

FULL COURT

(Lord Elliott, D D McDiarmid, R Macdonald)

Sutherland v Crofters Commission

(Application Caithness RN 175 - Order of 3rd October 1990)

Croft - application for decrofting direction - proposed refusal by Crofters Commission - appeal to Scottish Land Court - general interest of the crofting community - demand for tenancy - proposed direction of Crofters Commission upheld.

The Applicant as owner occupier of a croft at Latheron appealed to the Land Court in terms of Section 16A(8) of the Crofters (Scotland) Act 1955 against a proposed decision of the Crofters Commission to refuse a decrofting direction in respect of her croft. Her grounds of appeal were that the Crofters Commission did not specify any findings which had led them to assert that there was an identifiable crofting community; that the community interest had not been defined and established and that there was no evidence of local demand for the tenancy of the croft. The Applicant wished to obtain the decrofting direction to ensure that her croft would be kept in her family and that there would be no risk of the Crofters Commission asking for reletting proposals with a possible subsequent purchase by a new tenant. The Court held that there was ample evidence to justify the Crofters Commission decision and that the Commission were entitled to conclude that the Appellant's reasons for wishing to decroft were insufficient to justify the removal of the croft from crofting tenure.

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

Mrs Georgina Isabel Sutherland, Landhallow, Latheron, Caithness has appealed to the Land Court under Section 16A(8) of the Crofters (Scotland) Act 1955 (as amended) against a proposed decision of the Crofters Commission dated 28 December 1989 refusing a decrofting direction in respect of her croft at Landhallow. Her grounds of appeal are that the Crofters Commission did not specify the findings which had led them to assert that there was an identifiable crofting community, nor in what ways a community, if one existed would be adversely affected by taking the croft out of crofting tenure. She also averred that the community interest had not been defined and established and that an Application for a decrofting direction in respect of another croft in close proximity had been granted by the Crofters Commission. She also averred that, apart from one objection received in response to the publication of the Application for a decrofting direction which was subsequently withdrawn, no local demand had emerged for the tenancy of the croft.

Section 16A(7) requires the Commission to give notice in writing to the Applicant of their proposed decision specifying the nature of and the reasons for such decision. In a letter dated 28 December 1989 lodged in process the Commission set out their reasons for proposing to refuse her Application for decrofting direction as follows:

“The Commission's understanding is that you wish to decroft the holding to avoid the possibility of the Commission calling for reletting proposals at a future date in order that you may preserve the holding for your family. The Commission consider this to be insufficient reason to justify a decrofting direction, thereby removing the holding from the local pool of croft land. The Commission also recognise that there is an identifiable crofting community in

the area and consider it to be in the interests of that community that the holding remain within the ambit of the Crofting Acts.”

The Commission also lodged in process a report of a hearing held in Latheron Public Hall on 20 November 1989 into the Application for a decrofting direction. Representations were made on her behalf prior to the hearing by her solicitors Messrs D W Georgeson & Son, Wick setting out her grounds for wishing to decroft as follows: -

“Our client has four of a family and her reason for wishing to decroft the holding was so that she could pass on the croft to her four children equally among them, without the encumbrance of crofting tenure. It is certainly the case that one or more of her family will return to Caithness in due course and carry out farming operations on the croft. That being so, the croft will not come in to the local pool of croft land available for letting to strangers, Should one of the members of the family succeed in obtaining a tenancy of the croft that person would have an unfair advantage over the others. While the croft is only a small one, Mrs Sutherland has devoted a considerable amount of energy and spent substantial sums in developing the croft into a very attractive and well run holding. It is her most sincere and fondest wish that she should be able to pass on the results of all her efforts and expenditure over the years to her family unencumbered in any way. The thought that the croft might fall in to the hands of strangers is deeply distressing to Mrs Sutherland and we may say, also to the members of her family. Our understanding is that there was little opposition to the Application to decroft and in the circumstances, we would be most grateful if the Commission would reconsider their decision and grant the Application.”

As is normal practice the findings of the hearing were reported back to the Commission who made their decision which is now the subject of appeal before this Court. The Applicant requested that the case be heard de novo as it was neither appropriate nor reasonable to dispose of the case by legal debate only. The Court acceded to this request.

