

FULL COURT

(Sheriff MacLeod, A MacDonald and J Smith)

PALMER v CROFTERS COMMISSION

(Application RN SLC/8/06 – Order of 4 October 2006)

CROFT – APPEAL AGAINST REFUSAL OF DE-CROFTING DIRECTION – WHOLE CROFT APPLICATION INVOLVING VARIOUS PURPOSES ASSOCIATED WITH EXISTING CAMP-SITE AND WITH TOURISM GENERALLY - WHETHER REASONABLE PURPOSE ESTABLISHED - NEED FOR INTENDED PURPOSES TO BE SUFFICIENTLY FIRM AND SPECIFIC - WHETHER A CROFTING COMMUNITY EXISTED IN THE DISTRICT - EFFECT OF DE-CROFTING ON THAT COMMUNITY AND ON THE NEED TO MAINTAIN LOCAL POOL OF CROFT LAND - SECTIONS 20(1), 24(3) AND 25 OF CROFTERS (SCOTLAND) ACT 1993

The applicants were owner occupiers of a croft extending to some 87hectares at Arnisort on the Isle of Skye. The croft was situated between two crofting townships but was not itself part of any such township and did not have a share in any common grazings. Moreover, the applicants did not engage in any communal crofting activities. De-crofting directions had previously been granted in respect of a camp-site situated on the croft and two house sites. The applicants had applied to the respondents for a de-crofting direction in respect of the whole remainder of the croft, extending to the foresaid area. The direction was sought for a variety of purposes, different purposes being stated for different parts of the croft but all connected, in varying degrees, to the applicants' existing campsite business or to tourism more generally. The respondents having indicated that they proposed to refuse the application on the ground that no reasonable purpose had been proved for de-crofting the whole croft, the applicants appealed to the Land Court against that proposed decision in terms of section 25(8) of the Crofters (Scotland) Act 1993 ("the 1993 Act"). In so doing, the applicants argued, *inter alia*, that the respondents had misdirected themselves in holding that the croft was part of a crofting community for the purposes of section 25(2) of the 1993 Act.

The Court, having held (1) that it was open to it, as it would have been to the respondents, to consider the merits of the application in relation to the various parts of the croft separately, (2) that the question in terms of section 25(2) of the 1993 Act was not whether the croft was part of a crofting community but whether a crofting community existed in the district in which the croft was situated, (3) that here there was such a community and that the respondents had, therefore, not misdirected themselves on this matter and (4) that reasonable purposes within the meaning of sections 20(1) and 25(1)(a) of the 1993 Act had been established for certain areas of the croft but not for others; sustained the appeal in respect of certain limited areas of the croft adjacent to the existing campsite for which firm and sufficiently specific purposes had been established by the applicants; *quod ultra* refused the appeal and remitted to the respondents to proceed as accords.

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

This is an appeal under section 25(8) of the Crofters (Scotland) Act 1993 ("the 1993 Act") against the proposed refusal by the respondents of an application for a de-crofting direction in respect of the whole of the applicants' owner-occupied croft at Borve, Arnisort on the Isle of Skye. We heard the appeal at Portree on 8th August 2006 and carried out an inspection of the subjects on the same date. Mr Palmer conducted the appeal on behalf of himself and his wife. Mr Donald Smith, Solicitor, appeared for the respondents.

Form of proceedings

As has become the norm in such appeals, for the reasons stated by the Full Court in *Gray v Crofters Commission* (at page 4) procedure before us took the form of hearing the application *de novo*.

Authorities referred to

Gammie v Crofters Commission 1998 SLCR 49

Gray v Crofters Commission 1980 SLT (Land Ct.) 2

Hilleary v MacAskill and Another 2004 SLCR 162

MacColl v Crofters Commission 1985 SLCR 142

Moray Estates Development Co v Crofters Commission 1987 SLCR 141

Steven v Crofters Commission 1984 SLCR 30

Sutherland v Crofters Commission 1990 SLCR 96

Statutes

Crofters (Scotland) Act 1993

Witnesses

For the applicants evidence was given by Mr Palmer himself and by Mrs Kathleen MacAskill, a crofter in the neighbouring village of Edinbane who grazes stock on part of the applicants' croft. Although both Mr Smith, Solicitor for the respondents, and another member of their staff made themselves available to the Court for the purposes of giving evidence, in the event no evidence was led by or from the respondents.

THE EVIDENCE

Ben Robinson Palmer

Mr Palmer (59) gave evidence that he and his wife, Mrs Rhonda Grant Palmer, had purchased the owner-occupied croft of Borve in February 1999 from Mrs Joyce MacDonald. Mrs MacDonald and her husband had bought the croft from Lyndale Estate in 1974. Her husband had since died. There was already a campsite being run from the croft when Mr and Mrs Palmer bought it. In the past Mr and Mrs MacDonald had used the rest of the land comprised in the croft for agricultural purposes but by the time Mr and Mrs Palmer had come to buy the croft Mrs MacDonald had no stock on it. By that time also three de-crofting directions had been granted in respect of parts of the croft, one for the campsite area itself and the other two for dwellinghouses.

Mr and Mrs Palmer themselves had not previously been involved in crofting, Mr Palmer's previous work history having been with the Ministry of Defence and offshore. He had spent his life working with the sea rather than the land. They had been looking for a different lifestyle, were very fond of the west coast of Scotland and had ended up in Skye.

Since purchasing the croft they had sought to diversify and improve the campsite. They had upgraded the toilet facilities, completely renovated an old building to create a reception area and shop, and obtained an off-licence for the shop. They had started bicycle hire and canoe hire. They had prepared an area for use to launch boats on Loch Greshornish. They had acquired hens so that fresh eggs were available to the campers and Mrs Palmer baked fresh bread each morning. They had sought to create a walking and nature area where campers could exercise their dogs and see the wide variety of local flora and fauna. All of this had happened incrementally in the time they had owned the croft.

Turning to the purposes he and his wife proposed for the various parts of the croft, these were as follows. With reference to the plan prepared by the respondents and attached to production 4, the area marked "V" lying between the east of the existing campsite and the public road from Portree to Dunvegan was intended as an extension of the present campsite. The area marked "W" was what Mr Palmer referred to as "the terrace" and already accommodated the campsite office and shop and a black house. The area marked "X" was already established as an area for use in relation to water pursuits, such as canoeing and sailing. A gradual slope to the shore of Loch Greshornish had been created and the facility already existed in a basic form but required to be improved. The area marked "Y", being an extensive area of the north of the croft situated between said public road and Loch Greshornish, carried no stock during the summer months and the intention was to make it a more formal nature area. It had an area of bog in the middle which had a wealth of plant life. There were also the remains of a broch and signs of former habitation. The part of area "Y" to the north of the croft and nearer the public road was possibly to be used as the site of a Rare Breeds Park. It was also intended to create a paddock in part of area "Y". The area marked "Z" was the hill ground above the road. It was the applicants' intention to divide this as between the higher ground and the lower ground. The lower ground, that part nearer the road, was to be used for rough grazing and the possible introduction of reindeer. The higher ground was to be left wild as an area to be colonised by the eagles which would be disturbed from their present habitats by the advent of the Edinbane Wind Farm. He had discussed the feasibility of this with a representative of the RSPB who had thought it feasible but he had not obtained a formal report from her. He had even considered giving this land to the RSPB for use as a nature reserve.

