

This is a pre-copyedited, author-produced version of an article by Malcolm M. Combe published at 2018 SLT (News) 51

Revisiting access to land under the Land Reform (Scotland) Act 2003: *Renyana Stahl Anstalt v LLTNPA*

The author considers the case of Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority [2018] CSIH 22, in which the Court of Session dealt with an appeal from the Sheriff Appeal Court, who had previously dealt with an appeal from the sheriff. Each level of judicial consideration produced a slightly different outcome when considering the right of responsible access provided by Part 1 of the Land Reform (Scotland) Act 2003.

Access to land can be a practical and emotive issue. Disagreements over access can be hard-fought. Sometimes litigation ensues, in a bid to find a definitive ruling when compromise is impossible or other attempts at dispute resolution have failed. Sometimes one turn of litigation proves enough; sometimes not. This note considers the case of *Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority* [2018] CSIH 22, where the Court of Session dealt with an appeal from the Sheriff Appeal Court, who had previously dealt with an appeal from the sheriff. Each level of judicial consideration produced a slightly different outcome.

Of course, those involved in any particular access dispute will be directly affected by a court ruling, but access disputes can be of wider interest. That is so with this case, which is particularly instructive about at least two aspects of the relevant law – the Land Reform (Scotland) Act 2003 – which allows responsible access to the outdoors. The first of those aspects relates to the response an access authority can make when faced with a restriction to access, including any restriction that stemmed from a time before the Land Reform (Scotland) Act 2003. It is now clear that such historic restrictions can be appropriately addressed by the relevant enforcement body, namely a local authority or – as in this case – a national park authority. Secondly, the Court of Session has clarified the test to apply when assessing whether a landowner's actions (or inactions) are legitimate management practices which just happen to catch responsible access in the crossfire. It had previously been considered that this was to be measured *subjectively*, based on what a landowner actually thought. It has now been clarified that the test is an *objective* one, based on the situation on the ground.

Background

The access dispute in question was played out in the shadow of Ben Venue, in the Trossachs. The facts that gave rise to it and the governing legislation are set out in the judgment (paragraphs [1]-[12]). They were also set out in an earlier case note, about the Sheriff Appeal Court decision (Combe, "Access to land: responsible landowner conduct under the Land Reform (Scotland) Act 2003" 2017 SLT (News) 201). Accordingly, only a brief refresher of the facts and law is provided here.

Part 1 of the 2003 Act introduced rights of access to be on or to cross land (section 1(2)), subject to limited exceptions relating to either the characteristics of the land in question (section 1(6) and section 6) or the conduct of anyone taking access (section 2, with forbidden conduct determined with reference to section 2(2) read alongside sections 9, 12 and 29). Access can be taken for passage or for recreational, educational and in some cases commercial activity on land where access rights are exercisable. On such access land, the landowner or manager must act responsibly when using, managing or otherwise conducting the ownership of it. As we shall see, the Scottish Outdoor Access Code is an important factor in determining whether a landowner or anyone else has acted responsibly (section 3). There are also some situations which can never be responsible conduct in

terms of the law. From a landowner's perspective, this would be where they act (or indeed fail to act) in a way that unduly deters access where it should be permitted (section 3(2)(a), read alongside section 12, 14 and 23).

In this case, the landowner sought to limit and discourage access to an area of some 120 hectares which were described as open hillside, in-by [separately fenced] fields and woodland at the Drumlean estate. 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 at the given time. (Other animals – namely deer – were present.) The sign and the gates were all in position prior to the 2003 Act coming into force, and the general pattern of locking the gates had also been established prior to that. These measures 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), a statutory provision about impediments to access. This is exactly what the relevant access authority – Loch Lomond and the Trossachs National Park Authority – did. The landowner then made use of section 14 to appeal against this notice.

As noted, each level of judicial consideration produced a slightly different result. At first instance, a sheriff ruled against the access authority, holding that the landowner had been (subjectively) acting for a legitimate land management reason. Evidence was led to that effect. The previous case of *Tuley v Highland Council* 2009 S.L.T. 616[; 2009 S.C. 456; [2009] CSIH 31A], which related to a woodland access dispute at the Black Isle, suggested that any landowner conduct was to be measured by what a landowner was actually thinking when managing land, hence the subjective approach here. The access authority then successfully appealed to the Sheriff Appeal Court, which ordered that all three gates must be opened and (separately) the removal of a sign warning of the dangers of wild boar (a decision linked to the fact there were no wild boar at the time), for reasons explained in the earlier case note. Finally, the Court of Session has largely followed the Sheriff Appeal Court in practical terms, but with the subtle difference of only requiring two gates to be accessible (as, it was held, one of the other two gates provided suitable access without the need for the third gate), and also not ordering the sign about boar to be taken down (as, from the evidence, that sign had actually been required by Stirling Council in connection with an earlier boar herd). This note will now consider the different route it took to that decision. (All paragraph references are to the Court of Session decision, and all statutory references are to the 2003 Act, unless otherwise stated.)

