The Indycamp: Demonstrating Access to Land and Access to Justice

In late 2015, a camp was set up in the vicinity of the Scottish Parliament, on land belonging to the Scottish Parliamentary Corporate Body. What became known as the 'Indycamp' comprised a collection of tents, motor vehicles, caravans and trailers, along with the campaigners who brought these items themselves. The campaigners - the (self-styled) Sovereign Indigenous Peoples of Scotland - had hoped to remain there until Scotland became independent from the rest of the United Kingdom. However, court action brought by the landowner in the Court of Session resulted in an order to remove the camp. Following an unsuccessful reclaiming motion against that order,[1] the Indycamp was cleared on 4 November 2016. The legal process to clear the camp raised some interesting points of law, primarily in relation to access to land, demonstrations, and access to justice. This note considers these issues in turn.

A. ACCESS TO LAND

Engaging in activity on land that you do not own is not always sensible, particularly if you do not have the owner's permission or a right other than ownership. Scots property law does allow access to land without a landowner's prior consent where there is a right under the Regalia (which allows access to the foreshore or a tidal river), a public right of way, or through the rights of responsible access conferred by the Land Reform (Scotland) Act 2003. As will be discussed below, only the 2003 Act was potentially applicable to the Indycampers.

Outside those situations, the traditional position is that a landowner can take steps to retain or regain exclusive possession, albeit she has limited remedies against a one-time, bare trespasser, and for a prohibition of access relative to a specific individual to carry force of law, judicial action must be raised against her. Issues of enforcement and a custom of tolerating recreational access to land aside, the balance of authority demonstrates that a landowner can exert a significant amount of control over access to her land:[2] Lord Trayner's oft-quoted maxim that it is 'loose and inaccurate' that there is no law of trespass in Scotland[3] was approved by the Court of Session in the Indycamp litigation.[4]

With the underlying property rules being stacked in favour of the landowner, could the Indycampers have relied upon statutory access rights? The 2003 Act,

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[1] *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761; *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, 2016 S.L.T. 862; affirmed [2016] CSIH 81. At the time of writing the Inner House has refused permission to appeal to the Supreme Court.

[2] Consider J A Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 Neb. L. Rev. 739 at 760.

[3] *Wood v North British Railway* (1899) 2 F. 1 at 2. See the discussion in R R M Paisley, *Access Rights and Rights of Way* (2006) at 40.

[4] [2016] CSOH 65 (particularly paragraphs 31-33), affirmed [2016] CSIH 81.

supplemented by the Scottish Outdoor Access Code,[5] blankets Scotland with access rights that allow people to be on or cross land in a responsible manner subject to limited exceptions.[6] These access rights, which are universally applicable,[7] allow people to be 'above and below (as well as on)' land for recreational purposes, relevant educational activities (such activities being defined as those which further someone's understanding of natural and cultural heritage)[8] and commercial purposes, provided that the money-making activity can also be undertaken 'otherwise than commercially or for profit'.[9] Recreation is not defined, but the Access Code suggests that it includes activities such as walking, cycling, orienteering, and wild camping. There is also a stand-alone right to cross land.[10]

Any analysis of a particular access activity would then normally consider whether the land was excluded. either owing to the characteristics of the land[11] or as a result of a temporary exclusion order by the relevant local authority,[12] and whether the access was responsible[13] (under s.2 read alongside other provisions but particularly s.9, which states that certain conduct such as crossing land in a motorised vehicle[14] or 'hunting, shooting or fishing'[15] can never be responsible access). However, in the Indycamp litigation, neither the Outer nor the Inner House needed to get that far.

Even though they had the beginnings of a stateable case (as wild camping is treated as a recreational activity in the Access Code and the land in question was not excluded), the (non-professionally represented) Indycampers did not initially rely on the 2003 Act. This allowed Lord Turnbull, at first instance, simply to state:[16]

> Given that no direct reliance was placed on the 2003 Act, it will be sufficient to note that the right of access given by section 1 is a right to be on land for limited purposes, as defined within that section, none of which are present in the circumstances of the occupation by the Camp.

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[5] See s.10. The Code is available at: http://www.outdooraccess-scotland.com/.
[6] See ss 1(7), 6. For fuller discussion see: Paisley (n 3); Lovett (n 2); and M M Combe, 'Get off that land: non-owner regulation of access to land' 2014 Jur. Rev. 297.
[7] s 1(1).
[8] s 2(5).
[9] s 1(2)(a); s 1(3). The prime example of an outdoor activity that can be undertaken 'otherwise than commercially or for profit' is hillwalking. Thus, a paid mountain guide can enjoy access rights as much as an amateur hillwalker.
[10] s 1(2)(b).
[11] See, eg, *Gloag v Perth and Kinross Council* 2007 SCLR 530, considered in M M Combe, 'No Place Like Home: Access Rights over Gardens' (2008) 12 EdinLR 463 at 467.
[12] Under s 11.
[13] See *Tuley v The Highland Council* 2007 S.L.T. (Sh Ct) 97, rev 2009 S.L.T. 616; *Forbes v Fife Council* 2009 S.L.T. (Sh Ct) 71. Both these cases are analysed in M M Combe, 'Access to Land and to Landownership', (2010) 14 EdinLR 106. See also Lovett (n 2) at 809-814.
[14] s 9(f) (unless that vehicle is being used to provide mobility for a person with a disability). Automobiles are clearly excluded: see the discussion about parking in the Access Code (at 76 and paragraph 3.58). Lord Turnbull was particularly critical of cars being positioned on the Indycamp site: [2016] CSOH 113 paragraphs 58-59.
[15] s 9(c).
[16] [2016] CSOH 113 paragraph 58.

