FULL COURT

(Lord McGhie, D M Macdonald, D J Houston)

LAMONT v CROFTERS COMMISSION

(Application RN SLC/4/01 -- Order of 1 November 2001)

Croft -- Appeal against decision of Crofters Commission to refuse to grant the decrofting direction -- Reason for seeking this to be free from crofting legislation -- hearing de novo -- A reasonable purpose -- Interest of the crofting community in the district -- Demand for croft -- Sections 24 and 25 of the Crofters (Scotland) Act 1993

The applicant appealed against the decision of the Crofters Commission to refuse to grant a decrofting direction in respect of the croft number 3 Eorabus, Isle of Mull. The applicant wished to decroft the croft "to be free from crofting legislation so that if any scheme came along he would be free to take advantage of it."

Parties agreed that the appeal should be dealt with by way of a full hearing *de novo* and after hearing evidence and inspecting the croft the Court held that no reasonable purpose had been made out for decrofting by the applicant; that there was a demand for crofts in the locality and it would not be in the general interest of the crofting community to decroft is croft. The Court refused the appeal.

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 3 Eorabus, Bunessan, Isle of Mull.

Parties were agreed that we should deal with the appeal by way of a full hearing *de novo*. We sat at Bunessan on 25 September 2001. We carried out an inspection of the croft on that date. Mr Lamont appeared on behalf of the applicants and for convenience we shall refer to him as "the applicant". He himself gave evidence and he also led evidence from John E M Macinnes, Area Assessor and a crofter on Iona. The respondents were represented by Mr Donald I Smith, Principal Legal Officer, employed by them. He led evidence from Mrs Mairi MacFarlane, Area Commissioner and crofter; David Goodfellow HAO, employed by Scottish Executive Environment and Rural Affairs Department; John Fisher, owner and occupier of No. 5 Eorabus and Chairman of the relevant Grazings Committee; and Donald M MacLean, Knock Farm, Isle of Mull.

Certain matters were either undisputed or emerged clearly from evidence or inspection.

1. The applicant obtained the tenancy of the croft 3 Eorabus in 1996. He acquired title as owner in January 2000. He subsequently conveyed a one-half share to his wife in March 2000.

2. The croft consists of five acres arable and nine acres outrun. It has one of five grazings shares in Eorabus South Common Grazings.

3. The croft lies between the road and the sea. The common grazings lie mainly on the landward side of the road but include a strip by the shore to which the croft has direct access.

4. In area and quality of land, the croft can be treated as typical of many crofts in the north west of Scotland.

5. A substantial portion of the outrun is fenced off to protect a herb rich habitat grant aided under an Environmentally Sensitive Area scheme

6. The reason given in evidence by the applicant for seeking to decroft the whole croft land was that he "wished it to be free from crofting legislation so that if any scheme came along he would be free to take advantage of it". This was broadly consistent with the reason given in the formal application which was: "To obtain clear title". By "scheme" we understood him to mean no more than a use inconsistent with crofting tenure. No specific schemes were discussed although, as noted below, we heard some evidence of possible use of part of the land for housing.

7. The applicants are owner occupiers of a former croft at 7 Eorabus. This was decrofted in December 1981. In their written pleadings the applicants contended that the purpose of decrofting was to allow 3 Eorabus to be farmed along with No. 7. It was averred that neither would be viable without the other.

8. We heard no evidence bearing positively on the viability of the two units either separately or together.

9 A residential caravan occupied by tenants of the applicants is situated near to the road at the east side of the croft.

10. Outline planning permission has been granted for development of a house on or near the site occupied by the caravan.

11. There was no dispute that the Crofters Commission would have agreed to any application seeking decrofting of that house site alone.

12. An important issue of fact in any appeal under section 28 is the question of demand for the croft. All the witnesses appeared to accept that if the croft was indeed available for let there would be a demand for it. Mr Lamont's own acceptance of this was, perhaps, intended to be somewhat ironical. He pointed out that the land had been derelict for 40 years prior to his occupancy and had "suddenly become a desirable piece of land". His position was that as he intended to keep using the land it was not available for let. All talk of demand was theoretical. It did not require serious consideration. Leaving aside his evidence, however, we were satisfied by other witnesses that there would be a demand for the croft, for whatever reason, if it was now available to let. Mr Macinnes, an experienced farmer and crofter from Iona thought there would always be local people who would want the croft if available. They would not make themselves known when it was clear that it was not in fact available. Mr Goodfellow had been working in the crofting counties for 18 years. He had been involved with Mull crofts for over five years. He was aware of an active demand for crofts. He gave examples of a good deal of interest in vacancies. He pointed out that there was little permanent fixed equipment on the croft and accordingly there would not be high ingoing costs. Mrs MacFarlane gave clear evidence that there would be a demand for young people for the tenancy if it was available. She based this on her knowledge of repeated enquiries made to the Commission seeking information about available crofts. She also said that her own