Asked why a de-crofting direction was needed, Mr Palmer explained that that had to do with financial restrictions. If they were to raise finance they had to have unfettered ownership of the land, not just ownership. Borrowing to date had been in the form of a mortgage over the house (the house site having already been decrofted in Mrs MacDonal'd's day). Otherwise they had paid for absolutely everything themselves and had taken on additional jobs (over and above their work with the campsite) to enable them to do so. They had approached the Local Enterprise Company for financial assistance with the upgrading of the toilets but had had to put that, and other developments, in abeyance, with the result that planning permission had now lapsed. The reason for that had been practical rather than financial, in that it had proved impossible to obtain estimates for the work. There had been a particular problem with funding for the road into the campsite. No-one would give them finance for that. They had spoken to their accountant who had said that they could not get finance until the land had been de-crofted. The situation was therefore, that they had not actually applied to any financial institutions such as banks but had taken the advice of a finance specialist who had told them that de-crofting was necessary if they were to raise finance on the security of the property.

Mr Palmer explained that the applicants' strategy was to make the campsite as attractive as possible. That was particularly important because of the apprehended loss of business resulting from the Edinbane wind farm development. To counteract that they had to widen the range of facilities and attractions available. The facilities themselves had to become the attraction if the landscape and scenery were no longer going to attract the same numbers of people. Mr Palmer saw that as the direction in which things had to go.

As to the existence of a crofting community, the applicants had nothing to do with either Kildonan and Flashadder Township, to the north, or Edinbane, to the south, from the crofting point of view. There was no inter-action of that sort between them.

As to the extent of the applicants' own crofting activities, they had a mixed herd of Blackface, Gotland and Hebridean sheep with a couple of Jacobs included. The flock numbered 30 and they also had a horse. They were interested in the introduction of reindeer because reindeer did not jump fences and ate everything including moss and lichen.

Mrs Kathleen MacAskill used some portions of the applicants' land. She had recently acquired an apportionment on the Edinbane common grazings which was still to be fenced. She had a fank of her own and she allowed Mr and Mrs Palmer to use it. This relationship with Mrs MacAskill had come about because Mrs Palmer and Mrs MacAskill shared a love of horses and they had become firm friends. Also Mrs MacAskill ran some coaches and Mr and Mrs Palmer would, from time to time, put business her way in that connection. The part of the applicants' land which she used was the part above the road. Once her apportionment had been fenced however, she was unlikely to have any continuing need to use the applicants' land.

The Court then asked Mr Palmer as to what planning permission he might need for his various intended developments. He said that he would require change of use to be granted in respect of the campsite extension. A permanent slipway would probably require planning permission. Planning permission was in place for some of the structures on the proposed terrace area. Change of use permission would be required for the blackhouse only if it was to be used for residential purposes. Planning permission was already in place for their entrance area, drystane wall, the road into the campsite and the septic tank. There was strong demand for chalet development in the area. One did not need planning permission for up to three

chalets. That may be the way to go at the moment, however, he would need finance for these works. The chalets came as kits and cost £20,000 each. With infrastructure costs the total cost would be £30,000 each and, therefore, £90,000 in total. He estimated that the total development for the campsite extension area alone would cost £200,000.

The development would generate a certain amount of employment. This would initially be seasonal but there was increasing demand for winter bookings. It would need investment to meet this demand. At present during the summer they employed two people part-time on grass cutting, reception, toilet cleaning and tourist assistant duties. If the campsite extension alone went ahead this would require more people involved in maintenance and cleaning. If chalets were built tradesmen such as builders, plumbers and electricians would be required. Most of the water activities he could do himself but if that side of things developed he would have to train others in it, particularly from the health and safety point of view. At present they allowed people from the surrounding area to keep boats or to access the water as this was the first point at which Loch Greshornish became deep enough for the launching of boats at any state of the tide. No additional staff would be required for the wildlife area; any assistance required would be provided by the existing staff.

Mr Palmer said that he and his wife were interested in the potential of the landscape. They were keen on developing that aspect of things. There were 165 different species of flora and fauna in the bog in the area to be used for nature walks and land use now meant not just digging the land and planting potatoes but looking after the land as its temporary custodians. He and Mrs Palmer, however, did not want to do that under crofting status. Continuation of crofting status was more likely to remove land from their care and control.

Mr Palmer could see only positive results from the developments they had in mind. They would be a bonus for the local community and for others in Skye. Asked about their local commercial links, Mr Palmer explained that most of their supplies tended to come from the mainland but they did have some local suppliers such as the Co-operative, the Isle of Skye Brewery and a local potter. The rest of their supplies they obtained from the Cash and Carry. They did, however, sell their own sheepskins and eggs.

Questioned by the Court as to whether there might be difficulties with the supply of water from Scottish Water for any increased use of the campsite, Mr Palmer explained that although they were increasing the area of the campsite the total numbers of caravans and tents which they were allowed in terms of their license (30 caravans and 100 tents) would not change. What they wanted to achieve was to double the number of vans visiting and reduce the tent spaces. They never had as many as 100 tents on the site in any event. So he did not believe that the maximum water demand would change.

Asked whether there were any other chalets close by he said that there were a few. The pottery at Edinbane had two or three. Someone else on Edinbane had two and there were odd ones "dotted about". They were all very heavily booked.

With reference to the intention to introduce reindeer to the hill, Mr Palmer was asked by the Court whether there were any other deer on the hill. He had not seen any. Indeed he had hardly ever seen a deer on Skye. He was not aware of a local deer population.

Asked whether they had applied for SEERAD or other grants, Mr Palmer said that they had applied for grants but had found themselves disqualified. The ceiling for grant eligibility was a gross annual income of £15,000. Although he and his wife re-invested everything they earned in the business they could not qualify for these grants because of that ceiling. They could not, however, sit back and let things stagnate. They had gone out, found work and earned money to fund their business.

Asked by the Court as to what would happen when Mrs MacAskill gave up grazing the croft, Mr Palmer said that they would still get the use of her fank should they need it although they could in fact dose all their sheep by injection. There would be no adverse consequences of Mrs MacAskill not using their land.

With reference to production 8, a report on the application prepared by Mr Hunter of SEERAD, and in particular what was said therein about the townships of Kildonan and Flashadder, Mr Palmer said that the area of ground north and west of Borve had not been actively crofted in over 40 years. The Flashadder Common Grazings were used by one crofter to a small extent for grazing maybe 10 to 20 sheep. So far as the land to the south, being part of Edinbane Township, was concerned, most of that had now been resumed and some of it was Mrs MacAskill's apportionment. Mr Palmer was unsure as to who owned the ground east of his croft.

With reference to Mr Hunter's comments on Edinbane, Mr Palmer noted that eight out of its 26 crofters were said to be active and that it was estimated that they had 40 cattle and 450 sheep. Mr Palmer could not count 40 sheep on that hill. He had been on the hill recently and had seen virtually nothing in the way of stock. Almost everyone in Edinbane had other jobs anyway.

