining property of North House is not registered as a croft. It lies to the south of Burnside. It is rather larger at 14.01 acres, but is otherwise similar. North House has a one-ninth share in Linkertaing Park. Use has been made of the buildings for agricultural purposes. The dwellinghouse is derelict.
8. The various properties which were described as being outwith crofting, were not readily distinguishable from those which belong to the appellants. They too had the appearance of being self-contained small-holdings, used for grazing and residential purposes, stocked with small numbers of sheep and

cattle, and providing small areas of winter keep. There was nothing visually to suggest that they were components of a substantial farming business.

9. Towards the north end of the east side of Eday lies Calf Sound. The crofting area at Calf Sound appeared to be composed of larger crofts, but the holdings were of a similar appearance to those of Cusbay. Like Cusbay, Calf Sound has the appearance of a traditional crofting township. We heard that, of about a dozen named holdings, four crofts were held by Mr Thomson; three were held by Orrisor Trust, a self contained body which had little dealings with others; and some four were not registered crofts.
10. There are understood to be not fewer than twenty two registered croft subjects on Eday. Three are held in tenancy, the remainder are owner-occupied. Only Mr Thomson and Mr Tulloch are both owners and occupiers of more than one croft. Mr Tulloch is elderly and lets some of his land to four non-crofters.
11. Mr Thomson and a neighbour have an arrangement for sharing equipment. Each owns and maintains certain equipment and the other has use of it without payment. They share a bull. It is not disputed that they work together and help each other as the need arises.
12. Mr Knight and Mr Tulloch share haymaking equipment.
13. The areas at the south end of the island which had been identified as being under crofting, viewed from the roadside, appeared to consist of relatively few crofts with little to point to the existence of any crofting township.
14. The crofts of North Blackbrae and Swinstay, West Side, were decrofted by order of the Commission in 1990, followed by Castlehill, West Side, in 1992. The croft of East Blett, Calf Sound, was decrofted in 1993.
15. The respondents' productions included a plan showing five distinct parts of Eday shaded as crofting areas. There was no evidence of the three small southern areas having any form of crofting community nor, indeed, of carrying on any active crofting. The common grazing on the south-west side was said to be held by a farmer. Although the plan showed, shaded, the whole district of Cusbay from Lesshamar in the south to Linkertaing in the north, as being a crofting area, there was unchallenged evidence from the applicants that several holdings in the centre part of Cusbay were not registered as crofts.

Procedure in application to Crofters Commission

In 1997, the applicants were refused a decrofting direction for the croft of Burnside by the Commission. The following year they again applied for a decrofting direction. On 20 October 1998 the Commission intimated their provisional decision to refuse this application. This provisional decision, and the applicants' response, was thereafter the subject of a public hearing in Eday on 2 December 1998. The subjects of Burnside were viewed from the public road. Thereafter, the Commission proceeded to issue a Note of Proposed Decision, to refuse this application, on 12 January 1999.

The Note sets out the history of the application and procedures adopted by the Commission in their consideration of it, summarises the statutory provisions, and then sets out the Commission's policy on decrofting as follows: "In considering an application for a direction that a croft shall cease to be a croft where no reasonable purpose is adduced, the Commission – if satisfied that there is a local crofting community – will not decroft that subject unless there are sound reasons which do not conflict with the general interests of that community".

It may be observed that this summary does not make express reference to demand. It does contemplate that there might be sound reasons for the decrofting even although no "reasonable purpose" was adduced. We think that, on a fair reading, the effect of the policy, as set out, would be that the Commission would not decroft croft

land if they were satisfied that there was a local crofting community unless a reasonable purpose was adduced. This is not entirely clear because the Note then sets out under the same heading of “Policy” various factors to which the Commission will have regard. The first listed is the extent and location of the land and the purpose of the application. It appears that this list of factors is intended to apply where a purpose has been adduced. It is thus not apparent that the Commission’s policy clearly distinguishes between an application which comes within the terms of section 25(1)(a) and one which does not.

