This is a pre-copyedited, author-produced version of an article by Malcolm M. Combe published at 2017 SLT (News) 201

Access to land: responsible landowner conduct under the Land Reform (Scotland) Act 2003

Scotland is blessed with numerous areas where outdoor access for recreational and other purposes is both possible and popular. This brings opportunities, notably for the tourism industry and for the health and wellbeing of those taking access. It also brings challenges, relating to the pressure of access at any particular spot and interference with other land-based activities.

Two national park authorities are charged with stewarding particularly important areas of Scotland under the National Parks (Scotland) Act 2000 (asp 10) and related legislation. The areas in question are Loch Lomond and the Trossachs, and the Cairngorms. In some jurisdictions, national park authorities own the parks they manage outright. That is not the case in Scotland. This means national park authorities must work with local landowners and the wider community to achieve their statutory objectives. This they must do in a variety of ways. For present purposes, it is their role as access authorities for the areas they steward in terms of the Land Reform (Scotland) Act 2003 (asp 2) that is worthy of comment. This role sparked the case of *Loch Lomond and Trossachs National Park Authority v Anstalt* [2017] SAC (Civ) 11; 2017 S.L.T. (Sh Ct) 138. (All paragraph references are to this case, and all statutory references are to the 2003 Act, unless otherwise stated.)

Part 1 of the 2003 Act introduced rights of access to be on or to cross land, subject to limited exceptions. The exclusions from access relate to either the characteristics of any given parcel of land or the conduct of a (purported) access taker. No prior bargain or acquiescence by a land manager is required to authorise the crossing of land or any recreational, educational and in some cases commercial activity land on which access rights are exercisable (which I will refer to as "access land" for ease). Such conduct has already been authorised by the Scottish Parliament. In fact, the landowner must act responsibly when using, managing or otherwise conducting the ownership of access land. (For ease, I will render the 2003 Act's "using, managing and conducting the ownership of land" as simply "managing". "Landowner" is also used throughout, although under section 32 the term can equally apply to anyone else in natural possession of land, such as a tenant.) As we shall see, the Access Code – a document provided for in section 10 of the 2003 Act and approved by the Scottish Parliament – is an important factor in determining whether a landowner or anyone else has acted responsibly. There are also some situations which can never be responsible landowner conduct in terms of section 3(2)(a) read alongside other sections including section 14(1), namely where they act (or indeed fail to act) in a way that disincentives access.

Access rights at Drumlean – the issues

Much could be and has been written about the Scottish access regime. This note will focus on the two aspects that were at issue in this case, which related to a landowner's choices to limit and discourage access to an area of some 120 hectares described in the opinion as comprising "open hillside, in by fields and woodlands" (paragraph 4) at the Drumlean estate in the shadow of Ben Venue (just one of the impressive hills in the Trossachs which draw many people there). In this particular instance, three gates to the enclosure were left in a default locked position, and a sign warned of the danger of wild boar when there were in fact no such animals present. (Other animals – namely deer – were present.) These had the effect of restricting and discouraging access to 10% of the whole estate. In the scheme of the 2003 Act, access authorities have a duty to uphold access rights (section 13). They can do this in a variety of ways, including serving a notice when they

consider there has been a breach of section 14(1) (which is set out in full below). This is exactly what the relevant access authority did.

From an access rights perspective, the issue to determine was whether the enclosure of the land was a contravention of section 14. This involved the consideration of two aspects. If the land was not access land, that would have been determinative of the case (as the access authority would not have been able to object), but as we shall see the nuance here was actually the time when the barrier was created, as the 2003 Act does not retrospectively target physical barriers to access which were in place before the law came into force. The second aspect was whether the purpose or main purpose of the landowner's choices was not simply to inhibit access. In other words, was there was a legitimate land management reason for them?

At first instance, the sheriff held that, as the matters complained of had begun before the 2003 Act introduced the new access regime, the land was not accessible. This was characterised by the parties to the case and the court as the "*timing issue*". The sheriff then noted in any event that landowner had acted in a way that would have been responsible land management of access land. Central to this is the question of why the landowner acted (or omitted to act): this was the "*purpose issue*". The access authority appealed and, as we shall see, was successful on both points. Another issue the Sheriff Appeal Court faced was whether it was appropriate for it to review the evidence presented to the lower court (and relatedly to consider evidence that the lower court had excluded). The appellate court noted that the bar for interfering with the original fact finder's findings is set high, but felt it was appropriate to revisit matters by reference to the transcript in the circumstances (paragraphs 55-58). There was also an issue about privilege and the exclusion of certain advice that had been led in evidence (under reservation) about discussions between the parties and advice the landowner had received (paragraphs 45-46). This had led to evidence that pertained to the purpose issue not being considered at first instance. The Sheriff Appeal Court (adopting the submissions for the appellant made at paragraph 21) ruled this could be considered. Notwithstanding the importance of these points about privilege and the role of an appellate court, this note will now focus on issues relating to the 2003 Act.