Finally, before cross-examination, Mr Palmer made it clear that he believed the respondents to have misinterpreted the legislation. In terms of the legislation there had to be a crofting community in existence before a de-crofting application could be refused. Where there was no crofting community the respondents were duty bound to grant a de-crofting application. Mr Palmer said that they were not part of a crofting community.

Asked by Mr Smith, at the commencement of cross-examination, as to what he intended to put in the nature park he intended to create an area "Y", Mr Palmer referred for comparison to the Rare Breeds Park at Oban. This would be surrounded by little paddocks and a blackhouse. The creation of this park would not require improved fencing on the boundary between area "Y" and the common grazings to the north. So far as cost of livestock was concerned, Mr Palmer thought the bigger investment would be work rather than cost. Many of the animals would be sanctuary animals. He thought £2,000 to £3,000 would be sufficient. The animals could be found at rare breed shows, which his wife attended, and in catalogues.

The present sheep stock owned by Mr and Mrs Palmer were not run along with Mrs MacAskill's stock. Mrs MacAskill managed her own and Mr and Mrs Palmer managed theirs.

Asked about his existing borrowing and how it was secured, he confirmed that this was secured only on the dwellinghouse, not on the existing campsite. The present mortgage was sitting at £80,000 to £90,000. He accepted that a four bedroomed house in this part of Skye was likely to be worth upwards of £200,000. Asked about the value of the de-crofted campsite, under reference to something called Fox Leisure he said that the value would be £6,000 per caravan pitch giving a total

current value of £180,000. He could increase that value substantially by shifting the emphasis, as he intended to do, from tents to vans.

Finally, in cross-examination, he confirmed that the planning permission which he had had for the extension of the campsite had expired.

Kathleen Ann MacAskill

Mrs MacAskill (59) lives at 4 Edinbane. She said that she had lived in Edinbane for nearly 50 years. Borge croft had never been part of Edinbane Township throughout that time. It was always simply Borge, Arnisort. It had always been worked on its own. She was not aware of any link, social, economic or otherwise between the Edinbane crofting community and Borge.

When Mr and Mrs Palmer had first come to Borge, Mrs MacAskill had received a telephone call from Mrs Palmer asking for the name of a farrier. It was from that initial phone call that her friendship with the Palmers had grown. Mrs MacAskill explained that she herself bred ponies.

Mrs MacAskill said that she ran sheep and cattle on Borge croft but there was no formal contract, nothing of that sort. She used the hill land during the summer and the shore side of the road at times during the winter. She hoped that she and Mr and Mrs Palmer would still work animals together even after she got her apportionment fenced. Nothing would change if Mr and Mrs Palmer had what Mr Palmer in questioning the witness called "a clear title" to the land. Asked whether the granting of Mr and Mrs Palmer's application would have any adverse effect on the crofting communities of Edinbane or Flashadder, Mrs MacAskill said that she could not see that it would make any difference at all to anyone else. Mr and Mrs Palmer had done a tremendous amount of work since arriving in Edinbane, from building buildings to digging ditches. Their work had had a knock-on effect, for example, for herself as a tour operator and also for local restaurants. She was not aware of any objection to Mr and Mrs Palmer's application.

Mrs MacAskill confirmed that she was the crofting tenant of 4 Edinbane. She had got married and moved to live in Edinbane 40 years ago but she had worked there before that. In Mrs MacDonald's day at Borge she (i.e. Mrs MacDonald) had had her own sheep on the croft and Mrs MacAskill had used to help her manage these.

Asked by the Court as to whether she recognised the description of Edinbane contained in Mr Hunter's report, production 8, she said that one would struggle to find 450 sheep in Edinbane. Asked whether one would also struggle to find eight active crofters she replied that she could think of only 2½, being herself, a Mr MacMillan and a young boy who had started to raise sheep. At the moment there were no sheep on the hill apart from some which had escaped. There were likewise no cattle on the hill. There were about 25 cows and followers on the inbye land and some 220 to 240 sheep.

Asked about Kildonan and Flashadder and in particular whether Mr Hunter's reference to there being five active crofters was about right, Mrs MacAskill replied that between Kildonan and Flashadder she could think of only two families who were active in crofting. Sadly, she would agree with the description that crofting was of "low intensity" in these townships.

Asked about levels of demand for land, Mrs MacAskill said that there was demand for house sites, more in Kildonan than in Edinbane though two houses had gone up in Edinbane in the past year. People were selling off their crofts for house sites. She was not really aware of any demand for crofts in that part of Skye. She had heard mention of young people wanting crofts in Edinbane but that had been seven or eight years ago. Some of the people concerned had moved away, down south.

In addition to her own croft Mrs MacAskill worked her daughter's croft and a croft belonging to friends in Upper Edinbane. She was not aware of any tenancies having become available in the township recently. Most tenancies were transferred within families. That had happened in her own case. There had, however, been assignments of tenancies in Kildonan where an old gentleman had died leaving two crofts to his grandson who had sold them. The purchaser had in turn sold the crofts on to friends for house building.

Asked what she regarded the local district as being, whether Snizort or wider, Mrs MacAskill replied that Borge seemed to be on its own. There was Edinbane and there was Kildonan and Flashadder. Borge was in the middle. They were all, however, in the same district which she described as the parish of Duirinish.

Mrs MacAskill confirmed that she allowed Mr Palmer the use of certain facilities on her croft, these being sheep handling facilities.

With reference to her apportionment, she said that she had taken it out because of the wind farm development. Asked whether she saw apportionment as being the way things were going in the district and whether she thought crofting in the area had a future she said that there was very poor interest in crofting at Edinbane at the moment. Asked whether she saw the break-up of the township as inevitable, she replied "probably".

She presently had, in terms of stock, two cows, two heifers, two calves, 180 breeding ewes and 60 gimmers and lambs.

The fencing of her apportionment had not begun. Even after it had been completed it would always be useful to have access to Mr and Mrs Palmer's ground so that stock could have time on each place. Ideally she would still very much like to have the use of Mr and Mrs Palmer's land.

She dipped sheep twice a year. She did Mr and Mrs Palmer's along with her own. That was at her own fank. The rest of the Edinbane crofters had a portable dipper. They did not use Mrs MacAskill's fank. They had not asked to do so.

The landlord of Edinbane was Ruaraidh Hilleary. The landlord of Kildonan and Flashadder was David MacLeod. They took an active interest in what going on, at least Mr Hilleary did. She could not think of any occasion on which they had been asked about breach of conditions relating to the common grazings of either township.

Asked about the age structure of the community in Edinbane, Mrs MacAskill said that the majority were ages with herself, bar one young crofter. The age profile for Kildonan and Flashadder crofters was similar.

In re-examination she confirmed that she had included her own 180 breeding ewes in the 240 sheep she had said were in Edinbane. Accordingly the other crofters had only 60 sheep.