The Note proceeds to discuss the “evidence considered by the Commission”. The first matter dealt with was the existence of a crofting community in the district in which the croft is situated. The Commission noted the applicants’ contention that whilst there might be a crofting community at Calf Sound there is no crofting community in Cusbay. The Commission did not attempt to deal expressly with that point. The rest of the material summarised under the heading of “Existence of a crofting community” was the Commission’s explanation for decrofting directions previously made in respect of four crofts on Eday. They gave details of three holdings at West Side which had been decrofted, essentially because they could not then find any evidence that the crofting system of land tenure had any continuing relevance to those residents who were prepared to state their views. West Side is some ten kilometres by road from Burnside. In relation to the fourth croft of East Blett, “although there were representations from the local community that the holding should not be decrofted and evidence of demand for the tenancy of the croft and a recommendation that a hearing be directed before any proposed decision was taken, the Commission, again on Mr Hunter’s recommendation, agreed to make a direction decrofting East Blett”. Mr Hunter was the then Commissioner for the area. The Commission state that they now consider this direction to have been made in error.

It is plain from the overall decision that they implicitly rejected the contention that Cusbay should be seen as the relevant district. Their decision under this head was expressed as follows:-

“The Commission were therefore gratified – and perhaps to some extent surprised – to find, in response to both the previous and current applications by Mr and Mrs Knight, that a considerable number of residents on Eday do evidently consider that there is an extant crofting community on the island.” So Eday was clearly seen as the relevant district. The use of the term “gratified” gives the impression that the Commission may not have been entirely dispassionate in finding that there was a crofting community. They recorded that several residents clearly regarded the crofting system as of continued relevance to retention of the population and the maintenance of a number of part-time agricultural units which might be used as a base for young people in other employment and a means of attracting new residents. It is plain that the view of the local population was a major factor in persuading the Commission that a crofting community existed on the island.

They next dealt with “demand for the tenancy of the croft if it was available for letting on the open market”. This appeared to be based entirely on the needs of the fish farm. The note narrated that several young people were in urgent need of a residential base on the island as a “number of them were currently ferried to Eday from other neighbouring islands”. A number of those young persons had indicated that they would be interested in any croft. There were eight full-time staff on the fish farm and the Commission considered that the evidence of their earnings would allow purchase of a tenancy such as Burnside. The Commission had made it clear to the applicants that the croft house site would readily be decrofted. In their view, this could provide enhanced security to a prospective lender.

The evidence before us indicated that, whatever the position of the fish farm at the time of the proposed decision, it had in fact now changed. Mr Byres was no longer manager. Of the present staff, 2 travel from Stronsay while 4 other full-timers live on Eday. There are some part-time workers who live in Eday. One of the Eday workers stays in a caravan, and one of the Stronsay workers has applied for a Council house in Eday. The new policy addressed seasonal fluctuations in workload by bringing in extra staff from Kirkwall as required. Accordingly the long-term labour requirements were lower than had been previously anticipated. The likelihood that an employee of the fish farm would be a potential candidate for a croft tenancy was thus also reduced.

The Grounds of Decision were that there was no evidence that it was imperative to achieve a sale that the croft be decrofted. This, read along with the view that the house itself could readily be decrofted to enable an incomer to get a mortgage, make it plain that the Commission's concern is, understandably, with the croft land.

The Commission said there was sufficient evidence that there is still a crofting community on Eday and a wish within the Community to retain the crofts. They concluded that there was ample suitable demand. The decision commented on owner-occupiers and then went on to say that they did "as a result of the information obtained in this case, see the potential of revitalising the crofting community on this small and relatively sparsely populated island by retaining the limited pool of part-time crofts for the use and occupation of incomers of sufficient means with the ability to earn their principal income from other sources. The fish farm was the only source identified.

Evidence

The applicants gave evidence that they acquired their subjects in total ignorance of the existence of crofting legislation. We accept this evidence. It does suggest a lack of proper professional advice from those acting for them at the time and it should be added in fairness that these solicitors were not involved in the proceedings before us. We did not require to hear their version of events.

It became plain that the applicants regarded the powers of the Crofters Commission as iniquitous. They stressed their view that the system and the Commission's approach to it, was out of date. It was clear that the applicants' reason for seeking to have their land decrofted was that they should be able to sell the property as a whole, entirely free from the controls of the Crofters Acts. They had no immediate intention to do so, but envisaged that that might take place on Mr Knight's retirement more than two years' hence. They did not attempt to establish how their proposals would affect their financial circumstances. They had not investigated how any other options might have compared in this regard. They expressed a determination that their successor should not be placed in the same circumstances as those under which they had found themselves on acquiring their property.