Before doing that, the welcome provision of maps of the area by the Court of Session in two annexes to the judgment should be acknowledged. This aids comprehension of the decision and eases understanding of (for example) why the closure of one gate might still afford access to the area. Hopefully future cases can adopt a similar approach, where appropriate.

Issues

One point that should be set out clearly at the outset is that where land is not excluded from access, the landowner is under an overarching duty to use, manage and otherwise conduct the ownership of it in a manner that is responsible (per paragraph [59]). In this case, notwithstanding the fact the enclosure was part of a larger area (and access was possible in that larger area), the enclosed land in question was clearly *not* excluded as a single unit and so could not be carved out for separate treatment (paragraphs [55]-[56]). Within the enclosed area there were some features (such as farm buildings) that could have been exempt from access (paragraph 55), but any restriction relating to the whole enclosed area would need to be part of a properly considered – and objectively justifiable (see below) – overall land management scheme.

Section 14 is about impediments to access in relation to land where access rights apply, although it is framed in a way that some access restrictions can be acceptable when they are not wholly or mainly aimed at restricting access. That will be discussed below. There is another issue concerning what restrictions it catches, which can be classified as a temporal rather than a geographic one. That will be discussed first.

The timing issue was considered in an earlier case, where a fence across a (former) path was allowed to remain in place notwithstanding the service of a section 14 notice: *Aviemore Highland Resort Ltd v Cairngorms National Park Authority*, 2009 SLT (Sh Ct) 97. This was because the fence was erected prior to the law coming into force, with a related issue that the access authority had not framed its notice in a way that could catch the pre-existing fence. This newer case suggests a future case like that could now be decided differently. In the dispute at Drumlean, the issue was not so much the installation of gates, but rather the continuing failure of the owner to unlock them, which brought section 14(1)(e) into play. Even then, Lord Carloway has now made clear that the proposition that seemed to flow from the Sheriff Principal's decision in *Aviemore* that no notice under section 14 could competently be served in respect of works, actions or omissions prior to the coming into force of the Act is "too broadly stated" (paragraph 60).

Incidentally, a related human rights challenge, based on Article 1 of the First Protocol of the European Convention on Human Rights (peaceful enjoyment of property) based on retrospectivity grounds failed (paragraph 78). This means that landowners must now manage land and any "historic" features (that is to say, pre-2003 Act modifications) in a way that reflects the change in the law. A separate human rights challenge, based on Article 6 (fair hearing) also failed: the Court of Session was satisfied that the appeal to the sheriff relating to the initial notice then the access authority's appeal to the Sheriff Appeal Court formed a process that had not breached the landowner's Convention rights. It can tangentially be noted that the scheme of Part 1 of the 2003 Act also faced an earlier human rights test in the case of *Gloag v Perth and Kinross Council* 2007 S.C.L.R. 53, in relation to Article 8 (private and family life) in the context of the section 6(1)(b)(iv) exclusion of access at a domestic garden that pertains to a dwelling. Much more could be written about human rights and the right of responsible access and indeed the 2003 Act more generally (including the notable case of *Paic Crofters Ltd v Scottish Ministers* [2012] CSIH 96; 2013 S.L.T. 308, on the crofting community right to buy) but for now it can be noted that once again the 2003 Act has emerged from a human rights challenge relatively unscathed.

Finally, of crucial importance in this most recent case is the move away from a subjective test as to why a landowner did something, towards an objective assessment. Landowner actions that would otherwise not be responsible management can be rendered acceptable when they are not done "for the purpose or for the main purpose of preventing or deterring" the exercise of access rights. This would allow, for example, a restriction on access to woodland when planned forestry operation are taking place. The focus on the subjective intention had been the result of an *obiter dictum* in the earlier Court of Session case of *Tuley*, which first the sheriff and then Sheriff Appeal Court felt bound to follow. This new Court of Session case has shifted to an objective analysis, which means future assessments can actually look at the context as to why access is restricted (taking guidance from the Access Code) rather than seeking to establish exactly what a landowner thought. The Sheriff Appeal Court had (at paragraph 64 of the earlier judgment, [2017] SAC (Civ) 11; 2017 S.L.T. (Sh Ct) 138) tried to remove the worst excesses of subjectivity by stressing that a landowner's concerns must relate to a particular site rather than access rights in general, but the need for such chicanery has now been mitigated.