Submissions

(i) For the applicants

Mr Palmer submitted that the relevant legislation had not been properly applied by the respondents in this case. He referred to production 16 and the elements listed there as being features of crofting communities. When one went through these

elements it was seen that Borge was not part of a crofting community. Mr Palmer then carried out that exercise. With reference to the listed elements he said that Borge was occupied under crofting status; that there was no communal working or community networking between Borge and anywhere else; that effective use was being made of croft land or its potential, although not all for crofting purposes; that there was no common grazings committee; that he and his wife had not accessed or used crofting grants or supports; that there were no community management schemes in operation; that there was no communal management of the village hall or other facilities; that there were no livestock groups; no sharing of heritage, cultural and communal identity, half of Skye's population having originated elsewhere; no sharing of equipment, skills or resources and no local agricultural show, group or committee. Mr Palmer referred to the recent decrofting application at Taynuilt dealt with by the respondents and referred to in production 21, where it had been held that there was no crofting community extant. In the present case the respondents had said that paragraph 3.4(b) of production 10 that Borge croft was integrated into the township of Edinbane at "agricultural, economic and social levels". Mr Palmer totally refuted that but, challenged by the Court, came to accept that there was integration with Edinbane at the social and economic levels.

Skye was undergoing change at present. Sheep were disappearing as an economic mainstay. Tourism was a major issue for Skye. Land use was therefore changing. One had to make the best economic use of the land. He and Mrs Palmer were not applying for decrofting in order to create multiple housing sites. They were developing and diversifying their tourist-related business as part of a necessary change brought about by external factors to which they had to respond.

With reference to the meeting of the respondents of 16th December 2005, he had been present at that meeting. Only one question had been asked. It had been whether people had known that they could object to the application. There had, therefore, been no adequate consideration of the application. In particular there had been no adequate consideration of what Mr and Mrs Palmer had been trying to do in their application. He did not believe that the respondents had applied the legislation to his application.

With reference to the requirement in the legislation that the purpose for which decrofting was sought must relate to the good of the croft or of the estate or to the public interest, Mr Palmer submitted that he and his wife were the croft and the estate. It was in their interest that the decrofting direction be granted. It was certainly in the public interest that it should be granted. With reference to production 17, it was stated there that the respondents would grant a reasonable purpose application unless satisfied that the proposed purpose would have an adverse effect on the local crofting community. The present application would have a positive effect on the local community. He failed to see, therefore, why they should be refused a de-crofting direction.

So far as the need for planning consent was required, Mr Palmer had no reason to suppose that he would not get planning consent. Absence of planning consent did not appear to have prevented the granting of decrofting applications elsewhere.

Returning to the question of the existence of a crofting community, Mr Palmer argued out that the question was whether they were *in* a crofting community, not whether they were *adjacent* to one.

In Mr Palmer's submission the purposes for which decrofting was sought were reasonable. They would not have an adverse effect on any adjacent crofting

community or on the community at large. On the contrary, socially and economically, they would only be of benefit to the community at large.

So far as partial decrofting was concerned, Mr Palmer did not think that fragmenting the land into individual components, some decrofted and some not, would be a good idea. That said, it would not break his heart if we were to leave the land above the road subject to crofting but in his submission it was better to deal with the whole croft as a unit. The fact was that crofting was changing, indeed agriculture was changing. The present application reflected that change and was rendered necessary by it. There was no reason not to grant the application.

Finally, Mr Palmer referred to production 19 which, he said, had been picked off the internet at random. He referred, in particular, to paragraph 6.2 thereof and to the reference to the Board of the respondents having approved an application for which the reasonable purpose stated had been the building of four apartments. The relevant sub-paragraph reads:- "The development is considered to be for a reasonable purpose as it will allow for the building of four apartments which in turn will provide employment for the applicant's wife and bring additional visitors to the area which will benefit other local businesses". Mr and Mrs Palmer were not proposing to build four apartments but otherwise that statement accurately summarised all that they wanted to do.

(ii) For the respondents

Mr Smith began his submissions by helpfully taking us through the statutory provisions which now govern de-crofting. In particular he referred to sections 23 to 25 of the 1993 Act as well as to some statutory background in the form of the relevant provisions of the Small Landholders (Scotland) Act 1911, the Crofters (Scotland) Act 1955 and the Crofting Reform (Scotland) Act 1976.

Having set out the statutory context Mr Smith then turned to the respondents' assessment of the application. As appeared from production 2, the letter of 4th January 2006 intimating the respondents' proposed decision, the respondents considered this application to fall within the discretionary category of section 24(3) of the 1993 Act rather than the mandatory category of section 25(1)(a) of that Act. That was because the respondents considered that Mr and Mrs Palmer had not put forward any reasonable purpose (within the meaning of section 20 of that Act) for decrofting the whole of the croft.

Mr Smith then referred to the terms of section 20(1) of the 1993 Act and in particular to the requirement that the reasonable purpose had relation to "the good of the croft or of the estate or to the public interest". Subsection 20(3) provided several examples of what constituted a reasonable purpose for the purposes of subsection (1). That was not a comprehensive or exhaustive list. The Court had, from time to time, been satisfied that other purposes stated by landlords (in the context of resumption, with which section 20 deals) had satisfied that statutory test. A recent example of such a purpose, which had some relevance to the present case, was the proposed use of areas of ground at Edinbane, which comprised common grazings shared by several crofters, for use as a wind farm (*Hilleary v MacAskill and Another*).

Mr Smith then quoted the Full Court's treatment of the statutory provisions which had become sections 24(3) and 25 of the 1993 Act in the case of *Gray v Crofters Commission* at page 2 of the Report. There the Court had said that it was not a reasonable purpose for resumption of croft land that it enabled the cultivation of the holding to be carried on personally by the landlord. Similarly, that was not a

reasonable purpose for a de-crofting direction. The consequence, the Court had said in *Gray v Crofters Commission*, was that the case fell to be considered under what were then sections 16(9) and 16A(2) of the 1955 Act. The latter was now section 25(2) of the 1993 Act and in *Gray* the Court had decided that it contained two guiding principles which Parliament had laid down as to be followed in deciding whether to grant or refuse a decrofting direction. These principles were, firstly, that regard had to be had to the general interests of the crofting community in the district in which the croft was situated, which was the overriding consideration, and secondly, as a particular aspect of that overriding consideration, demand, if any, for the tenancy.

In *Steven v Crofters Commission* the Full Court had rejected an application for de-crofting by an owner-occupier of a croft where the sole reason for it was that she wished to be free from control by an outside body and free to do as she wished with the croft both in terms of sale and succession. Having held that that was not a reasonable purpose for de-crofting, the court had gone on to assess whether de-crofting would have any adverse effect on the common grazings in which the croft shared and concluded that it would not. However, the Court had further held that decrofting of this croft would reduce the local pool of croft land kept available for persons of crofter status. That was in a situation where there was held to be local demand. While Mr Smith quoted extensively from the Court's judgement (the full extracts are shown in his helpful transcript of his submissions) we will content ourselves for present purposes with the following extract (taken from page 41 of the report):-

"The decrofting of Eastend (the croft in question) would reduce the local pool of croft land kept available for persons of crofter status and in a situation where there is present local demand. While each de-crofting application has to be considered on its own merits, nevertheless if this application were now to be granted on the present grounds, further de-crofting applications in like circumstances might be difficult to resist with possible harm to the local community".