With the regime in the 2003 Act in mind, anyone wishing to understand how the legislation works in general and understand how situations like this can be dealt with would do well to read paragraphs 5 to 11 of the opinion of the Sheriff Appeal Court, which sets out the law clearly. The opinion was delivered by Sheriff Principal Stephen, QC. She also delivered the judgment in one of the first cases on the 2003 Act, namely *Caledonian Heritable Limited v East Lothian Council*, Haddington Sheriff Court, 28 Apr 2006 (case reference B401/05) (available at http://www.scotcourts.gov.uk/search-judgments/judgment?id=bb0187a6-8980-69d2-b500-ff0000d74aa7). That judgment was important because of when it occurred, but it was also important in setting out how section 14 of the 2003 Act operates. There, the access authority objected to signage, barriers and the removal of a bridge and after the judgment of Sheriff Stephen (as she then was) the situation was resolved to the access authority's satisfaction. Section 14 was again at issue in this case, giving Sheriff Principal Stephen a welcome opportunity to bring her experience to bear here.

The timing issue

The land at issue did not host any features that would render it excluded from access under section 6 of the 2003 Act. This meant the landowner had to comply with section 14(1). It prohibits signs, obstructions, dangerous impediments and the like. It is too important to paraphrase and is worth setting out in full, with my emphasis added at one passage. It provides:

> The owner of land in respect of which access rights are exercisable shall not, *for the purpose or for the main purpose* of preventing or deterring any person entitled to exercise these rights from doing so—
>
> (a) put up any sign or notice;
>
> (b) put up any fence or wall, or plant, grow or permit to grow any hedge, tree or other vegetation;
>
> (c) position or leave at large any animal;
>
> (d) carry out any agricultural or other operation on the land; or
>
> (e) take, or fail to take, any other action.

The italicised text will be returned to below. Dealing first with the wording in paragraphs (a)-(e), clear as the wording is there has still been litigation about the provision. The case of *Aviemore Highland Resort Limited v Cairngorms National Park Authority* 2009 S.L.T. (Sh Ct) 97 related to barriers which existed prior to the 2003 Act coming into force. Essentially, owing to the framing of (a) and (b) – which both target the putting up of signs, notices, fences, or walls – a barrier that was in position prior to 2005 is not in contravention of the section. In *Aviemore*, the issue related to a fence which had been erected across a lane in 2004. The access authority served a section 14(2) notice about the fence. The problem for the access authority was the law which regulated new features like the fence was not in force when the fence was erected, and that the law was not retrospective. As noted by the Sheriff Principal who ultimately ruled against the access authority, the prohibition did not extend to (for example) the maintenance of an existing one. The notice accordingly failed. (There was also a hedge that followed the line of the fence which section 14 might have regulated (in relation to the growing of it, rather than the planting, albeit the date of planting was not clear). The notice was not framed in a way that caught the hedge, so this issue was not tested.)

The Drumlean case was different: in fact, it was described in court as "the antithesis of the *Aviemore* situation" (paragraph 38). It was not about the erection of barriers in contravention of section 14(1)(b), but rather the continuing failure of the respondent to unlock gates under section 14(1)(e). In this connection, the obvious but legally useful distinction between a gate (which is designed to open) and a fence (which does not) was made. This case highlights (at paragraph 39) that the 2003 Act can impose a positive obligation on a landowner, namely "to consider, among other things, whether gates which had previously been locked, should be unlocked so as to enable the access rights created by the Act, to be exercised." For these seeking to contextualise what the change in the law meant and means for landowners, this is a helpful observation.