What does this mean? Judicial endorsement has been given for restrictions to or management of access in the past, as seen in the *Tuley* case relating to the management of equestrian access and the later case of *Forbes v Fife Council* 2009 S.L.T. (Sh Ct) 71 to do with the overnight closure of a path relatively near some houses. Such cases would not necessarily be decided differently today as a result of the subjective to objective switch. The real effect of the switch is to ensure blanket effect of the access scheme that blankets much of Scotland's land and inland water. There is now no scope for one landowner's subjective intention to lead to a different legal position where another landowner had a different subjective intention where the circumstances in any given situation are ostensibly the same (paragraph [63]).

Of course, when you have a new Court of Session judgment you can state things with confidence, but an objective test has to be the best approach (albeit I quietly accepted the subjective approach without questioning it in my earlier case note). As Lord Carloway states (paragraph [63]), objectivity applies in other aspects of the 2003 Act scheme, in terms of determining how much land can be excepted for privacy around a dwelling, and also in terms of what activities can be classed as recreation. Thus, whilst some people might regard campaigning for Scottish independence via the establishment of a camp as a hobby, this of itself will not be enough to render that activity recreational (consider the remarks of Lord Turnbull and Lady Dorrian in the Outer House and Inner House considerations of *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65 at paragraph 58 and [2016] CSIH 81 at paragraph 33, both considered in Combe, "The Indycamp: Demonstrating Access to Land and Access to Justice" (2017) 21 EdinLR 228). Objectivity also seems the appropriate route in terms of property law principles: consider the law of accession (per the discussion in George L Gretton and Andrew J M Steven, *Property, Trusts and Succession* (Haywards Heath, 3rd edn 2017) at paragraph 9.11); can a third party arriving at any particular location be expected to know the intention of the person who annexed an item to land? Objectivity accordingly makes sense in the context of gauging any access restriction.

As to how subjectivity got into this particular test about a landowner's intentions in the first place, perhaps the benign subjectivity of the particular landowner in *Tuley* – who actually wanted to facilitate access to their land in a sustainable manner – was appropriate in that case, but a subjective test might lead to strange results in other circumstances. This is no longer something to worry about. The one word of caution that might need to be sounded in relation to the new approach is that a broad, uncritical application of the objective test might not allow for much leeway under section 3, which should allow for responsible land management by landowners, acting lawfully, reasonably and in a manner that does take account of access rights (section 3(3)). The new Drumlean ruling is a welcome correction; care should be exercised to ensure the application of it is not an over-correction.

Finally, what did this objective approach mean for the case at hand? Objectively, the main purpose of the gate closure was to prevent access, and there did not need to be any particular expert evidence about animal behaviour to determine that apparent concerns relating to the interaction of access-taking humans and resident animals were not crucial to this equation (paragraphs [68]-[69]). Meanwhile, the Court of Session proceeded on the basis that landowners are obliged to have regard to the Access Code (as mandated by the 2003 Act), and that Access Code does cater for some interaction of access takers and animals without the need for a blanket exclusion of people, but in this regard the Code was essentially held to be common sense. Responsible land management could, it was noted, accommodate public access, through paths and signage, which would encourage access to defined parts of the land (paragraph 69). Separately, in relation to security concerns, it was noted that the landowners could erect such fences or walls near any buildings to cater for the

privacy and safety of persons living and working there and the security of any items kept there (paragraph [57]). Such steps would be permissible, complete exclusion of people would not be.

Conclusion

Whilst there were variations between the decision of the Sheriff Appeal Court and the Court of Session, the net effect of the Court of Session decision is to essentially endorse the practical effect of the Sheriff Appeal Court case: namely that the land is accessible, and the landowner was correctly ordered to take steps to allow for access. From a legal point of view, the clarification that a landowner can indeed be ordered to do something when access land has been (metaphorically) ring-fenced is important, and the approach adopted shows why situations like the *Aviemore* fence might be decided differently in future. More important still is the shift from a subjective to an objective test when assessing a landowner's purpose, which should ensure a uniform approach across Scotland and also avoid the need for difficult evidence gathering exercises to ascertain exactly what people were thinking. Finally, whilst the access authority was simply fulfilling its statutory duty, it does seem appropriate to acknowledge the role it played here in laying the groundwork for this important ruling for the right of responsible access. There must have been stages in the litigation, especially after the original decision of the sheriff, where taking this case any further would not have seemed appealing. The fact that they did will reverberate around the great Scottish outdoors.