Although no objection to the present application had been taken by anyone who might have an interest in the tenancy of the land, the Commission had nevertheless been satisfied that there would be local interest in a crofting tenancy of the land comprised in the applicants' croft if it were genuinely made available for letting at the present time.

In *MacColl v Crofters Commission* the applicant had pled, among other grounds of appeal, that he proposed to use the croft for agricultural purposes and that in any event de-crofting would not be detrimental to the general interests of the local crofting community. It was submitted in that case that *Steven v Crofters Commission* had been wrongly decided. Again Mr Smith quoted extensively from the Court's judgement and for these full extracts we again refer to his written submissions, but we will content ourselves with the following extracts (from pages 145 and 146 respectively):-

"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 had the applicant been 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 Macmaster* 1962 SLCR App. 91 and *Board of Agriculture for Scotland v MacLean* 1929 SLCR 71 at page 85."

and

“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.”

The Court had then found the case to be indistinguishable from *Steven* and refused the appeal.

Moray Estates Development Co v Crofters Commission was a case in which the Court had refused the landlords’ appeal although the application had been for a reasonable purpose (tree planting and house building). The appeal had nevertheless been refused because the Court had been “fully satisfied” that there was a large and genuine demand for the croft from persons who might reasonably be expected to obtain the tenancy thereof if offered for let on the open market. Although deciding the case on that ground, the Court had also asked itself whether it was in the general interests of the crofting community in the district that the croft should be decrofted and whether, indeed, there was any such community. In considering the latter question the Court had said that:- “There are no common grazings as there were in the case of *Steven v Crofters Commission*, although this is not fatal to the presence of a local crofting community. However, there certainly needs to be more than one croft. We consider that there does at least require to be a nucleus of crofts to which the Acts still apply to justify the need to maintain a pool of crofting land”.

In that case the Court had held that there was “just sufficient” evidence to justify the Commission’s proposed decision. In the present case the applicants had, quite properly, emphasised the fact that their croft was a self-contained unit with no share in any common grazings. However, the croft was still substantially used for the grazing of livestock and had limited alternative uses and as it neighboured with two townships which included common grazings shared by several crofts, the Commission had concluded that it would not be in the general interests of the local crofting community to deplete the local pool of croft land in the absence of a reasonable purpose under the 1993 Act. It was clear from the *Faebuie* case (i.e. *Moray Estates Development Co v Crofters Commission*) that it was not essential for a croft to share in common grazing before the Commission could exercise its discretion to refuse a de-crofting application.

Sutherland v Crofters Commission had been the first case in which the Commission had led evidence and appeared before the Court in order to defend its proposed decision. Although there had been no objection to the application, nor any express interest in obtaining the tenancy of the croft, the Court had refused the appeal, holding that there was a local crofting community in the district in which the croft was situated and that there was ample evidence to justify the Commission’s decision that in the absence of any reasonable purpose for de-crofting the whole croft, they were entitled to conclude that the applicants’ reasons for wishing to decroft were insufficient to justify the removal of the croft from crofting tenure. This was similar to the view taken by the respondents in the present case.

Mr Smith then turned to consider whether the respondents had been entitled – and correctly exercised their discretion – to refuse to modify the application in accordance with section 25(5) of the 1993 Act. He said that at an earlier stage it had been suggested to the applicants that they might restrict their application to those areas of the croft already developed, or intended to be developed, for campsite or house related functions. However, said Mr Smith, the applicants did not appear to have, definite, concluded plans, including outline planning consent where such consent

was required, for even such of their proposals as related to the campsite. As we understood Mr Smith's submission, this detracted from proposals which would otherwise appear feasible and would have constituted a reasonable purpose having relation to the public interest (i.e. the provision of tourist facilities) to such an extent that they did not, in the circumstances of this case, amount to reasonable purposes.

Dealing with the stated purposes in more detail, it was the respondents' understanding that the area between the house and the public road and the larger area to the north of the road giving access to the campsite were to be used principally as a vegetable garden, for grazing stock and for conservation purposes. The respondents did not consider that any of these proposed uses amounted to a reasonable or compelling purpose for de-crofting the area concerned. In particular, the respondents did not regard such proposed uses as incompatible with the methods of cultivation specified in paragraph 13 of Schedule 2 to the 1993 Act. Furthermore the respondents did not consider that it would be appropriate or practical to impose conditions on any de-crofting direction, in terms of section 25(3) of the 1993 Act, where the proposed use of the land was one permitted under crofting tenure. As established from the cases already cited, it was not a reasonable purpose for decrofting that the cultivation of the croft be carried on by the owner-occupier personally.

In any event the applicants had stated to the respondents that they were asking for the whole croft to be decrofted as it made "no sense to fragment it with a bit here and a bit there". It was the respondents' preference to see "reasonable purpose" applications for each phase of any proposed development or extension of the applicants' business so that each such application could be considered on its own merits at the relevant time applying the statutory presumption in favour of de-crofting which would arise under section 25(1)(a) of the 1993 Act, subject, of course, to the considerations contained in subsection (2) of section 25.

FINDINGS IN FACT

We found the following matters admitted or proved:-

1. The applicants are owner-occupiers of a croft known as Borge, Arnisort, situated on the shores of Loch Greshornish in the north of the Isle of Skye.
2. The croft extends to some 87 hectares and is bisected by the A850 Portree to Dunvegan public road. Above the road, that is to say on its easterly side, is an area of some 59 hectares of fenced rough grazing. Below the road, between it and Loch Greshornish, is the remainder of the croft comprising its inbye land and some grazing.
3. The applicants keep a mixed-breed flock of 30 sheep on the croft and one horse. Said Mrs MacAskill also grazes her sheep on the croft from time to time, mostly on the hill but sometimes on the inbye. A small area of ground is used to grow vegetables.
4. Borge is a 'stand-alone' croft. It is not part of a township and does not share in common grazings. With the exception of an informal arrangement, born out of friendship, between the applicants and said Mrs Macaskill whereby she grazes sheep on their land and they have the use of her fank for dipping and dosing their sheep, there is no interaction of a crofting nature between the applicants and any other crofter. Borge is, however, bounded to the north by the crofting township of Kildonan and Flashadder and to the south by the crofting township of Edinbane. Neither is a vibrant crofting township but some

crofting goes on in both. Beyond these two townships, the entire north of Skye is a collection of crofting townships. There is, therefore, a crofting community in the district in which Borge is situated.