They gave evidence to the effect that there was no longer any crofting community on Eday. They drew support for this from some comments on the Report of the Audit for Eday, commissioned by Orkney Islands Enterprise, part of which was lodged as production 12. There was community activity and strong social links but they regarded this as no different from neighbourliness. They were extremely knowledgeable about all aspects of life on Eday and most of our information about the current status of crofts and other holdings on the island came, unchallenged, from them.

There was a question as to whether the common grazings land had been sold in pro indiviso shares to the parties who had had the grazings rights or whether these parties had simply had conveyances of the grazings rights. There had been some informal apportionment at the north end, but the appellants' share pertaining to North House had not been apportioned. We did not hear sufficient evidence to allow us to form any opinion as to the present status of these grazings, but it is a matter of public record that they featured as common grazings in the first fair renting on Eday in 1887. There was no Grazings Clerk, Grazings Committee or any form of grazing regulation. There had been a recent unsuccessful attempt to form a grazings committee with a view to regulation.

The registered tenant of North Linkertaing was an absentee. There, one field had recently been ploughed by Mr Thomson's son. The nature of his interest was not established to our satisfaction in the evidence. We accept that the Crofters Commission had not at that time sanctioned any new lease or sub-lease.

The applicants also challenged the accuracy of the report of the public meeting held in the process of their decrofting application. However the report was not, itself, the decision and we need not deal in detail with the criticisms of the report as such. The decision itself is set out in the "Note of Proposed Decision".

It was accepted that the situation had changed since the issue of the Commission's decision. In particular, Mr Byers was no longer the manager of the fish farm. He spoke to the new arrangements under which it was proposed to run the fish farm, making it clear that these would not improve the employment prospects on Eday to the extent which had been envisaged at the Commission's hearing. Although he indicated that he intended to retain his tenanted croft, which lies some seven kilometres south from Cusbay, he anticipated that he would also shortly take up the position of farm manager to the estate. In addition, he held the tenancy of another farm which extended to over one hundred acres. Despite his extensive interests, he nevertheless considered it desirable to maintain land in crofting. He confirmed his views on crofting as expressed at the hearing, pointing out the particular benefit to be gained from crofting grants. He himself had no interest in extra croft land at present, and was not aware of any other interest.

Mr Thomson gave evidence of the existence of an active crofting area at Calf Sound, where there is co-operation and neighbouring between himself and a neighbour. His wife and son had an interest in crofts at Cusbay but he had not. He understood that the other crofters there did not agree amongst themselves. However, it was plain that there was a substantial degree of co-operation between Cusbay and Calf Sound in relation to the eight crofts or so belonging to or cultivated by himself and Mr Tulloch. In his opinion, every one of the decrofting directions on Eday had been unhelpful to the island and he had made formal objection to each to the Commission. He was particularly concerned that decrofting cut off easy access to crofting grants.

Mrs Sullivan obviously felt strongly about the potential benefits of crofting. Although an owner-occupier, she regarded herself primarily as a crofter. However she also made it clear, expressly, and by the tenor of much of her evidence, that there was no co-operation in crofting activities at Cusbay at present. It was not disputed that there were particular difficulties concerning the grazing shares in Linkertaing Park, shares which the Commission had stated to be crofting rights. The resolution of these problems would have helped the crofting community. There might not be a crofting community at present owing to these difficulties and to the failure of the regulatory authorities to sort matters out. Even so, on the basis of her own market experience there would most certainly be a demand for a croft to rent. In answer to a direct

question from Mr Knight, she confirmed that she was not opposed to the Knights' application to decroft. She herself had made such an application but had later withdrawn it. She felt that active assistance of the Crofters Commission would be beneficial to the community particularly in relation to control of the grazings.

Mr Smith explained the background to the earlier decrofting decisions. He admitted that consideration of demand from the fish farm had been a factor in their decision. He considered that there were vestiges of a relatively small crofting community in the region of Calf Sound and Cusbay, the crofters of Cusbay being more independent than those of Calf Sound. The crofts in the south of the island were more isolated.