knowledge of the area satisfied her that there would be such a demand. It is clear that an incoming crofter would have the benefit of various grants. The CBGLS scheme provided grants for housing. Grants would be available for agricultural sheds, fencing and reseeding. Grants would be available for various aspects of agricultural equipment such as poly-tunnel frames. There was evidence that certain grants might be available for non-crofters but we heard no detail of these. Mr Goodfellow agreed that there were currently two absentee croft owners in Eorabus. That, however, is not the same as an immediately vacant croft. Mr Fisher said there was always a demand for a croft. In answer to a question about demand in the local area he said there would always be a demand in any area. Mr MacLean thought there was a scarcity in the Ross of Mull and that there would be local interest if the croft was available. There would certainly be a demand for housing.

We conclude, without difficulty, that if the croft was indeed available there would be a demand.

Some other matters of fact were canvassed in evidence. We heard, for example, that the part of the croft adjacent to the road was shown on the draft local plan as zoned for housing. Mrs MacFarlane indicated that the Commission could be expected to agree to decroft land for such a purpose. However the applicant stressed that this was only a draft plan. He said that he had been told by planning officials that further housing would not be permitted on the croft. He did not attempt to present the application on the basis of any positive purpose. He did not contend that it was needed for housing. Accordingly we cannot treat that as the purpose of the present application.

We heard evidence that the applicant had obtained the croft tenancy in 1996 following pressure by the Crofters Commission under their policies in relation to absentee tenants. The former tenant, Mrs MacLean, lived at Knock, some 30 miles to the east where her family carried on a substantial farming business. She assigned the tenancy to Mr Lamont. There had previously been an arrangement whereby he used the croft in exchange for allowing the MacLeans to have use of an area of land owned by him near their farm. The use of this land had ceased by agreement. It was clear that Mrs MacLean and her son, Donald MacLean, who gave evidence, had strong feelings about the proposed decrofting. As they had been compelled by the legislation to give up the croft, they perceived it as unfair that the applicant should be able to free himself from that same legislation. They would be happy to take possession of the croft again if it became available. However Mr MacLean did not suggest that any of his family would now wish to live on or near the croft. The applicant's evidence that the croft had lain unused for many years before 1996 was not challenged.

Although Mr Smith had led the evidence of the MacLeans' feelings on the matter, he made no positive attempt to found on this in submission. It is of doubtful relevance and, for the purposes of the present case, we consider that this background should be ignored.

We heard a good deal of evidence about other crofts in the Ross of Mull where the Crofters Commission had made decrofting orders. However, we did not have clear evidence as to the specific circumstances of each case. We accept that consistency is an important element of justice. Where apparently similar cases have been dealt with in different ways, an applicant can expect some reason to be given. It is equally important that the Commission look carefully at the circumstances of each case. It is not a valid criticism of the Commission to say simply that a previous decision reached a different result in broadly similar circumstances. Cases turn on their own facts. For

example, before a comparison could start to be made, it would be essential to know what purpose was presented to the Commission as the basis of the application. Further, the Commission must look at each case in light of circumstances pertaining at the time. The weight to be given to specific factors may well change as a result of change in local or national circumstances.

We, of course, are hearing this matter afresh. We did not hear sufficient detail to allow us to place any weight on the previous decisions. We mention them briefly for completeness. The Commission set out in their pleadings, the reasons for making the decrofting direction in relation to 7 Eorabus in 1981 and no attempt was made to found on that as having a direct bearing on the present application. It appears that in the 1970s and 1980s, various crofts at Ardachy and Ardfenaig were taken out of the control of crofting legislation. Quite apart from the absence of detailed evidence of the circumstances, we consider that the lapse of time makes direct comparison inappropriate. We are aware, in general terms that the Commission has been increasingly active in the promotion of crofting over the last decade. Although the pressures on agriculture as a livelihood have intensified, the potential for diversification has probably increased. There have been changes in the financial support available.