At the hearing Mrs Sutherland was represented by Mrs Ogilvie, solicitor, Wick. The Respondent Crofters Commission, were represented by their solicitor Mr Smith.

Examined on oath Mrs Sutherland outlined the history of the croft which had been in her family, with the exception of a few years since the last century. It extended to 4.86 hectares of arable and 1. 42 hectares of outrun now with two apportionments in the common grazings. She still worked the croft although she was in her 70s and had both cattle and sheep stocks. She wished to retain the croft in her family and was afraid that, without decrofting, the Crofters Commission could subsequently ask for reletting proposals and a new tenant could ask to buy the croft. She had already experience of this happening on a family croft and this influenced her considerably. She wished to be free of crofting tenure.

She agreed the area was a crofting community although there was little or no communal working and no common grazings committee. The croft some 200 yards from her own croft had been decrofted for no better reason than she had, and she had heard of other crofts being decrofted since her Application was refused. She had never heard of an assignation being refused in the area and she was surprised by some of the decisions. She thought there were seven crofts in the immediate area but Latheron was a large parish.

Cross-examined by Mr Smith for the Crofters Commission Mrs Sutherland agreed she had a sublet of an adjoining croft now tenanted by her son Colin Sutherland. She worked it in conjunction with her own croft. Asked if her good standing in the neighbourhood and standard of management was the main reason for the lack of demand for her croft if it became available for letting, she stated that she was greatly encouraged by the loyalty shown to her in the community. She appreciated the Commission were bound to retain a stock of crofts but felt the right of inheritance should prevail without hindrance. She could give no example of the Crofters Commission asking for reletting proposals where a croft was worked; but she considered that the decrofting of Black Croft in the vicinity was a precedent and potential purchasers would only buy if the land was decrofted. There was no demand for the tenancy.

Some crofters had substantial holdings and young entrants to crofting were not considered when amalgamation took place although it was not always people with crofting experience who were given crofts. Decrofting the house only would not achieve her objective of retaining the croft in her family. She agreed her only purpose in seeking to decroft was to preserve the croft in the family and that it would still continue as a working unit, but if decrofted, it would be easier for her family to hold on to it. She had no intention of disposing of it. Black Croft was never worked by the former tenant but it was decrofted for the same reason she gave and it was of great benefit to the owner-occupier in monetary terms. She considered this was unjust. Her son Colin Sutherland who presently owned a hotel in Golspie would inherit the croft and he intended to return to Latheronwheel eventually.

Mr James Forbes, local assessor for the Crofters Commission gave evidence. He had made inquiries in the area in relation to demand for the tenancy of Mrs Sutherland's croft if it became available, but apart from one person who had subsequently withdrawn, no demand was identified locally. Neither did he think that the decrofting of Landhallow would have any adverse effect on the general interest of the crofting community in the district. He agreed with Mr Smith that Latheron parish was a crofting community and that a number of crofters had purchased their crofts. He also agreed that there was no general desire for decrofting but reiterated that there was no local demand for crofts, and there was very little communal activity although there was good neighbourliness. He had reported these facts to the Commission.

Mr Guthrie Georgeson, Shantry then gave evidence. He is a small farmer, not a crofter, but because of the size of his business he is of like economic status to a crofter and his unit is in close proximity to Landhallow. He supported Mr Forbes evidence that there was no local demand for the croft. He considered decrofting to be a safeguard from anyone else obtaining the croft tenancy, and in view of the long association Mrs Sutherland had with this croft, and her wish to retain it in the family he supported decrofting in this case. He was not interested in more land but he agreed under cross-examination that local people would not wish to interfere in Mrs Sutherland's affairs by expressing an interest in a hypothetical tenancy. If it was a vacant croft there would no doubt be demand. He was in favour of the retention of the land in agriculture whether in crofting or not. He could see no difficulty for the Crofters Commission if they granted a decrofting direction as the land would continue in agriculture. He agreed that holdings had been amalgamated over the years and there were many fewer crofts now than hitherto. He agreed it was a crofting community although the number of crofts had dwindled.

Mr Donald R Gordon was called as witness by the Crofters Commission. He is Chief Technical Officer with the Commission. He advises the Commission on crofting

matters including decrofting applications. He agreed Mrs Sutherland was a capable crofter with good stock and good permanent improvements. He had always regarded Latheron parish as a crofting community with many multiple units and some 15 to 20 farms. The statistics showed 391 crofts in the parish.