5. Borge was at one time part of the Lyndale Estate. It was purchased from the Estate by the then tenants, Mr and Mrs MacDonald, in 1974. Mr and Mrs MacDonald established a campsite on the croft. At that time or subsequently de-crofting directions were obtained in respect of three areas of the croft, one being the area of said campsite, one the site of the croft house and relative ground and the third, possibly granted in contemplation of Mrs MacDonald's sale of the croft, some time after her husband's death, the site for a new house. These three areas are the areas respectively marked A, B and C (C being in two parts) on the plan attached to production 4.
6. The applicants bought the croft and the de-crofted areas A and B from Mrs MacDonald in 1999. Since then they have invested a great deal of energy, money and time in the development of the camp-site business. In doing so they have displayed considerable imagination and vision. They have created an attractive 'advertising wall' announcing the entrance to the camp-site from said public road, built an access road to the campsite, opened a shop and office (the former open to non-residents as well as campers), restored a blackhouse, started bicycle and canoe hire, created a boat launching facility for use relative to water sport, upgraded the toilets and started to supply fresh eggs and home-baked bread to campers. They have funded these developments entirely from borrowing secured over the former croft house and from earnings not just from the campsite but from jobs they have taken on in addition to the demands of their own business.
7. The business thus developed by the applicants is of benefit to the local community, particularly to the village of Edinbane to the south. The campsite attracts visitors to the area and allows them to spend some time in the locality. They patronise local shops, restaurants and licensed premises. The applicants employ two people on a seasonal and part-time basis and they buy some of the stock for their shop from local sources (such as the Isle of Skye Brewery, The Co-operative Supermarket in Portree and a local potter) although the greater part comes from a Cash and Carry. The continued existence of the applicants' camp-site and its ability to go on attracting people to the area is, therefore, in the public interest.
8. The applicants have now applied to the respondents for a de-decrofting direction in respect of the whole of Borge croft. Although lodged as a single application for de-crofting of the whole, different purposes are identified for different parts of the croft. These are as follows, again referring to the map at production 4:-
 - i. The area marked "V" is to be an extension of said camp-site. It comprises an area between the eastern boundary of the present campsite and the fence along the western verge of said public road. It is intended for use by campervans or caravans rather than tents and the pitches to be laid out for these will comprise the greater part, although not the whole of area "V", the part of it nearer the road being too steep for that purpose.
 - ii. The area marked "X" is to be used for water sports such as canoeing and sailing. It is to the west of the existing campsite and its ancillary facilities. A rudimentary boat launching facility has already been created in this area and old ship containers are used to house canoes and other equipment. The applicants' intention is to replace these with

proper, permanent facilities in the form of a slipway and more appropriate accommodation. This proposed development has the potential to benefit the local community in that area "X" is at the point at which Loch Greshornish becomes deep enough to allow boats to be launched in any state of the tide.

- iii. The area marked "W" already contains the campsite reception and shop and the restored blackhouse. In addition to the facilities already situated there the applicants are proposing to build a café in this area.
 - iv. The area marked "Y" is a large area, comprising the whole of the rest of the part of the croft below the road. It is presently used mainly for grazing by the applicants' sheep and, from time to time during the winter, by sheep belonging to said Mrs MacAskill. A number of purposes are identified for it. Its south-western corner, immediately north of areas X and W, is the site of an iron age Broch. Adjacent to this is an area of rough grazing and bog. The bog is said to be very rich in flora and fauna and the intention is to create a walking area with the bog as its centre-piece, thus preserving the bog and creating a recreational feature for campers. This area is already used as a dog-walking area for campers. To the east of this area and between it and said public road is a large area intended for possible use as a Rare Breeds Park. The applicants' thinking is not yet sufficiently advanced to be more specific as to what this might, in practice, involve in terms of size, numbers and varieties of animals and ancillary facilities. To the south of this last-mentioned area, and roughly between the house and said public road is an area which would be used for a variety of purposes such as a vegetable garden (already in the course of being established) and a paddock and grazing for horses.
 - v. The area marked "Z" is the land above the road. It is presently used for grazing sheep, both by the applicants and Mrs MacAskill. Its proposed use divides it into two with the upper, higher ground to be left unused as a possible habitat for Golden Eagles fleeing the wind turbines of the proposed Edinbane Wind Farm and the lower ground retained for rough grazing by sheep and, possibly, reindeer. Again the applicants' thinking about reindeer is at an early stage and the feasibility of the idea has not been fully researched.
9. The foregoing proposals are driven, at least in part, by the applicants' perception that their business is under threat from the advent of the proposed Edinbane Wind Farm. The applicants believe that its coming has the potential to reduce drastically the number of people visiting and staying in the area and that the future of their business depends on counteracting this by the provision of an increased range of activity at the campsite so that these activities themselves become the attraction in place of the beauty of the landscape.
10. No objection has been lodged to said application.
11. After sundry procedure, which included the holding of a public hearing on the application, by letter dated 4th January 2006 (production 2) the respondents wrote to the applicants intimating their intention to refuse said application on the following grounds:-
- "a) The croft is situated at the heart of a crofting community and is bounded by crofting townships and common grazings. Reasonable purpose has not

been demonstrated to decroft the whole croft and appropriate planning consent has not been obtained.

- b) The croft is used primarily for agricultural purposes at present by the applicants and by a neighbouring crofter from the village of Edinbane. Their croft working is communal and Borve croft is integrated into the township at agricultural, economic and social levels.
- c) The croft is at present fulfilling a demand for croft land in the area as it forms an integral part of the neighbouring crofter's unit.
- d) The maintenance of a pool of crofting land is in the interests of the community and provides an actual and potential opportunity for active crofting.
- e) The continued use by an Edinbane crofter of the part of the croft occupied by her should decrofting be granted should not be seen as an argument supporting decrofting.
- f) The Commission are aware of widespread interest in crofts throughout-out Skye and specifically have a list of 6 names of people under 40 years of age who are interested in obtaining crofts in North West Skye through the Highlands and island Croft Entrant Scheme."

12. The applicants have appealed that decision to this Court.

DISCUSSION AND DECISION

The first of the respondents' grounds of refusal raises two matters which are fundamental to the application and to the way it is to be decided. These are (i) whether there is a crofting community in the district in which the croft is situated and (ii) whether the applicants have established a reasonable purpose, or reasonable purposes, for decrofting. We deal with these in turn.

Is there a crofting community in the district?

The applicants argue that they are not part of a crofting community. The relevant question in terms of section 25(2) is, however, a slightly different one. It is whether there is a crofting community in the district in which the croft is situated. The significance of the question is that if there is no such community there is a presumption in favour of granting a decrofting application: *Gray v Crofters Commission; Gammie v Crofters Commission*.

The applicants' argument was based on the fact that Borve is a 'stand alone' croft. It is not part of a township, does not have a share in any common grazings and does not share any facilities, or join in communal working, with any other croft. The agreement the applicants have with Mrs MacAskill simply allows her to graze stock on their land and does not involve interaction of the kind associated with a crofting community.

In our view that takes too narrow a view of the matter. As we have said the question is not whether Borve is integrated into a crofting community in that sense but whether

there is a crofting community in the district in which Borve is situated. In our view it is obvious that there is such a community. Defining 'district' narrowly for the moment, that community is comprised of the crofting townships of Kildonan and Flashadder, immediately to the north, and Edinbane, immediately to the south. Both of these townships have common grazings and although few of their crofters seem to be active we infer from the existence of common grazings that there is some degree of communal working among them. But in any event, as Mr Smith argued in reliance on what was said in *Moray Estates Development Co v Crofters Commission*, one can have a crofting community even where there are no common grazings. Defining 'district' more widely, it is well within the judicial knowledge of this court that there are numerous crofting townships, and numerous crofts, in the whole parish of Duirinish and indeed in the whole of the north of Skye. In our view, therefore, it would be absurd to hold that there is no crofting community in the district and the applicants' argument on this point fails.