Although neither party cited the decision in *MacCormick v Crofters Commission* 1990 SLCR 79, it may have been assumed that the Court was aware of the decision as being one relating to a croft in the same parish. In that case the Full Court held that the holding should cease to be a croft. However, it may be observed that the Court was not satisfied that there was sufficient evidence of demand at that time. In this respect, we require to proceed on the evidence presented to us. Although this Court may, in certain circumstances, require to give substantial weight to findings in fact of a previous court, it is obvious that a finding as to demand in 1990 has little direct bearing on current demand.

More recent examples were referred to at Knockvolagan and Ardtun. In each case, land which was decrofted remained in agricultural use. The applicant pointed to this as showing that it would make no difference whether the land was decrofted or not. However, that is plainly something which depends on the individual owners and their particular circumstances. We do not accept these examples as being directly relevant to the issue before us.

The applicant founded on the fact that the grazings committee had not objected to his application. It followed, he contended, that they must be taken as supporting it. We heard evidence from John Fisher, the Clerk to the Committee. He said that although he had written to the Crofters Commission with details of persons said to be in attendance at a meeting to discuss the application, there had, in fact, been no meeting. He explained that he had been aware of the views of all the members and considered a meeting unnecessary. He had included Mr Lamont as one of those in attendance. However, he had not discussed the matter expressly with him. He, himself, had intended to apply to decroft part of his own unit. It would not have been appropriate, he said, to object to the application by Mr Lamont.

We had no reason to doubt the evidence of Mr Fisher. We accept that a practical approach must be taken to matters of administration. It may be observed that it was unfortunate that he chose to respond to a request for information by providing details of persons attending a meeting when no such meeting had in fact taken place. This has led to confusion as to the weight which might be given to the views of the Committee. We consider that it is a matter of every-day experience that friends and associates in a small community are reluctant to object to developments where the

potential adverse impact on each of them personally may not outweigh the bad feeling likely to be created by objection. While the absence of objection is a relevant factor it is not equivalent to positive support.

The applicant gave evidence critical of the material on which the Commission had proceeded to reach its decision. He made specific criticism of the way in which they had dealt with inspection of the croft. He made detailed comment on the nature of the evidence available to the Commission of demand for croft tenancies. However, as we made clear at the hearing, the Commission in this case followed their usual practice of inviting this Court to hear matters *de novo*. Where a Court is hearing a case afresh it must proceed on matters spoken to in evidence or agreed. Evidence may, of course, include hearsay material. It is usual for the Court to assume that documentary material can be taken at face value unless explicitly challenged. There was, however, some confusion as to the role of the Court in an appeal. We return to this below.

We stressed that the Court would carry out its own inspection and, accordingly, that evidence as to the nature of previous inspection was not relevant to matters before us. We heard evidence from the applicant and from Mr Macinnes as to the nature and quality of the land. At inspection we examined soil depth with a spade at many points within the arable portion. The expert members subjected the soil to visual analysis. There was nothing to indicate that the greater part of the arable area was anything other than typical brown loam. Mr Macinnes had described the land as reasonable in places but thin in parts. Our findings suggested reasonable soil cover throughout the bulk of the arable portion. The land was typical of very many west coast crofts.

Submissions for parties

Submission for Crofters Commission:-

We invited Mr Smith to make the first closing submission to assist the applicant see the relevant issues. Mr Smith started to express certain views as to the policy of the Commission. We questioned whether this had been covered in evidence and whether such reference was appropriate in a hearing *de novo*. Mr Smith made no further attempt to rely on such material. He submitted briefly that in terms of the Act - a reference to section 28(2) - it was necessary for the Commission, once the existence of a crofting community had been established, to consider demand. There was no dispute about the existence of a crofting community in the present case. He submitted that demand had been established. The land should accordingly stay subject to crofting control unless there was a good reason to the contrary. One such reason would be to provide land for housing. But no such reason had been established here.

Submission for applicant:-

Mr Lamont stressed that the only clear reason for the Crofters Commission objection seemed to be that, in principle, consenting to his application would make it difficult to object to others. This was the "thin end of the wedge" argument. But in practice it would make no difference whatever if the land was decrofted. Taking his 14 acres out of crofting would make no difference to crofting as a whole. The co-operation which presently existed at Lower Ardtun would continue. The discussion about demand was entirely theoretical. The croft was not available and would not in fact become available. He and his family would continue to use it.