On appeal, however, the Indycampers did develop the point. They argued, first, that their activities included recreational elements and also that the activities of the camp served an educational purpose. Secondly, as regards the vehicles, it was submitted 'whilst it was correct that vehicles had been driven onto the land on [sic] contravention of section 9, the majority should not be punished for the actions of a minority.' Thirdly, they claimed that 'the terms of section 6 prohibited invasion of the space around a caravan, and so protected the reclaimers' occupation of the subjects.'[17]

On this last point, the legislation does indeed exclude 'a caravan, tent or other place affording a person privacy or shelter' and land in the immediate vicinity of such places from access rights.[18] However, it seems a stretch to imagine that such a restriction can stop a landowner taking enforcement action against a non-owner who has unilaterally placed a caravan on land. In any case, a landowner does not need to rely on rights of access under the 2003 Act to take access to its own land.

As regards the first claim, a detailed counter-argument sought to demonstrate that the Indycampers' primary purpose was political, arguing that political activities are not inherently recreational or educational. Activities such as imparting information (education) or socialising by holding a barbecue (recreation) were not, it was claimed, the primary purpose. The limited duration of the right to be on land was also pointed out: '[t]he Act only allows someone to remain on the premises while the specified purpose is carried out. They must then leave.'[19]

The Lord Justice Clerk, Lady Dorrian, wasted no words in rejecting the Indycampers' argument, simply stating 'we are satisfied that there is nothing in the Act which justifies the reclaimers' occupation of the property.'[20] That was that. But even if the analysis had been taken further, the Indycampers did not help themselves by taking access via motor vehicles then leaving those vehicles and other items on the land, neither of which is allowed in terms of the 2003 Act. There are also questions about how responsible their conduct was, both in terms of damaging the land and excluding others from it.[21]

With all of this in mind, future political campers cannot confidently rely on the 2003 Act; not only that, the criminal law provisions of the Trespass (Scotland) Act 1865 (which regulate occupations, encampments or fires that are not classed as responsible access under the 2003 Act) could be deployed against them.[22] There may be other considerations to allow such camps (which will be analysed in the next section), but the scope of 2003 Act rights are clearly limited in this context.

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[17] [2016] CSIH 81 paragraph 20.
[18] s 6(1)(a)(ii) and s 6(1)(b)(iv).
[19] [2016] CSIH 81 paragraph 26.
[20] [2016] CSIH 81 paragraph 32.
[21] Disputes between access takers inter se are considered in Combe (n 6). Incidentally, the Indycamp had originally been positioned within Holyrood Park itself, but that area of land was covered by byelaws and camping there could not have been responsible (s 2(2)(a)(i) read with s 12).
[22] As indeed might the Criminal Justice and Public Order Act 1994 s 61.

B. LAND AND DEMONSTRATIONS

Where there is no underlying right of access, a landowner is therefore in a strong position to regain control of land. However, where, like the Scottish Parliamentary Corporate Body, the landowner is a public authority, account must also be taken of Convention rights, in this case Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association).

In the first of his two opinions, and despite not being explicitly addressed on the point by the Indycampers, Lord Turnbull noted that the question he had to consider was 'whether the interference with the [Indycampers'] rights entailed in granting an order [for possession] would be lawful, necessary and proportionate.'[23] He considered relevant English case law on these points,[24] then asked to hear evidence of how the Indycampers' actions 'do, or do not, constitute an interference with the rights of others to access the grounds of the Scottish Parliament, or on any other matter which might fall to be weighed in a proportionality assessment.'[25] When he returned to make that proportionality assessment he decided, again with reference to English case law, that the landowner's steps were proportionate.[26] He observed that, '[i]n essence the [Indycampers'] position seems to be that their rights under articles 10 and 11 should trump both the petitioner's right to possession and the rights of others to enjoy undisturbed use of the grounds', then noted that this approach was 'selfish or even arrogant', illustrating that with their approach to hosting barbecues and parking motor vehicles on the (grass) land despite nearby parking provision.[27] Tellingly, Lord Turnbull also noted the following:[28]

> The order sought by the [landowner] does not substantially impair the ability to protest at the grounds of the Scottish Parliament. It may interfere with the [Indycampers'] wish to conduct their vigil in the manner and form of their choosing but they are mistaken in considering that they have an unfettered right to make this choice.
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> The interference with the [Indycampers'] article 10 and 11 rights which would be caused by granting the order sought is targeted, limited and will not deprive them of the essence of their rights. The balance which has to be struck in light of all of the circumstances I have identified comes down firmly in favour of