Have reasonable purposes been established?

The respondents' approach to this was to ask the question whether a reasonable purpose or reasonable purposes had been shown for de-crofting the whole croft. It seems that they felt compelled to take that approach because the applicants declined a suggestion that they modify the application so as to confine it to an extension of the campsite and de-crofting of the area of the shop/office and blackhouse (see Answer 10 for the respondents). The respondents chose not to modify the application at their own hand as they could have done in terms of subsection 25(5). The result was that they treated it as an 'all or nothing' application. Taking that approach, they felt that since a reasonable purpose, or reasonable purposes, had not been stated in respect of the whole croft, whatever the merits of some of the stated purposes for certain areas of the croft might be, the application fell to be treated in its entirety as one for their discretion in terms of section 24(3) and 25(2) rather than one to be considered, even in part, as coming under the mandatory provision of section 25(1)(a). They were also, on that approach, unable to come to different conclusions for different parts of the croft.

Whatever the applicants' position was before the Commission - we understand them to deny that they had been inflexible on the matter - their position before us was that whilst they would prefer the whole croft to be de-crofted now, thereby avoiding the necessity of repeated applications and possible resultant fragmentation of the croft with parts de-crofted and parts not, they would prefer that their application be granted in part than refused in total. In other words the application is not conditional on the whole croft being de-crofted: it is not now a case of all or nothing, if it ever was. Instead it is more like a number of applications, one for each part of the croft for which a separate purpose is stated. Since our freedom to treat the application as modified must be at least as wide as the respondents' under subsection (5) of section 25 (see subsection (8) which imposes no constraints on how we may dispose of an appeal) we have felt able to treat the application, and the appeal, in that way.

The result is that our approach is different from the respondents' in that we propose to examine the merits of the application as it relates to each part of the croft for which a distinct purpose is proposed. Because our approach is different in this way from the respondents', the merits of the application in respect of each such part of the croft will be at large for us. In other words, this is not a situation in which we have to avoid substituting our own exercise of discretion (in so far as our decision involves an exercise of discretion) for the respondents': our approach being different, any exercise of discretion on our part will be *de novo*.

Taking that approach we deal with the various areas of the croft as identified on the plan which is part of production 4 as follows.

Areas V, X and W

We have no doubt that a decrofting direction should be granted in respect of these areas, subject to the conditions we mention below.

We say that firstly because the purposes stated for each of them are, in our view, sufficiently linked to the campsite business and sufficiently specific for these purposes to amount to reasonable purposes within the meaning of sections 20 and 25 of the 1993 Act. In a sense the purposes derive their legitimacy, if we can put it like that, from the original decision to de-croft the site of the present campsite. It was obviously thought at that time that the provision of a campsite was a reasonable purpose for de-crofting. We agree with that and are simply extending that logic to these additional areas given that the purposes stated for them are so closely linked to the campsite. Secondly, we are satisfied that the purposes stated for these areas are in the public interest of the local community for the reasons identified in finding in fact 7, so that that specific requirement of subsection 25(1)(a) is satisfied. Thirdly, the extent of the ground involved in each case is not excessive, again satisfying that specific requirement of the subsection. And, finally, applying the principles contained in subsection 25(2), we do not think that the interests of the crofting community in the district would in any way be prejudiced by the granting of the application in respect of these limited areas of ground.

Area Z

We are equally clear about what should happen with area "Z". This is the land above the road. It is a large piece of land, extending to some 59 hectares and forming a wedge between the common grazings of Kildonan and Flashadder, to the north, and Edinbane to the south. Neither geographically nor in terms of the purposes stated for it is it as closely linked with the campsite as the land below the road.

The stated purpose for the lower part of this area is rough grazing with the possible introduction of reindeer. Rough grazing is what it offers at the moment and is a purpose subsumed within the meaning of "cultivation" for the purposes of Paragraph 3 of Schedule 2 to the 1993 Act. The introduction of reindeer would likewise be compatible with that definition of cultivation. The effect of de-crofting would therefore simply be to have the land freed from the constraints of crofting legislation. It is clear from the cases that that is not a reasonable purpose for resumption, and hence not for decrofting, within the meaning of the legislation (*MacColl v Crofters Commission; Tabor v McMaster*).

The purpose stated for the higher ground is simply to be left as a wild area and possible future habitat for eagles dispossessed from other nearby areas by the advent of wind turbines. We do not know what implications this has for the actual management of the land except that we understand that no grazing would take place. Mr Palmer said that he had discussed his proposal with a representative of the RSPB who had thought it feasible. Before deciding that this was a reasonable purpose, however, we would require more detail as to what is intended to be achieved, how it is intended to achieve it and how feasible it is to achieve it. The present plan is lacking in all three respects and we are unable to hold that a reasonable purpose has been established for this land.

The result of that is to take the application, in so far as it relates to the land above the road, out of the mandatory provisions of section 25(1)(a) and into the discretionary area of sections 24(3) and 25(2).

Approaching matters in that way, the first thing we ask ourselves is whether there are cogent reasons, falling short of reasonable purposes, for de-crofting this land. We think not. It is neither geographically nor in terms of its intended use as closely related to the campsite as the ground below the road. It forms a distinct area, separated from the campsite by the public road. Its present use is agricultural and has nothing to do with the campsite. Although the chance of seeing Golden Eagles and reindeer would no doubt be attractive to users of the campsite the proposed uses for this area are less closely connected with the campsite than any of the purposes stated for the land below the road. For reasons stated below in relation to area "Y" we do not think de-crofting of this area of land is necessary for the purposes of raising capital. We are not, therefore, persuaded that there is any case to be made for the de-crofting of this area.

That being the case, and reminding ourselves that the onus is on the applicants to show good reason why the order should be granted not on the respondents to show reason why it should be refused (*McCull v Crofters Commission* at page 143), it is not necessary for us to consider the effect of de-crofting on the crofting community in the district and the application in so far as it relates to area "Z" simply falls to be refused.

Area Y

We found this area to be the most problematic.

So far as reasonable purpose is concerned we have a difficulty caused by the unspecific nature of the stated purposes. The applicants' thinking as to the Rare Breeds Park, especially, seemed to be in the early stages of development. The evidence in relation to both it and the creation of an ecologically rich recreational area gave us the impression that these were things which might happen rather than things which, subject to any necessary planning permission or the like, would happen. In our view what is required in order for de-crofting to be granted under section 25(1) is not an uncertain and unspecific notion as to a possible use for the land in question but a firm, specific, well-developed and demonstrably feasible proposal. It is only when that is available that the question whether the purpose is a reasonable one can properly be addressed. We do not find that in this application in so far as it is based on these proposed purposes. For example, it was not clear whether the applicants had applied their minds to any health and safety implications there might be in having such a park cheek by jowl with the campsite. So far as the other purposes stated for area "Y" are concerned – the creation of a paddock and vegetable garden – these are entirely compatible with crofting use and there is no need for a de-crofting direction in order to achieve them. Accordingly we hold that no reasonable purpose has been established for this area of land.