Decision

As there was apparent confusion about the nature of the appeal procedures it is appropriate to repeat that where it has been agreed by parties that we should deal

with the matter *de novo* after proof, we have to consider the application afresh. It is accordingly unnecessary for us to refer in any detail to the evidence before the Commission or to carry out any assessment of their approach. We require to consider the matter on the basis of the whole evidence led before us. We are not simply reviewing the exercise of discretion made by the Commission. We made some comments on this in *Knight v Crofters Commission* 1999 SLCR 102 at pages 113-114.

Where it is arguable - and it is unnecessary for present purposes to put it any higher - that a discretion is vested in the Commission, the proper approach to appeals is not free from difficulty, having regard to the terms of section 25(8). These difficulties have, in practice, been resolved by the agreement of the Commission that the Court should hear such cases *de novo*. If any other approach was to be taken by the Commission, we would welcome full legal submission.

On the evidence in this case we are not satisfied that the applicant has established "a reasonable purpose" for decrofting. We dealt with a similar situation in *MacKintosh v The Crofters Commission* SLC/125/99 (Order of 7 August 2000). As that case turned on its own facts, it was not reported, and for convenience of the present applicants we simply repeat parts of what we said. We observed that we had had occasion to consider aspects of the proper approach to section 25 in course of the decisions in *Gammie v Crofters Commission* 1998 SLCR 49; *Ferguson v Crofters Commission* 1999 SLCR 77 and *Knight v Crofters Commission*, also in 1999 SLCR at 102. We thought it unnecessary to repeat the observations made in these cases. It was sufficient to refer to *Knight* at page 115 where we stressed the importance of determining whether the application falls to be dealt with under section 25(1)(a) of the Act or under the general power conferred by section 24. That was a question which turned on whether the reason for decrofting could be said to be a “reasonable purpose" as that term is specifically defined by section 20. Although that section specified a list of purposes deemed to be included as "reasonable purposes", the fundamental test was that the purpose should have relation to the good of the croft or of the estate or to the public interest.

Where the application is not based on a reasonable purpose within the meaning of section 25(1)(a), we have to consider whether decrofting is appropriate under the broad discretion conferred by section 24(3) and to do so by balancing the relevant factors as best we can. We cannot put ourselves in the position of attempting to exercise a discretion on behalf of the Commission. We must make our own decision on the evidence presented to us. In assessing the matter, we must have regard to the general interest of the crofting community in the district and the demand for a tenancy. These are factors referred to in section 25(2).

In *Knight, supra* we said: "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". Similarly, when we ourselves have to make an assessment, we consider that where there is a crofting community in the district, little is required to tip the balance towards refusal. There is no dispute that there is such a community in the present case and as we have indicated, there is persuasive evidence of suitable demand.

The Court has frequently accepted the general proposition that maintenance of a pool of crofting land is in the interests of the community: *Steven v Crofters Commission* 1984 SLCR 30; Fox *v Crofters Commission* 1991 SLCR 38. Anything which provides a potential opportunity for active crofting will, of itself, tend to be in the

interests of the local crofting community. We have previously expressed the view that it is unnecessary to be more specific.

All cases require to be looked at on their own facts. The circumstances of the present case are not the same as *MacKintosh*. The decision here is, perhaps, a narrower one. However, we have found nothing to set against the proposition that maintenance of a pool of crofting land is in the interests of the crofting community.

We heard evidence that certain grants were available to crofters. We have been persuaded that the subjects would attract new tenants. We have little doubt that the availability of grants, including grants for housing, has a part to play in this. If the croft was able to be let as a croft it would attract a new occupier who would be able to play a part in the community.

Mr Lamont argued powerfully that as he and his family had no intention of relinquishing the land, it was irrelevant that there might be a potential tenant for it. However, that is commonly the case in decrofting applications. The right to seek a decrofting direction is given to the owner of a vacant croft. Where that owner is an absentee, the Commission can be expected to proceed by attempting to find a tenant. A decrofting application will normally - though not invariably - be made by a person in the position of the present applicant who intends to continue to hold the subjects. We are satisfied that the legislature must have recognised this and must, accordingly, have intended the Commission to proceed by assessing the situation as if the croft was available. We must take the same approach.

The argument that it will make no practical difference whether a croft is decrofted or not cannot be seen as an argument supporting decrofting unless it is assumed that there is a presumption in favour of decrofting. However, we discussed this fully in *Knight, supra.* We are satisfied that there is no such presumption. In any appeal there is an onus on the appellant. In the present case we have not been satisfied on the evidence that a decrofting decision should be pronounced. We accordingly refuse the application.