Submissions

The applicants relied for support on the earlier decrofting decisions including those at West Side. All the islands were suffering from depopulation and there was no evidence of local demand. The real problem was that the Crofters Acts were not adapted for modern times.

Mr Smith admitted that this application was complicated by the earlier decrofting decisions. He distinguished the West Side crofts, but considered they had made a mistake in decrofting East Blett, on the advice of the local Commissioner. The Commission had been surprised by the local interest now shown. Although they had a duty to consider both the crofting community and demand, it was difficult to establish genuine demand in the hypothetical situation where there was no croft actually available to rent. They had formed the view that there would be a demand for Burnside. There was in any event no immediacy here to decroft, there was no imminent sale. The whole of Eday was a fragile community, the Commission took the view that there was a crofting community, and the Court should be slow to disturb their decision. He submitted that Steven v Crofters Commission, 1984 SLCR 30 was a relevant precedent. We note, for completeness, that the pleadings record the Commission's willingness to assist the community in setting up administrative machinery for the proper regulation of the common grazing, but that this was not further expounded before us.

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 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) ………..

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

(2) 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.

(8) The applicant may….appeal against the proposed decision or further direction to the Land Court who may hear or consider such evidence as it thinks fit in order to enable it to dispose of the appeal."

Decision

Where a decision is primarily entrusted to the discretion of an administrative body, a reviewing Court is limited in the extent to which it is entitled to interfere. However, under section 25(8) persons dissatisfied with a decision of the Commission in relation to decrofting can proceed by way of appeal and the Court may hear evidence. That is therefore an appeal on fact and law and a question arises as to the proper approach. In course of his submission, Mr Smith reminded us that the Commission had initially decided that it was not appropriate to appear as a party to such appeals. The policy now was to appear and to invite the Court to proceed by hearing evidence de novo. However, he submitted that the Court should to be slow to interfere with the Commission's decision if there was evidence to justify it. As we understood it, his contention was that the Court should not interfere with the decision of the Commission unless satisfied that the evidence before us showed that the Commission had proceeded on the basis of erroneous understanding of fact or in ignorance of material fact or had plainly gone wrong by taking into account something irrelevant or reaching a decision demonstrably unreasonable. This in substance reflects the well known tests for review of administrative decision: see for example Wordie Property Co Ltd v Secretary of State 1984 SLT 345.

There is no reason why appeals under section 25(8) should be dealt with by full proof de novo. However where we have, at the request of parties, heard an open proof with full evidence from both sides, the justification for "being slow" to interfere with the original decision is not self evident. An appeal court may be as well able to make the appropriate decision as the administrative body appealed against. Where the issue is one of primary fact, such as the existence of a crofting community in the district or the existence of suitable demand, the Court can properly make the decision on the basis of the evidence led. However, where the question requires the balancing of various factors it may be seen as primarily one for the discretion of the Commission. Difficulties can be expected at the appeal stage.

In the present case it is unnecessary to explore this issue further. We are satisfied that considerable weight should be placed on the discretion of the Commission exercised on the basis of their wide knowledge and experience of crofting matters generally. However, the exercise of any discretion requires to be based on the facts of the case. It will be apparent that the material before us is not identical with that upon which the Commission's decision was based. We did not hear direct evidence of how the Commission would have viewed matters on the evidence we had. In the circumstances we have had no option but to make our own assessment giving weight to such evidence as we have of the approach of the Commission on matters within their discretion and to our members practical experience of crofting matters.

It was not entirely clear whether this application could be regarded as having a reasonable purpose within the terms of section 25(1)(a), although it was not presented on that basis by the applicants. There was no attempt to suggest that the stated purpose, namely for sale, might relate to the good of the croft, the estate or the public interest, and there is nothing within the broad terms of section 20(3) which lends any support to the applicants on this point.

The applicants admitted that there was no immediate problem. They lived on and worked their croft. Their concern was that, at some future time when they were no longer able to work the croft, the Commission could force them to relet it. However,

that is part of the scheme of the legislation. It is not a special feature of this case. That possibility existed when they bought the croft. Nothing has changed in that regard. It was not suggested that it was a likely outcome.

