

Sheriff Appeal Court ruling on the Drumlean estate case in LLTNP.

Purpose

The notes below provide summary extracts of a recent judgement by the Sheriff Appeal Court on a section 14 case.

Action

Members are invited to note the contents of the paper and discuss as they see fit.

Background

This Sheriff Appeal Court case was brought by Loch Lomond and Trossachs National Park Authority (appellant) against Renyana Stahl Anstalt (Respondent): Sheriff Appeal Court, Edinburgh, 30 March 2017. This is a significant judgement, and especially important as an Appeal Court ruling because it therefore applies across Scotland, to all sheriffs, etc. This case may yet be subject to further appeal to a higher court.

Full version of judgement –

[http://www.scotcourts.gov.uk/docs/default-source/sheriff-appeal-court-\(civil\)/2017-sac-\(civ\)-011.pdf?sfvrsn=2](http://www.scotcourts.gov.uk/docs/default-source/sheriff-appeal-court-(civil)/2017-sac-(civ)-011.pdf?sfvrsn=2)

Notes

As a brief guide, some of the key subjects ruled upon are highlighted below, with quoted extracts and the paragraph numbers in the judgement -

- a) **Necessity for Sheriffs to take account of the Scottish Outdoor Access Code:** paras 31-34, and 50-53, and 62.
- “The Access code has statutory effect in the sense that it is expected to be a reference point for determining whether access rights are exercised responsibly and whether land is managed or the ownership of it is conducted responsibly. The court may - indeed must, since “regard is to be had” to the code – consider whether the guidance in the code on responsible conduct has been disregarded”.(32)
 - “In determining that matter [the concept of acting ‘responsibly’] regard is to be had to whether there has been a disregard to the guidance set out in the Access Code, guidance which is incumbent on both the persons exercising access rights and on the owners of land”.(33)
 - “As regards the Access Code, as narrated above, it is given statutory importance by virtue of sections 2 and 3 of the Act in considering what is and what is not responsible conduct, on the part of both access takers and landowners. While it is perhaps not of direct relevance in relation to section 14 it is clearly of relevance in relation to the broader questions as to whether a landowner is acting responsibly and whether his conduct is directed at the responsible or irresponsible access taker and accordingly should form an important if not essential part of the consideration when an issue is related directly to provisions within the Access Code.”(52)
 - “... Thirdly the sheriff failed to have regard to the terms of the Access Code.”(58)
- b) **Statutory obligation to manage land to facilitate responsible access – para 39**
- “The sheriff’s approach fails to take account of whether the landowner’s use of his land is responsible. It fails to recognise that the Act sets out a statutory presumption

in favour of access. The access rights are to be exercised in a responsible manner, and the Act expects land owners and managers to act in a responsible manner, which anticipates managing land in a way to facilitate access being taken. Responsible use of land in terms of the Act may well entail allowing access to land to which the public previously did not have access.” (39)

c) **The 'purpose or main purpose' issue** – paras 34, 43-48, 50-51, 54, 63.

- “...although “purpose” is to be assessed subjectively, the question of whether a landowner (or access taker) is acting responsibly is clearly to be assessed objectively having regard to, among other things, the Access Code.”(34)
- “..there must be some identifiable legitimate purpose specific to the land in question rather than a broad purpose which could apply to virtually any estate in Scotland.”(54)

d) **Locking of gates, and the timing issue** (ie the argument that these gates and signs were like that before the Act came into effect in Feb 2005) – paras 35-42

- “In the present case, the appellant complains not of the erection of the gates ..but upon the continuing failure of the respondent to unlock them under section 14(1)(e). This is, in effect, the antithesis of the Aviemore situation where the barrier or fence had been erected completely prior to the coming into force of the Act. Indeed it could be pointed out that a fence is a barrier, whereas a gate by its very nature is capable of allowing passage and may be locked and unlocked. It is not the erection of a barrier which is in issue here, rather the locking and subsequent failure to unlock the gates which is the justification for the section 14 notice. The use of the gate is a continuing state of affairs”.(38)
- “Responsible use of land in terms of the Act may well entail allowing access to land to which the public previously did not have access. Applying this to the present case the Act imposed a positive obligation on the respondent when the Act came into force, 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. In that context, it is easy to see why section 14(1)(e) refers to an omission to take any action”.(39)
- “the approach contended for by the respondent would have the bizarre (and surely unintended) effect that if a gate, hitherto locked, was unlocked at a minute to midnight on the day before the Act came into force, the public would have access over the land; but that where a gate which was hitherto unlocked was locked at a minute to midnight, there would be no right of access. That simply cannot be correct.”(41)
- “Subject to the purpose issue, the landowner is not entitled to continue to refuse access to the land by continuing to lock the gates after the Act came into force, or to have a ‘Wild Boar’ sign”. (42)

e) **Purpose - no defence of 'protecting the public from or to farm animals, machinery', etc** – paras 53, 59-64

- “It therefore is of relevance to note that the Access Code at paragraphs 3.29 – 3.34 recognises that access may be taken even where there is livestock, and provides guidance to those seeking to take access. The sheriff should have at the very least have taken the Code into account in assessing the respondent’s purpose “(53)

- “we do not consider that (the respondent) can have been genuinely motivated by a desire to prevent members of the public from being damaged (or, at any rate, that he cannot genuinely have believed that the risks on this estate were greater than on any other)”.(59)
- “Nothing in that passage of evidence persuades us that he was speaking about particular dangers posed by cattle on this particular estate, as opposed to the danger which can be posed by cattle generally.”(59)
- “As regards risk to machinery, the evidence did not establish any particular risk at this estate.... we do not consider that, on the balance of the evidence, he was genuinely motivated by any particular risk to the respondent’s machinery.” (60)
- “even if the respondent’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.”(64)

f) **Purpose - no defence that 'most of the area is available'** – para 63

- “We might add, to deal with a point made by Counsel for the respondent, that it matters not that access is available to other parts of the estate, nor that the enclosed area constitutes only some ten 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”.

g) - **considerations of 'danger'** – para 53

- “A related point is that section 15 of the Act itself clearly recognises that danger alone need not be an absolute impediment to access rights being exercised, insofar as it empowers a local authority to take such steps as it considers appropriate to warn the public of and protect the public from danger on any land in respect of which access rights are exercisable.”