

## FULL COURT

(Lord Elliott, A Gillespie, A B Campbell)

### MacColl v Crofters Commission

(Application Lochaber RN 158 — Order of 26th June 1985)

*Application for decrofting order -- proposed refusal by Crofters Commission -- appeal to Scottish Land Court -- failure to grant applicant a hearing -- applicant's proposal to use croft for agricultural purposes -- workability of crofting legislation*

The Applicant, the owner-occupier of a croft in Glencoe Village applied to the Crofters Commission for a decrofting order under Section 16(9) of the Crofters (Scotland) Act 1955. The Commission proposed to refuse the Application whereupon the Applicant appealed to the Court. Three grounds of appeal were put forward, namely that the Commission had failed to grant the Applicant a hearing; secondly, that the Applicant proposed to use the croft for agricultural purposes being a reasonable purpose in terms of Section 16A(1)(a) of the said Act of 1955 and in any event that decrofting would not be detrimental to the general interests of the local crofting community.

The Court after hearing parties' agents in debate refused the appeal.

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

This is an appeal by Mr Hugh S J MacColl under Section 16A(8) of the Crofters (Scotland) Act 1955 (as amended) against a proposed decision of the Crofters Commission refusing to grant him a decrofting direction in terms of Section 16(9) of his croft No 13A Lower Carnach

At the hearing on the appeal the appellant, Mr MacColl, was represented by Mr A J W Hastings, Solicitor, Oban and the Crofters Commission by their solicitor, Miss Flora Carmichael. The latter, however, explained that, as in previous appeals, the Commission still took the view that as they were *functus* and had been acting in a quasi-judicial capacity, their appearance would therefore be confined to providing information only. Prior to the hearing, the Court had invited them to lodge representations which they have done again on an informative basis.

Section 16A(8) provides that on appeal the Court may hear or consider such evidence as they think fit in order to enable them to dispose of the appeal". In this case, there was no request to us from the appellant or the Commission to hear evidence or cite witnesses as we have done in previous appeals. By prior note the appellant, on the contrary, requested the Court 'to fix a date for a hearing and site visit when the appellant can make verbal representations in support of his appeal."

The Court can see no objection to the Commission seeking to defend their own proposed decision, if impugned, by legal argument or even by leading evidence such as from local crofters to establish the presence of genuine local demand. Otherwise, this places an unusual burden on the Court, in its appellate capacity, in sometimes having to cite witnesses and then themselves conduct an interrogation. This Commission can hardly be *functus* when they still have to make a final determination in terms of section 16A(9) and the Commission have appeared before the Court in

references under section 4 of the Crofters (Scotland) Act 1961 [by] which references may even be made by the Commission itself.

This, however, was a legal debate and, Miss Carmichael did eventually reply to all the legal points raised by Mr Hastings and did not confine herself merely to supplying information.

The first attack made by Mr Hastings on the Commission's proposed decision to refuse a decrofting direction was that they had failed to grant Mr MacColl a hearing in accordance with Section 16(6). The latter provides that, before disposing of an Application, the Commission "*shall, if requested by the applicant, afford a hearing to the applicant and to such other person as they think fit*". By letter dated 18 October 1984, the Commission therefore wrote to the appellant's Glasgow solicitors indicating that they required to give Mr MacColl an opportunity both to make representations and to ask for a hearing. The letter continued "*accordingly, within 14 days of the date of this notice you should lodge on behalf of Mr MacColl any representations he may wish to make. Any requests for a hearing must be made by the same date.*" However, the appellant himself replied directly by letter dated 25 October 1984 which contained his representations in favour of a decrofting order and ended with these words: "*I would ask the Commission to reconsider this matter hopefully in my favour. If the Commission thinks that a hearing would be of use to them to determine this matter, then by all means have one. I would most certainly attend it.*"

As explained by Miss Carmichael, the Commission then decided in the light of all the information already in their possession that they did not need a hearing; more particularly, because they had already conducted a hearing into the proposed decrofting of the same croft when previously in the ownership of Carnach Crofts Limited of which the present applicant is a Director; and at which hearing no appearance was made on the applicant's behalf.