The appellants did not seek a decrofting direction for the house and garden ground as they had no intention of disposing of their property piecemeal. They did not wish to offer Burnside for let as a croft, but gave no indication whether they had evaluated that option. It appeared that they had only considered offering the two holdings for sale as a single unit entirely outwith the control of the Crofters Acts. They had valued the property on that basis only and were unable to attribute particular values to the crofting element.

It is, of course, a feature of the present case that half of the land worked by the appellants as a unit is not subject to the Crofters Acts. The access track to the house is partly on North House and partly on Burnside. The agricultural buildings are on North House. However, the Knights have run these two holdings under different legislation for some ten years. There is no reason to suppose that a newcomer should not be able to do the same. It appears that they were not always hostile to crofting controls because we heard that they had earlier sought to have North House registered as croft land. We were not advised of the reasons why this did not take place.

It is plain that the Knights have various options open to them should they choose in due course to dispose of their interests in Eday. None of these was adequately canvassed before us. We simply did not have any firm evidence of the financial implications which might arise from any of these options. In short, there is nothing in the evidence to suggest that they could come within the ambit of section 25(1)(a). The application accordingly does not have the benefit of the presumption in favour of decrofting which arises under the provisions of that subsection: see Ferguson v Crofters Commission, RN SLC/3/99.

However, the empowering provisions of section 24(3) are not expressly tied to section 25 although that is the section which makes detailed provision as to when decrofting should be allowed and what matters have to be taken into account. Parliament may have intended these provisions to be exhaustive of the circumstances in which the power given by section 24(3) could be exercised but the legislation is not expressed in this way. In Gray v Crofters Commission 1980 SLT (Land Ct) 2 the Court accepted, apparently without argument, that section 16(9) of the Crofters (Scotland Act 1955 (as amended) - now section 24(3) of the 1993 Act - gave a discretionary power which was quite independent of what is now section 25(1). The Court made clear that the discretionary power had to be exercised within the guidelines supplied by section 16(a) - now section 25(2). That approach to section 24(3) has been followed without question since 1980 and we see no reason to conclude that it is wrong. In other words, it is clear that the Commission does have power to grant an order for decrofting even where no reason has been stated. That approach was followed in Gammie v Crofters Commission 1998 SLCR 49.

The Court in Gray considered the effect of the guidelines and held that the general interest of the crofting community in the district in which the croft was situated was the “overriding consideration”. It was observed that crofting communities do not depend solely on agriculture for their income and that the crofting community interest should, accordingly, be “widely rather than narrowly construed”. The second guiding principle – the demand for a tenancy of the croft – was merely a particular aspect of the general interest In a particular case the general crofting interest might not be harmed in any way by a decrofting direction. There might not be any crofting

community to have any interest. The Court made clear its view that where, for example, the croft was in a built-up area or was surrounded by contiguous farms with no other croft or crofting community nearby, Parliament could not have intended the Commission positively to encourage new tenants or to have contemplated that tenants who purchased their crofts might be subsequently ousted by substitution of new tenants from elsewhere.

The Court said that it preferred to "adopt the different interpretation (sic) leading to more workable results under which decrofting directions would normally follow – unless against the general interest of a local crofting community which actually exists". This comment has been viewed as equivalent to acceptance of a general presumption in favour of decrofting where it is not positively shown that the proposal would be against the general interests of a local community. However, we are not satisfied that the Court intended to go as far as establishing any general presumption. There is no mention of such presumption in the Act. In reaching their decision the Court went on to examine, in detail, the whole circumstances of the case including the agreement of the various crofters to the proposed scheme. In deciding, on the evidence, that it was reasonable to decroft, the Court made no attempt to found on any presumption in favour of decrofting.

The attempt to identify the intention of Parliament is, of course, at the heart of interpretation of a statutory provision. Where a clear statutory intention can be determined this may be of great importance in interpretation of ambiguous phrases. However the primary guide to intention must lie in the language used. The Court, in Gray, did not say expressly which provision was to be given a "different interpretation". It is possible that they had in mind the word "may" in section 24(3). It is well established that such a provision can be taken to have a mandatory effect when it gives power to an administrative body to act for the benefit of a citizen. However where, as here, that term can be contrasted with the provision "shall" in the following section, we consider that it must bear its plain meaning. In other words it simply confers a discretion on the Commission to make a decrofting direction.