The court also noted that it would be absurd if a gate which was locked at a minute to midnight before the 2003 Act could stay locked thereafter owing to that happenstance (paragraph 41). The court accordingly held that the landowner was not entitled to continue to refuse access to the land by continuing to lock the gates after the Act came into force, subject to possible circumstances where the gate needed to be locked for a genuine purpose (this being discussed below). The court separately held that the owner could not display a sign warning of the dangers of wild boar (particularly as there were in fact no wild boar) (paragraph 42. Paragraph 4.9 of the Access Code is in point here. It notes "asking people to avoid using a route or area when there is no safety-related reason to do so, or keeping up such a sign when the hazard has ceased" is an example of what would be unreasonable interference with access rights).

<u>The purpose issue</u>

The trickier aspect of section 14(1) is revealed by the wording that allows a landowner to take any of the steps listed in paragraphs (a)-(e) when "*the purpose or…the main purpose*" of doing so is something other than preventing or deterring the exercise of access rights. This means an act or omission that is wholly or mainly targets access is caught, but a legitimate land management activity undertaken in accordance with the Access Code, which might catch some or all forms of access in the crossfire, is not.

Reference can again be made to prior case law. *Tuley v The Highland Council* 2009 S.L.T. 616 shows that a genuine land management decision that is not fixated on preventing or deterring access is acceptable. In that case (discussed in Malcolm M. Combe, "Access to land and to landownership" (2010) 14 Edinburgh Law Review 106), the landowners actually wished to facilitate access to their land in the Black Isle, but were rightly concerned about the cumulative effect of ongoing equestrian access to a particular track. They sought to close that access to horses, whilst leaving another route available for horse riders. The access authority objected to the route closure. The Court of Session ultimately ruled that the closure was permitted, as it was not wholly or mainly for the purpose of preventing or deterring access.

In the Drumlean dispute, whilst the sheriff had initially ruled that the landowner's purpose was acceptable, as noted below the Sheriff Appeal Court disagreed.

This case, and *Tuley*, both proceeded on the basis that this is to be measured subjectively, i.e. what did the land manager actually think. It is now clear that future cases must be approached in the same way. This case also raised a further important point, when it was noted "even if the [land manager]'s expressed concerns were to be accepted as genuinely held, the section 14 prohibition would still apply, because the professed concerns are so broadly expressed that they amount to arguments against access rights in general rather than in relation to this particular estate."

The clarification (at paragraph 64) that a landowner's concerns must relate to a particular site rather than access rights in general is an important one: if there is an argument to be had against access rights in general, that would need to be played out by law-makers, with any "victory" for that position being the repeal of Part 1 of the 2003 Act.

Responsible land management and the role of the Access Code

Observations in a previous sheriff court case had suggested that the Access Code is of limited use when determining whether land is excluded (*Gloag v Perth and Kinross Council* 2007 SCLR 530). Whilst it is true that the Access Code has no statutory role in relation to determining the extent of excluded land under section 6, the Drumlean case offers a judicial reinvigoration of the Access Code, first in approving a passage of it (at paragraph 31, endorsing paragraph 1.1 of the Access Code) and then by making its importance in the responsible conduct mix clear. As the Sheriff Appeal Court put it, "at the very least" the Access Code should be "taken into account" when assessing a land manager's conduct (paragraph 53). That is something the sheriff at first instance did not do.

The Access Code has an important role in the calculation of whether an access taker (or purported access taker) is responsible under section 2(2)(b)(i) of the 2003 Act, which directs that regard is to be had as to whether that person has disregarded the guidance in the Access Code. The Drumlean case highlights the importance of the Access Code under the mirror provision for landowners in section 3, confirming that it is mandatory to have regard to it when assessing what is responsible (paragraph 32).

In terms of whether the particular conduct at issue was responsible, it is now beyond doubt that the test for this is an objective one which has regard to the Access Code (paragraph 34). In applying that test to the case at hand, the Sheriff Appeal Court highlighted no less than six problems with the sheriff's initial approach. These related to his: a) erroneous exclusion of evidence (highlighted above); b) eventual treatment of the landowner's representative's evidence, which had evolved from unfavourable to credible and reliable without explanation (paragraph 48); and c) treatment of the evidence of the appellant's access and recreation adviser, which was apparently tainted by the fact the witness's characterisation of the law differed from that of the sheriff, but then the Sheriff Appeal Court found themselves to "broadly support" the access and recreation adviser's view (paragraph 49). Three further failures are then listed at (paragraph 50), namely the failure to: d) make any finding in fact as to what the respondent's purpose was; e) have regard to the access code; and f) appreciate that many of the respondent's professed concerns, even if genuine, were of such general application that they could not properly amount to a legitimate purpose for the purposes of section 14. The opinion then goes on to explain these failures, highlighting what section of the Access Code regard could have been had to in the process (paragraph 53, highlighting paragraphs 3.29-3.34 of the Access Code, on accessing fields with livestock). That these points were adumbrated so clearly will surely have the effect of making the judgment appeal-proof. Be that as it may, the opinion once again provides a helpful resource for those seeking guidance in approaching access disputes, securing the status of the Access Code in the process.