In the case of Black Croft alluded to, the circumstances put before the Commission in that decrofting Application were that this was a derelict croft not eligible for housing grant and owned by someone living some two miles away. The owner wished to decroft the unit in order to sell it and raise capital to improve his home unit. It was foreseen that Black Croft would ultimately go to someone outwith crofting. There were some 95 owner occupied crofts in the parish and the Commission were not always notified when purchase was made. Thus, some 257 of the total crofts were owner-occupied which was not a significant number on the east coast. There was very little non-agricultural development. A salmon smoking plant had recently closed down.

Cross-examined by Mrs Ogilvie he stated that he could not think of any owner-occupied crofts for sale in the area where a request for decrofting had been made. Decrofting was for the benefit of the crofter not the community and he considered that it was important to have more families in the community although this was frustrated by croft amalgamations. He believed there would be demand if Landhallow was available for reletting. A recent case in Inverness-shire where the Commission were required to relet a croft produced 96 enquiries and 57 firm applications. But he stated that the Commission used its discretion and had never taken action to seek reletting proposals where a member of the family said he intended to return. Most decrofting cases were granted to enable security to be provided for bank lending. He considered it was important to have a pool of crofting land, and decrofting reduced this pool. There were two common grazings namely Landhallow extending to 155 acres with 21 shares, and Latheronwheel Grazings of 1041 acres with 124 shares. Mrs Sutherland had two shares in each.

Re-examined he said there was no demand for Black Croft, Where a crofter seeks to purchase his croft the Crofters Commission can give an assurance if necessary, that reletting proposals will not be called for, and only in exceptional circumstances would they seek to do so.

In her closing submissions Mrs Ogilvie expressed her client's wish to retain the croft in the family and her apprehension that at some point reletting proposals would be called for and a possible subsequent purchase by the new tenant thereafter. Due to her son's occupation as an hotelier there was no certainty when he could return to the croft. There was no intention of selling the croft. The Sutherlands had been connected with this croft for generations. In this case also no demand had been identified within the community, and no evidence had emerged to indicate that decrofting would be detrimental to the general interest of the crofting community in the district, It would reduce the crofting pool by one, but this was inevitable It was for the Commission to prove detriment to the crofting community and she submitted that in this case the area might benefit from the continuing association with the family. The croft was small and would have no detrimental effect on the community if decrofted. She asked the Court to grant the Application.

Mr Smith in reply stated that no reason for decrofting was given in the original Application and the reason had only surfaced in the pleadings. He submitted that the reason now put forward for decrofting was not sufficiently compelling and was on all fours with Steven v Crofters Commission 1984 SLCR 30 and McCull v Crofters Commission 1988 (Land Ct) 4 where the Court had stated that merely to remove the

croft from crofting tenure was not a sufficient reason - and that something more than "freedom of use" was required. The Commission had not sought reletting proposals in this case. There was still a preponderance of crofting tenants in the area in spite of the high incidence of owner-occupiers, and this was essentially a crofting community. The fact that there was little communal activity was not exceptional. The Commission wished to resist decrofting to avoid another precedent which would in the Commission's view be to the detriment of the crofting community, and in particular to the younger generation who wished to enter crofting. The legislation was designed to protect such a situation. Even if it came to asking for reletting proposals this would still not deprive Mrs Sutherland or her successors of ownership, and she could convey the croft to any member of her family. He acknowledged, however that there could be circumstances where the Commission would be forced to seek reletting. Mrs Sutherland's reasons for decrofting were not more compelling due merely to her long association with the croft.

On the question of the demand the Commission were in the present circumstances only able to have regard to evidence on hypothetical demand. It was for the Appellant to prove that decrofting would not be to the detriment of the general interest of the crofting community and in his submissions she had failed to do so. In the case of Black Croft special reasons had been given for decrofting namely that it was a rundown unit which was to be disposed of, and the income used to improve another croft. This was a quite different circumstance from the present case. He asked the Court to dismiss the appeal.