Use of "shall" in section 25(1) shows a positive intention that decrofting should be allowed in certain circumstances. The effect of that provision, when read with section 25(2), is to create a presumption in favour of decrofting where the Commission is satisfied that it is for a reasonable purpose and that the ground in question is not excessive in relation to the purchase: Ferguson, supra.

We find no basis in the whole statutory provisions for a further presumption in favour of decrofting where the application does not fall under subsection 25(1). In the case of Ferguson the Commission conceded that the circumstances fell under section 25(1)(a) and the Court did not have to consider the implications of the latter part of the subsection. It may be observed, however, that Parliament has provided two explicit parts to the test under subsection (1)(a). There is no obligation on the Commission to make a decrofting direction under that subsection unless satisfied that the extent is not excessive. We find it difficult to contemplate that Parliament intended that in a situation where the Commission was not so satisfied - in other words where they had concluded that the land sought was excessive - that there was nevertheless a residuary presumption of some sort in favour of a grant. If there is no presumption in that situation, this tends to point away from any intention that there should be any general presumption.

In exercising its discretion under section 24(3), the main matter which the Commission must consider is the interests of the crofting community in the district. If there is no such community the statutory guidelines will not apply. Accordingly, as

the applicant, by the very fact of making an application, can be taken to have demonstrated that he has an interest to be free from the provisions of the Act, there will be nothing for the Commission to put in the balance against decrofting. While this might reasonably be said to give rise to a presumption in favour of an applicant, it is more accurately described as a situation where the balance is tipped by the particular facts of the case.

Throughout the various cases since 1980, there is no decision based upon any general presumption in favour of decrofting where no reasonable purpose has been established. However, although we do not think that there is room for any such presumption in favour of decrofting, we are equally unpersuaded that there is any justification for a presumption against decrofting. There is no statutory warrant for it. It is not supported by any clear authority. It is fair to say that there have been cases in which application for decrofting has been made simply on the basis of a desire to be free of the restraints of the Act and where the Court has made comments which might tend to support a presumption against the grant. Such comments must, however, be read in context.

In Steven v Crofters Commission 1984 SLCR 30 the Court, at page 41, observed of the applicant, "She has produced no evidence of significant prejudice or hardship due to remaining under the Crofters Acts other than subjection to the very legislation itself which is what she meant by 'freedom of use'. In our judgement something more is required". The Court had stressed that a desire to be free of the legislation was a criticism or challenge of the legislation itself and not a good reason for decrofting. The comment which we have quoted might suggest that the Court proceeded on the basis that unless there was an adequate reason, the application should be refused. Taken on its own that would be equivalent to a presumption against decrofting where there was no reason. However it is unlikely that the Court intended this. Earlier in the same paragraph they had stressed the need to look at each case on its own merits. They had found that decrofting would reduce the local pool of croft land kept available for persons of crofter status and a situation where there was a local demand for such land. We do not think the case can be treated as authority for any presumption against decrofting.

Examples of similar comments can be seen in Fox v Crofters Commission 1991 SLCR 38 and Sutherland v Crofters Commission 1991 SLT (Land Ct) 81. In both these cases the Commission had identified an existing crofting community and a potential demand for tenancies from suitable applicants. The Court supported refusal where no good reason had been advanced for decrofting. The decisions did not bear to proceed on the basis of any general presumption. In MacCormick v Crofters Commission 1990 SLCR 79 at 84 the Court referred to the cases of Steven and Sutherland as cases where, "the crofters who had purchased their crofts were still actively farming them and merely wished, looking to the future, to be freed from the application of the Crofters A and in particular the inherent threat of compulsory reletting by the Commission. The Court observed that something more than wishing to be free from crofting legislation was needed to justify a decrofting order- for otherwise decrofting orders could be obtained just for the asking." This suggests approval of a presumption against decrofting but, here again, the dicta must be looked at in context. It is clear that if no reason is advanced beyond a desire to be free of crofting, little will be required to tip the balance in favour of refusal. However, in all these cases there was evidence bearing on the interest of the local crofting community. In Gammie v Crofters Commission 1998 SLCR 49 where the Court found that there was no evidence of any existing local crofting community, the absence of any reason for decrofting was not a bar to the grant of the application.