That being so, the application in so far as relating to it falls to be determined within the discretionary provisions of the Act. We have found that to be a more difficult exercise in respect of this area of land than we found it to be for area "Z".

We have identified the following factors discussed below as bearing upon the exercise of that discretion.

Again we begin by asking whether there are cogent reasons, falling short of reasonable purposes within the meaning of the legislation, for de-crofting. We find that there are. It is because of that that we have required to perform a more detailed balancing exercise in relation to this area than was necessary for area "Z". The cogent reasons we have identified have to do with the way in which this area is very closely related to the existing campsite. It is accessed by the road which leads to the campsite. At the junction with the public road there is what Mr Palmer referred to as the 'advertising wall', advertising the existence of the campsite, and one's impression when turning off the public road is that everything beyond the wall is, in effect, the campsite. Furthermore part of the land is, as we understand it, already used to allow campers to walk their dogs on it. Accordingly there is a case for treating everything below the road as a *unum quid* centred on the campsite. Doing so would be geographically and administratively neat.

Another reason for de-crofting advanced by the applicants is that it would allow them to use the land as security for borrowing. That is true but we were not persuaded that any land beyond the present campsite and areas "V", "X" and "W" is necessary for that purpose. Mr Palmer gave evidence of their being £80,000 to £90,000 of borrowing secured over the applicants' home and accepted that it was likely to be worth something over £200,000. Nothing is secured over the present campsite. In that situation we take the view that the equity remaining in the house together with the value of the present campsite and areas "V", "X" and "W" is going to be enough to provide security for the sorts of sums which Mr Palmer said were necessary for his planned developments. Accordingly we have discounted this as a reason for de-crofting.

Secondly, we require to consider the general interest of the crofting community in the district in terms of subsection 25(2). We begin by considering the nature of area "Y". Although very much smaller than the area above the road it is, on the other hand, very much larger than the aggregate of areas "V", "X" and "W". It is, in fact, a significant area of ground and it includes, unlike the area above the road, good inbye land as well as the flora-rich bog. It would make a very attractive croft particularly in conjunction with the area above the road. It is presently used for grazing by both the applicants' and Mrs MacAskill's sheep. There is also some cultivation. It is therefore being actively used for crofting purposes. It is, therefore, a not insignificant area of good crofting land. Its loss to the pool of crofting land would be a more significant loss than the loss of areas "V", "X" and "W".

We now turn to look at the crofting community in the district, by which we mean the townships of Kildonan and Flashadder and Edinbane. On the evidence that community is not at the moment a vibrant one either in terms of the numbers of active crofters involved or of the extent of their use of either inbye land or common grazings. In that state of affairs we accept that granting decrofting in respect of this area of ground would not have any immediate adverse effect on the local crofting community.

As was observed by the Full Court in *Sutherland v Crofters Commission* (at page 102), however, the Commission requires to take a long term view and an unconditional decision to decroft is an irrevocable step. Although we heard no evidence as to present demand for crofting tenancies in this area (the respondents' pleadings and other documents mentioning demand from young crofters not being evidence) the very fact that there is a crofting community makes it desirable to maintain "a local pool of croft land" for persons of "crofter status" as it was put in *Steven v Crofters Commission*. Mr Palmer argues that the croft will, in fact, never be part of any pool of crofting land available to let (Paragraph 9 of the applicants'

Statement of Facts). That is, however, to overlook the powers of the Commission to call for letting proposals for vacant crofts and ultimately to let such crofts themselves under subsection 23(5) of the 1993 Act. As was remarked by the Full Court in *Gray v Crofters Commission* (at page 7), that it may not be the Commission's practice to enforce the vacancy provisions of the legislation cannot detract from the fact that they could legally do so. It may be thought that in the present state of crofting the possibility of that happening in the particular circumstances of this case is remote to the point of being fanciful. But that is not necessarily so. Circumstances can change. The present applicants are energetic and dynamic users of their land but some successor may not be. We have to take account of such possibilities: we cannot ignore the long term view.

Thirdly, the balance of convenience. We use the term to mean the balancing of the outcomes as between the granting of the application on the one hand and its refusal on the other. If the application is granted unconditionally - we do not consider that the present proposals are sufficiently detailed to enable us to impose meaningful conditions on de-crofting in terms of subsection 25(3) - the land will be irretrievably lost to crofting. If, on the other hand, the application is refused nothing irretrievable is done. Not only that but very little prejudice results to the applicants. If they deem it necessary and appropriate to do so they can re-apply when their proposals for this area of ground are clearer and firmer. That is an inconvenience which will involve them in additional expense but it is no more than that. In the meantime they can use the ground for its present purposes. More than that, they can even use the ground for their intended purposes. These are sufficiently consonant with crofting that, although the applicants would theoretically remain vulnerable to the possibility of having a new tenant installed in this area of land, whilst it was in use for these purposes it is inconceivable that the respondents would impose such a tenant. Finally under this head we bear in mind the threat to the viability of the camp-site business posed, on Mr Palmer's evidence, by the advent of the Edinbane Wind Farm. We express no view on the reality of that threat except to say that Mr Palmer is in a better position to judge it than we are, but if it is real and if, despite Mr and Mrs Palmer's best efforts, it has the effect feared then a significant area of land (area "Y") would have been taken out of crofting for no very good or compelling reason. From that point of view it may be prudent to await developments over the next few years rather than grant de-crofting now. Certainly the de-crofting of this area of land could not, on the basis of the present proposals, make the difference between the campsite surviving as a business or not surviving, come the turbines.

Balancing these considerations as best we can, and again bearing in mind that it is for the applicants to show good reason why de-crofting should be granted, we have, with some hesitation, come to the view that we should refuse the appeal in relation to area "Y".

Conditions

Since the application, to the extent to which we have decided that it should be granted, is wholly predicated upon expansion of the campsite and diversification of the activities associated with it, we think it right that de-crofting should be conditional upon planning permission and consents being obtained for (a) the change of use of area "V" so as to permit its use for caravanning and camping purposes; (b) the erection of a café on area "W" and (c) if the type of slipway and storage facilities envisaged by the applicants for area "X" so require, the erection of a slipway and relative storage facility on that area, all within a period of five years. A condition precedent to these, however, is the lodging by the applicants with the respondents of

a detailed, measured plan showing the boundaries of these various areas and generally corresponding to the identification of these areas on the map, part of production 4, annexed and subscribed as relative to our Order, all to the satisfaction of the respondents. In that regard we have marked on said map the boundary between areas "V" and "Y" as pointed out to us by Mr Palmer in evidence

EXPENSES

We have allowed parties 21 days within which to lodge any motions and submissions on expenses.

"AM" "RJMacl" "JAS"

of which intimation is hereby made.

"I STEEL"

for Principal Clerk