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[23] [2016] CSOH 65 paragraph 64.
[24] *Mayor of London v Hall and others* [2011] 1 WLR 504 (which related to the so-called 'Democracy Village' camp at Parliament Square Gardens in London) and *The Mayor Commonality and Citizens of London v Samedi* [2012] EWCA Civ 160 (regarding a camp located in the St Paul's Cathedral churchyard).
[25] [2016] CSOH 65 paragraph 67.
[26] [2016] CSOH 113 paragraphs 49-57. He preferred *Mayor of London v Haw* [2011] EWHC 585 (QB), where an order was made to stop an individual camping in Parliament Square Green to the case of *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 (with reference to *R (Barda) v Mayor of London* [2016] 4 WLR 20.
[27] [2016] CSOH 113 paragraph 58.
[28] [2016] CSOH 113 paragraphs 63-64.

holding that the interference caused by granting the orders sought is proportionate.

The Inner House adhered to this analysis. Nevertheless, it is clear that cases of this nature are not solely about property rights. From a comparative perspective, van der Walt highlights a number of areas where property rights face competition, including burial rights and labour rights,[29] and cites a pertinent (for present purposes) German case, involving an occupation at the publicly owned Frankfurt Airport.[30] As he notes, there will be occasions when 'the protection of property rights is restricted to the space that remains' once a non-property right has been catered for.[31] Cases like *Appleby*[32] and now the Indycamp provide precedents in which landowners have been able to rely on a property remedy. But in future situations, where suitable alternative platforms for the exercise of these important non-property rights are not readily available, the outcome could be different.[33]

C. ACCESS TO JUSTICE

All the judges involved in this litigation, not to mention the landowner and its representatives, endeavoured to accommodate the Indycampers' idiosyncratic arguments.[34] Lord Turnbull concluded his first Opinion by encouraging them to obtain some kind of qualified legal assistance (via legal aid or otherwise).[35] The judges only went so far though: for example, a motion by one Indycamper to allow for fresh lay representation to be obtained at a late stage in proceedings was refused.[36] Aside from the issue that they could not (or did not) find professional legal representation, some Indycampers raised the point that a lower court than the Court of Session should have been the forum (which could, the argument seems to be, have been cheaper, although one suspects the Indycampers would have been minded to appeal any Sheriff Court decision that went against them and matters may have ended up in a higher court anyway). There were also arguments that the case should have proceeded in front of a jury and that there was a lack of equality of arms.

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[29] A J van der Walt, 'The Modest Systemic Status of Property Rights' (2014) 1 Journal of Law, Property, and Society 15 at 71-91.
[30] 1 BvR 699/06.
[31] van der Walt (n 29) at 81.
[32] *Appleby v United Kingdom* (2003) 37 EHRR 38.
[33] Consider K Gray and S F Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space', (1999) 4 European Human Rights Law Review 46. Or, as van der Walt (n 29) at 64 expresses the abovementioned German case (in the context of a public owner), '"a flight into private law" will not allow the state to rely on its ownership status to infringe upon fundamental rights of citizens: 1 BvR 699/06 para 48'. van der Walt also discusses the similar position in Canada.
[34] Such arguments involving, variously: Jesus Christ in his second coming; the United Nations Declaration on the Rights of Indigenous People; the legitimacy of the Anglo-Scottish Union; and the legitimacy of the court itself and its judges.
[35] [2016] CSOH 65 paragraph 72.
[36] [2016] CSIH 81 paragraph 15.

These access to justice and fair trial points (with reference to Article 6 of the European Convention on Human Rights)[37] did not wash in the Inner House. Lady Dorrian was clear that Lord Turnbull took 'full cognisance of the fact that they were not legally assisted or legally qualified.'[38] She stated there was 'no merit'[39] in the gripes about the chosen forum or the lack of jury, although the overall (six-figure) bill for the action and resulting recovery of possession should be noted.[40] She then detailed all the steps Lord Turnbull took to assist the Indycampers to obtain representation, before concluding that their Article 6 rights were not breached.[41]

CONCLUSION

The aspirations of access to land and access to justice share some common themes about fairness and the ability to interact with important (physical and juridical) resources. The *Indycamp* litigation provided an opportunity for these matters to be analysed together, but any wider lesson about them might be difficult to draw from this particular and eccentric case. What is eminently clear, and what this case reinforces, is that a landowner, whether private or public, is in a strong position to regulate activities on its land, albeit other non-property law aspects must be taken into account when taking enforcement action against uninvited parties.

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[37] See generally S Peers, 'Europe to the rescue? EU Law, the ECHR and Legal Aid' in E Palmer, T Cornford, A Guinchard and Y Marique, *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 53.
[38] [2016] CSIH 81 paragraph 32.
[39] [2016] CSIH 81 paragraph 45.
[40] The total expense of the action as at 14 November 2016 (including enforcement of the decision) amounted to £105,889.65 excluding VAT, per a letter from Ken Hughes for the Scottish Parliamentary Corporate Body, available at http://www.parliament.scot/SPCB/July-Dec2016/SPCB(2016)Paper_080.pdf.
[41] [2016] CSIH 81 paragraphs 45-48.