It can therefore be seen that, although the simple desire of an applicant to be free of crofting might be sufficient to tip the balance in a case where there was nothing to put against it, the Court has frequently recognised that it is not an element of much weight where there is any identified reason for keeping the subjects in crofting in the general interests of an identified local crofting community.

Having regard to the applicants' underlying contention that Crofting restraints and policies were outdated it may be appropriate to stress that various Crofting Acts including the Acts of 1955 and 1976 were consolidated by re-enactment in 1993. It plainly was not the view of Parliament that the legislation was outdated. In any event the Commission and the Court are bound by that legislation. The Commission has the task under section 1 of promoting the interests of crofters and of keeping "under review" matters relating to crofting. It is entitled to assess each application for decrofting in light of circumstances and policies considered by it to be appropriate at the time.

However, if the policy of the Commission which we have quoted above is to apply a presumption against grant in any case where good reason for decrofting has not been established, we consider that the Commission has misdirected itself as matter of law. Where a case does not fall within section 25(1)(a) the proper approach is to consider all the facts and circumstances. The main consideration is the general interest of the crofting community in the district. If such a community exists and no good reason for decrofting has been established, it may take little to persuade the Commission that the balance tends in favour of refusal of the application.

The starting point therefore is to determine whether as matter of fact there is a crofting community which includes the subjects of application. We pointed to various factors which should be taken into account in Gammie at page 61. Although this was plainly not an exhaustive list, these included sharing in common grazings, sharing in the work of the crofts and including buying and selling, social identity, and self-assessment.

It is a reasonable expectation when considering a small, remote, island such as Eday, that the whole island can be regarded, and indeed regards itself, as a community. The constraints of living on an island tend to increase mutual inter-dependence. Although there is presently a school and a resident doctor, most services and supplies are necessarily sourced from outwith Eday. However, although the whole island can be described as a community and is predominantly non-crofting, that need not prevent there being an identifiable smaller crofting community nor need it prevent the crofting element in the island community from being clear enough to justify treating the island as a crofting community. Where, as in this case, there is evidence that crofting was formerly widespread throughout the island, with the crofts laid out in townships, this may be indicative, though not conclusive, of the existence of a crofting community.

The physical layout and consequently the social structure of the island holdings manifestly owe much to their origins in crofting. Both Cusbay and Calf Sound are physically similar to, and share characteristics typical of, crofting communities. Although many of the holdings are now out of crofting, the present character of the community reflects its historical origins. It is reasonable to have regard to this. Taken on its own it would not, of course, justify a finding that there was still a crofting community but it gives colour to the evidence of continuing crofting activity.

We accept the Commission's evidence that the crofts which were decrofted at West Side were sufficiently distinct and separate that we can exclude them as providing

relevant evidence of precedent. Whether or not they made a mistake in decrofting East Blett, we accept there may be relevant changes of policy. In any event we proceed on evidence relating to Burnside and have not required to examine the whole evidence bearing on East Blett.

Our consideration of all the evidence before us leads us to the view that there can be said to be a crofting community within Eday, albeit a small one. While undoubtedly the whole island can properly be said to form a community, it is sufficient that we find the area encompassing Cusbay and Calf Sound to be a crofting community. The townships comprise a mixture of tenanted crofts, owner-occupied registered crofts, and non-crofts which are visually indistinguishable.

There is no doubt that crofting is still carried on in Eday. Mr Knight was obviously actively engaged in crofting. Mr Tulloch is apparently still engaged in crofting, though well past the normal retirement date. Those crofters who gave evidence, Mr Byres, Mr Thomson, Mrs Sullivan, were active crofters who regarded the system of crofting tenure as being of value to the island, not least because of the available grants. They showed no inclination towards decrofting.