The Court do not regard the sentence quoted from Mr MacColl's letter as embodying a request for a hearing. On the contrary, he passed the decision on whether to hold a hearing or not back to the Commission itself. Their decision that a hearing would serve no further purpose was, in our opinion, reasonable. If, moreover, a hearing had originally been convened at which Mr MacColl's solicitor made the same legal submissions as he now makes on appeal, this would have made no difference to the result. For none of the relevant facts now appear to be in dispute. The documentary evidence lodged was not impugned by Mr Hastings beyond making the observation that certain of the local crofters said to be interested in the tenancy had not been fully examined as to their financial circumstances. No motion, however, was made to the Court to continue the case to hear such further evidence from the crofters. Indeed, Mr Hastings confirmed at the hearing that he was agreeable to the form of the proceedings adopted and that the appellant's case should rest upon his own verbal submissions.

While in previous appeals evidence was thought to be necessary and was indeed requested on behalf of the appellants, this is not therefore the present position.

Mr Hastings then submitted that Mr MacColl had only recently become the owner-occupier of No 13A Lower Carnach by purchasing this croft which was then vacant, the previous crofting tenant having been removed by Order of the court for non-payment of rent. Mr MacColl had then bought the croft from Carnach Crofts Limited as previous owners. He also owns the nearby crofts Nos 19A amounting to 0.64 hectare and 19B amounting to 0.10 hectare. The latter croft had already been

decrofted. Mr MacColl will continue to use croft No 13A amounting to 0.67 hectare for agricultural purposes along with the rest of his land which also includes 262.4 hectares at Leacantuin. The croft house of No 13A which is detached will be used for accommodation for someone in return for giving part-time assistance to Mr MacColl.

Mr Hastings submitted that this agricultural purpose was a reasonable one in terms of Section 16A(1)(a) of the 1955 Act (as amended) being also a reasonable purpose within the meaning of Section 12(2) which includes the provision of small allotments. In any event, he submitted that the Application succeeded under Section 16(2) as a decrofting direction would not be detrimental, to the general interest of the local crofting community and would leave the common grazings unaffected. There was in fact no community interest in this Glencoe area or any communal activities involving the sharing of stock or machinery. The common grazings, such as they are, were not now used by the crofters. In this case, therefore, the Crofters Commission had wrongly equated the interest of the community with local demand.

Mr Hastings also sought to attack the workability of the crofting legislation itself along the sane lines as in Steven v Crofters Commission 1984 SLCR 30 which he submitted had been wrongly decided. He referred the Court to Tailors of Aberdeen v Coutts 1 Robin 296; Anderson v Dickie 1915 SC (HL) 79; and Aberdeen Varieties Ltd v Donald 1940 SC (HL) 52. The latter case had been dismissed by the House of Lords on appeal as it did not disclose that the appellant had any patrimonial interest in the questions raised. Before the Court of Session, however, (1939 SC 788) it had been held that a restriction on the use of a theatre when disposed was not thereafter enforceable against singular successors, firstly, because this was illegal; and, secondly, because the extent of the burden did not clearly appear on the face of the deed and so could not be ascertained by reference to the Register. Mr Hastings referred to the following quotation contained in the judgement of Lord Wark: "*a feudal investiture is not liable to be defeated, qualified or abated by any condition or obligation that is not incorporated in the texture of the owner's infeftment.*"

We understand the citation of the above authorities to be for the purpose of demonstrating the negative effect of the crofting legislation on the transfer of croft land once it has ceased to be tenanted. Mr Hastings also attacked the workability of the reverse means test now applied administratively to owner-occupiers who require to be of "*substantially the same economic status as a crofter*" to obtain crofting grants. These criteria, according to Mr Hastings, were now out of date. As we understood his argument, it therefore followed that decrofting directions should be given, wherever possible, unless there were strong grounds for refusal. It may be added that Mr MacColl apparently satisfied this means test but fears he may not continue to do so.