Decision

The factual background is not in dispute. The Appellant had purchased the landlords' interest in this croft some time previously, and in terms of Section 16(11A) of the Crofters (Scotland) Act 1955 (as amended) the croft although still occupied by her is now regarded as a vacant croft. She has applied under Section 16(9) of the above Act to the Crofters Commission for a direction that the croft shall cease to be a croft. The Appellant was not required to give a reason for wishing to decroft but in considering the case the Commission in terms of Section 16(A)(2) 'shall have regard to the general interest of the crofting community in the district in which the croft is situated and in particular to the demand, if any, for a tenancy of the croft from persons who might reasonably be expected to obtain that tenancy if the croft were offered for letting on the open market on the date when they are considering the application.

In this case the reasons advanced by the Appellant are not dissimilar to those put forward in Steven v Crofters Commission *supra*, namely to have a clear title to the croft unfettered by crofting tenure, and to be able to retain the croft within her own family. She wished to be free of any risk of the Crofters Commission seeking reletting proposals now or in the future when the status of a successor to the title could be vetted by the Commission. This would not be to challenge the right to the title but to decide whether or not reletting proposals should be called for.

In Gray v Crofters Commission 1980 SLT (Land Ct) at page 7 the Court emphasised that there were two guiding principles which Parliament had laid down in Section 16A(2) to be followed in deciding whether to grant or refuse a decrofting direction and while inter-related, were not synonymous. The Court said "The Commission is directed, in the first place, to have regard to the general interest of the crofting community in the district in which the croft is situated. In our view this constitutes the overriding consideration - overriding in some cases even a balance of agricultural advantage or some hardship to a crofting landlord - involving social considerations of

the community interest.” ... “the words which follow prefaced by the phrase ‘and in particular’ merely indicate a particular aspect of the foregoing general interest, namely the demand by prospective acceptable tenants for the crofting tenancy in question.”

The Court decided that the Commission had misdirected themselves in holding that any latent demand whatsoever from outsiders prevented the granting of the decrofting Order sought. The latter was required to enable a major new drainage scheme to proceed following a voluntary reorganisation of the local crofts which had the full backing of the local crofting community. That of course is very different to the present case.

In the present case the Commission are thus initially required to have regard to the general interest of the crofting community and whether or not a decrofting direction would harm the community in any way. The Court is satisfied after hearing the evidence and carrying out an inspection that the Commission were entitled to take the view there is a definite crofting community in Latheron parish although there are some obvious differences between this crofting community and communities on the west coast, not least in a lesser communal activity in Latheron. But the essential ingredients of a crofting community namely a number of crofting townships with individual or general common grazings clearly exist, in which individual crofters have shares. Some 257 of former crofters in this district are now owner-occupiers, but they still continue to have shares in the common grazings.

The Commission has to take a long term view in regard to the general interest of the crofting community in the district and assess the effect on the community of an irrevocable decision to decroft. This croft is not of course actually available for reletting at the present time, but the evidence of the witnesses, and indeed the applicant was that if it were available for letting, there would be keen demand. In regard to demand it was established in Moray Estates Development Company v Crofters Commission 1988 SLT Land Ct) 14 that there was no express geographical restriction and that the term “open market” in section 16A(2) indicated the contrary.

The Commission, in its evidence and submissions made several references to the need to maintain a “pool of croft land” to enable suitable persons to enter crofting. There is no special mention in the statutes that a pool of croft land should be maintained, but sections 1(1) and 2(1) of the Crofters (Scotland) Act 1955 which set out the functions and duties of the Commission state inter alia “promoting the interests of crofters, and of keeping under review matters relating to crofting” and “to keep under general review all matters relating to crofts and crofting conditions”. Clearly the loss from crofting of substantial numbers of crofts through decrofting must be a legitimate matter for the Commission to consider in the context of these functions. But the overriding consideration in disposing of specific decrofting applications is the general interest of the crofting community in the district in which the croft is situated.

The Court conclude that there was ample evidence to justify the Commission’s decision, and that they were entitled to conclude that the appellant’s reasons for wishing to decroft were insufficient to justify the removal of this croft from crofting tenure.

In all the circumstances the Court are satisfied that the Commission did not misdirect themselves in law and that there was sufficient evidence to justify their proposed decision to refuse the Application. The Court thus refuse the appeal.

There were no motions for expenses.

For Applicant: Mrs J Ogilvie, Solicitor, Wick.

For Respondent: Mr D I Smith, Solicitor, Inverness.