There is evidence of co-operation between crofting families in the two townships. Mr Knight described such cooperation which took place as neighbourliness, but "neighbouring" is itself a feature to be expected within a crofting community. Social intercourse is an integral part of any community and particularly a crofting one. There was clear evidence of this at Cusbay. We do not find the evidence of problems in Cusbay to offer any indication that a crofting community does not exist. It is not uncommon for neighbours to have longstanding disagreements. Disharmony is not untypical of community behaviour, particularly within a crofting community. For example, it is frequently encountered where there is uncertainty over grazing rights. In the last analysis, the question of whether these various factors is sufficient evidence of a crofting community is one of impression. We consider that Mr and Mrs Knight can properly be regarded as part of a small crofting community which extends at least over these two townships. It is unnecessary for the purposes of this application to determine whether that community extended any further.

It was recognised by the Commission that any person acquiring the vacant tenancy would be likely to have to decroft the house as part of the process of obtaining collateral for a loan to acquire it. It was apparent that underlying the proposed decision was the view that the applicants should be encouraged to exercise their right under section 25(1)(b) to have the house site decrofted but to keep the remainder as a croft so that a new tenant could get the benefit of crofting grant to build a new house. It was also recognised that available grant would be insufficient to allow a house to be built. It might not be possible to borrow to meet the shortfall, although, if the incoming tenant was capable of providing the necessary labour, he might be able to bridge the gap in that way. The existence of crofting grant might well allow an incomer with some capital resources to acquire a house which would otherwise be out of his range.

We are satisfied that there is accordingly a benefit to the community in that the existence of Burnside as a croft is a potential source of capital by way of grant which could help attract another active resident.

We think it reasonably clear that the Commission was attracted by the prospect of being able to provide accommodation for an employee at the fish farm. This may well have been an important consideration at the time of their hearing, but the evidence before us was that the prospect of there being such demand had

considerably receded. However, we did not understand that that prospect had entirely vanished.

It appeared that if a house became available on Eday it might be taken by a person now living on the neighbouring island of Stronsay. We did not carry out any form of inspection of Stronsay. It is a larger island with a wider range of facilities. It was accepted, however, that it suffered the same problems of potential depopulation as Eday and that loss of a family from Stronsay to Eday would not be an overall social benefit.

However, although demand in relation to the fish farm which was an important part of the Commission's decision has not been positively established in the evidence before us, we do not think it unreasonable now to have regard to the existence of the fish farm as a potential source of demand for accommodation. It is an established business. The methods of operation may change but it will always require staff. The availability of crofting grant may well prove an element in attracting staff to live on Eday.

Further, and in any event, we are aware that fashions and policies in relation to crofting have changed for good reasons. The applicants' view that crofting was out of date and of dwindling importance is not consistent with the experience of the Court. There is a growing awareness of the value of protection of fragile remote communities. There is now a recognised demand for crofts generally. We heard unchallenged evidence from Mr Smith of the discussions involving the Commission, Orkney Islands Council and Orkney Islands Enterprise as to how the resources of these bodies might best be harnessed to the task of protection of such communities. It is plain that the Crofters Commission and the availability of financial support for crofters have an important part to play.

Mrs Sullivan's evidence suggested that there would be suitable demand for Burnside. She had had a lot of response after having advertised twenty-two acres of bare-land croft. She was certain that there would be a demand for the tenancy of the croft.

In our opinion, although there is little hard evidence of demand, such indications as there are tend to suggest that there would be demand at a price. Whether that price would be sufficient to satisfy the applicants we are unable to say. There was no evidence of any unsuccessful attempts to sell. On balance, we consider it more likely than not that there will be suitable appropriate demand. The availability of crofting grants might well have a positive effect on the overall price obtainable for the applicants whole subjects. We heard no evidence that it would have a negative effect.

Having heard all the evidence we consider that this is a case where a decrofting order should not be made. The applicants have not demonstrated any clear need for it. There is no evidence that it is in their best financial interest. While this is a narrow case we consider that, on the evidence available at present, the balance tips in favour of refusal of the direction. We do not regard it as in the best interest of this crofting community to remove the Burnside from the scope of crofting controls and benefits.

The applicants appeared on their own behalf. It is clear that the evidence presented to us reflected a change of circumstances since the proposed decision of the Commission. Our decision is made in light of the whole circumstances as they now appeared from evidence led before us. We consider it appropriate to make no award of expenses.