Miss Carmichael, however, pointed out in reply, that the cases cited all concerned real burdens or conditions sought to be imposed in private deeds. They do not concern the validity of restrictions directly imposed by Act of Parliament.

It may be that crofting leasehold tenure with its restrictions on reletting or on the status of permitted occupants does tend to undermine "*the texture of the proprietor's infeftment*" by not appearing on the Register; and hence may inhibit the transferability of property. It has implications too for pending registration of title. But the Crofters Commission and the Land Court have to apply the law as it stands, however uneasily the provisions relating to vacant crofts introduced by paragraph 12 of Schedule 1 to the Crofters (Scotland) Act 1961 may now lie with the new provisions relating to croft purchase.

We have already referred to this problem in Steven as well as to the possibility that the Court itself might be persuaded to refuse a compulsory tenant authorisation to purchase on the grounds of substantial hardship to the owner or sound estate management under Section 2(2) of the 1976 Act.

The law nevertheless remains that all vacant crofts in an owner's hands are still subject to the Crofters Acts until decrofted. To justify the decrofting of croft land, good reason has to be shown by the applicant under Section 16 of the 1955 Act (as amended) and, in particular Section 16A(1)(a) or (2). We do not agree with Mr Hastings that the onus is upon the Commission to justify why they should not grant a decrofting Order. The onus is on the applicant to show why they should. Miss Carmichael explained that croft No 19B had only been allowed to be decrofted as it was situated at one end of the township and was not really being used as a croft at all.

The applicant here is not proposing to set up small allotments or carry out any development but to carry on the existing system of crofting agriculture. This is not a reasonable purpose which would have justified the authorisation of resumption under Section 12 of the 1955 Act had the applicant being the landlord. For it is not a reasonable purpose that the cultivation of the holding is to be carried on personally by the landlord: see Tabor v McMaster 1962 SLCR App 91 and Board of Agriculture for Scotland v Maclean 1929 SLCR 71 at page 85.

If, in the course of time, it transpires that Glencoe Village becomes more of a tourist centre with tourism displacing local crofting and no continuing crofter's interests in the common grazings -- then the decrofting of this croft land to allow some reasonable development may come to be justified. But we must re-emphasise that there is no proposal here for any such development. The back of the village is still given over to crofting and there are substantial written objections from local crofters genuinely interested in obtaining a let of this croft land.

If there had been some proposal for development on this now vacant croft then the Commission would have had to apply the peremptory provisions of Section 16A(1)(a); with a possible appeal, on refusal, to this Court. The legal test would then be whether, had the owner been the landlord of a tenanted croft, resumption would have been for a reasonable purpose under section 12 of the 1955 Act.

In the result, we regard this case as indistinguishable from Steven where the reason given for justifying a decrofting direction was to enable the applicant to be free to leave her croft land on her death as she wished without any interference from the Commission. Mr MacColl's reason is likewise simply to be free from the effects of the crofting legislation.

No good reason has therefore been given for obtaining a decrofting direction in relation to this croft land. By separate application, Mr MacColl can still obtain a peremptory decrofting direction under Section 16A(1)(b) in relation to the detached croft house which he wishes to use as a residence for a part-time agricultural worker. In relation to the croft land, however, there remains under existing legislation the principle of maintaining a pool of crofting land available to other crofters and protected by the Crofters Acts in regard to which the Crofters Commission are the primary judges. Crofting agriculture is still being continued on croft 13A and the adjoining crofts -- although we accept that the common grazings now appear to play no significant part.

In the opinion of the Court, the Crofters Commission did not require to convene a hearing for which they were not asked; and in disposing of the Application under section 16(2) on the full information before them, both from their own advisers and local crofters, they reached a reasonable conclusion which we should not now disturb.

For these reasons, we refuse the appeal.

For Applicant:            Mr A J N Hastings, Solicitor, Fort William

For Respondent:        Miss F C C Carmichael, Solicitor, Inverness