The Sheriff Appeal Court then went on to consider the issue *de novo*, and saw fit to highlight that the representative of the landowner held views which were inconsistent with the Access Code (and further, that this representative claimed never to have seen the Access Code and then failed to answer a question as to whether he had given thought to the terms of it) (paragraph 62). In evidence, this representative expressed the view that members of the public ought to be excluded from land where access rights could be exercised for the protection of the public themselves and of the animals (in this case deer) that were there and also for the security of machinery there, but this view was not supported by advice which he had been given (which he was reliant on, as he had no relevant qualifications in relation to the practical running of the estate: paragraph 65, additional finding in fact 20) or by the Access Code. To the extent a lack of knowledge of the Access Code might have been understandable (but not exactly forgivable) in the immediate aftermath of the legislation coming into force, it is patently not acceptable over a decade after the change in the law.

A word on excluded land

Was the enclosure excluded land in terms of section 6? Clearly not, in light of the foregoing discussion, and also in light of the point made (at paragraph 40) that one exclusion specifically legislated for in the 2003 Act (at section 6(1)(f), allowing for historic fee charging regimes at sites to continue) would have been otiose if enclosed but gated land was already excluded.

One targeted observation of the Sheriff Appeal Court (made in response to a point made by counsel for the respondent) also deserves highlighting in this regard. In terms of whether the enclosure could be entitled to special regulatory treatment as a result of a holistic view of the estate, the court noted (at paragraph 63): "*it matters not that access is available to other parts of the estate, nor that the enclosed area constitutes only some 10 percent of the total area of the estate. Bearing in mind that the rights conferred by the Act are not restricted to crossing land, but include the right to be on land, that is nothing to the point. Access rights exist over all land which is not excepted, and are not to be restricted to the majority of all non-excepted land.*"

Competing interests?

As we have seen, the access authority in this case was successful, and those involved in the access lobby will be grateful to it for taking this important case to appeal. For completeness, it can be noted that that this access authority should not be characterised as being in favour of all access in all circumstances. Recent byelaws of Loch Lomond and The Trossachs National Park Authority (available at *http://www.lochlomond-trossachs.org/things-to-do/camping/campingbyelaws/*) have been controversial, particularly as responsible access takers are now unable to wild camp as a result of the steps taken by the access authority (triggered by irresponsible recreational access) to restrict camping to designated areas. It can also be noted that access is not without its (physical) risks to access takers and (legal) risks to occupiers of land, as highlighted in the *Leonard v Loch Lomond and The Trossachs National Park Authority* [2014] CSOH 38, affirmed [2015] CSIH 44. There is no particular indication in the case report as to whether the outing (in 2006) that led to the case was inspired by the new access regime. Either way, section 5(2) specifically operates to keep occupiers on the hook, although in that case the pursuer failed to establish the liability of the access authority. These two episodes demonstrate that access authorities have a difficult balancing act at times, much like access takers and landowners themselves do in the overall scheme of the legislation.

Concluding observations

Two final tangents will be offered, about names. In the published judgment in the Drumlean case, the pursuer is named as "Loch Lomond and Trossachs National Park Authority" rather than "Loch Lomond and *The* Trossachs National Park Authority" (emphasis added). The version with the definite article is correct in terms of article 4 of The Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 (SSI 2002/201) but this guide stays true to the judgment issued.

Finally, in its Scots Gaelic form, Ben Venue is *A' Bheinn Mheanbh*, which means the miniature mountain. There seems to be a certain irony in the fact that the landowner of the Drumlean estate objected so strongly to access taken below the miniature mountain, and thus made a mountain out of a molehill.

Those tangents notwithstanding, what will the legal legacy of the Drumlean case be? Another irony emerges, namely that this individual attempt to roundly object to access has resulted in such a clear and useful discussion of how access rights work. Responsible access takers should maybe be grateful for the (former) land management practices at Drumlean after all.