

**Appeal by Loch Lomond and Trossachs National Park Authority
v Renyana Stahl Anstalt**

Sheriff Appeal Court, Edinburgh

Case refs: [2017] SAC (Civ) 1; STI-B362-13

Decision dated 30th March 2017

Scottish Court Service website:

[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)

Appeal against decision by Sheriff Brian Cameron in the Stirling Sheriff Court on 13th November 2015 (Case Number B362/13).

[NOTE

In addition to the decision on Access Rights the Court dealt with the question of whether the Sheriff's rejection of (a) a substantial amount of evidence as inadmissible, because of its privileged nature, (b) the evidence of Mr K. Auld the Access and Recreation Adviser of the National Park Authority (NPA) because of the Sheriff's misinterpretation of the Inner House judgment in Aviemore Highland Resort limited v Cairngorm National Park Authority 2009 SLT (Sh CT) 97, and (c) the relevance of the Access Code, coupled with his erroneous findings in fact and in law, meant that the Sheriff reached a conclusion which was clearly wrong. The Court held that he had, and that they could therefore review the evidence of the witnesses and substitute their own findings in fact and in law. Discussion of this is beyond the scope of this case guide.]

The Respondent, Renyana Stahl Anstalt (RSA) a Lichtenstein asset-owning vehicle, owns the Drumlean Estate near Aberfoyle (about 1500 acres) and was represented by Dr Brach who had a power of attorney to deal with all legal matters of RSA as regards Drumlean Estate.

Part of the Estate is operated as a farm. At the date of service of the section 14 notice and thereafter there were about 135 deer within an 120 hectare fenced area referred to as 'the enclosure', along with the farm buildings, and a separate enclosure where wild boar had been kept in the past. At the time of service of the notice there was also a small herd of pedigree highland cattle. There are two gates giving access to the enclosure (the Kennels gate and the Main gate) and a third gate to the Estate (the Altkeith Gate). There had been gates in existence there since before the Land Reform (Scotland) Act 2003 Act (the '2003 Act') came into force, and they were kept locked when not being operated. The Kennels Gate and the Main Gate had been replaced in about 2010.

There had been negotiations about access between the NPA and RSA since 2007. When these failed, the NPA served a notice in 2013 under section 14(1) of the 2003 Act requiring the gates to be unlocked and also requiring removal of a notice on the

main gate saying 'Danger Wild Boar'. RSA had appealed to the Sheriff Court against this notice.

At the earlier hearing, Sheriff Cameron had found in favour of the landowner and quashed the Section 14 notice. The main ground of his decision was that the gates had been locked since before the 2003 Act had come into force (the 'Timing Issue' – see below), but he also said that the main purpose for the locking of the gates was not to deter access (see the 'Purpose Issue' below). The NPA appealed to the Sheriff Appeal Court against this decision.

The 'Timing Issue'

Under section 14(1) of the 2003 Act, a landowner must not erect fences, put up warning signs etc where the 'purpose or main purpose' is to deter people from exercising their access rights, and local authorities may serve notices on landowners requiring them to remove any such obstructions. In Sheriff Cameron's decision, he had referred to the case of *Aviemore Highland Resort Limited v Cairngorms National Park Authority* 2009 SLT (Sh Ct) 97 (the 'Aviemore case') in which the Cairngorms National Park Authority had served a notice under section 14 of the 2003 Act requiring the removal of a fence which blocked access to a footpath. (A hedge had also been planted, but as the date of its planting was not agreed by the parties its situation was not dealt with in the Appeal). The fence had been erected in 2004, i.e. before the 2003 Act came into force on 9th February 2005. In these circumstances, the court had decided that the fence could not have been erected with the purpose of deterring access because access rights had not existed at that time. The notice referred only to the fence's erection and not to any continuing situation thereafter, nor to any omission by the landowner.

Sheriff Cameron had interpreted the Aviemore case to mean that access rights did not apply to land where impediments to access existed before the Act came into force and continued to remain in place. The Appeal court disagreed, and noted that the terms of the two Section 14 notices were different, and the Sheriff had disregarded other relevant facts, such as the use of the gates followed by their re-locking, and their replacement after the Act took effect. This was not the mere maintaining of the position at the time when the Act came into force. A fence was a barrier, but a gate was intended to allow passage and may be locked and unlocked. The use of the gates was a continuing state of affairs, unlike the action in the Aviemore case which had been completed before the Act into force. Section 14(1)(e) of the 2003 can be infringed by a failure to take action and it was the failure to unlock the gates that justified the Section 14 notice requiring RSA to do so.

The 2003 Act sets out a statutory presumption in favour of access and requires land managers to act in a responsible way to facilitate access being taken. Responsible management might well entail allowing access to land to which the public did not previously have access.

The court referred to section 6(1)(f) of the 2003 Act which allows a land manager, in limited circumstances, to restrict access to land where people had been charged for access before the Act came into force. This provision would not have been necessary if the respondent's argument in the current case had been correct.

The appeal court therefore concluded that Sheriff Cameron had been wrong in his approach to the timing issue. The land at Drumlean is land to which the Act applies and therefore the respondents were not entitled, on this ground, to refuse access by continuing to lock the gates after the Act came into force, or by having a 'Danger Wild Boar' sign (particularly where there were in fact no wild boar).

The 'Purpose Issue'

As noted above, under section 14(1) of the 2003 Act, a landowner must not erect fences, put up warning signs etc where the 'purpose or main purpose' is to deter people from exercising their access rights. In this case the NPA considered that both the locked gates and the 'Danger wild boars' sign were designed to deter access and this led to a Section 14 notice being served requiring RSA to unlock the gates and take down the sign. Dr Brach, for RSA, claimed that the purposes of the locked gates and sign were to protect people from potential danger from animals, to protect animals within the enclosure, and to protect farm machinery. This had been accepted by Sheriff Cameron, but the Sheriff Appeal Court did not agree.

The test for whether this section is infringed had been examined in the Tuley case (Tuley v Highland Council 2009 SC 456) where it was concluded that the test was a subjective one – the court needs to look at what the landowner was seeking to achieve. The Sheriff Appeal Court said that this involved examining the landowner's good faith and honesty, and they criticised Dr Brach's evidence that he was not aware of the negotiations and advice about access, and said this was not credible.

The Sheriff Appeal Court emphasised the importance of the Outdoor Access Code in considering what is responsible conduct by both access takers and land managers. Sheriff Cameron had not taken into account the fact that the Code recognises that responsible access can be taken even where there are cattle and machinery present and gives guidance to access takers in these circumstances. There was no evidence of any unusual risk in relation to farm machinery, cattle or other animals on this particular Estate. The risks were no greater than might apply to any other farm land. They therefore concluded that the main purpose of the locked gates and sign was to deter access, and this infringed section 14(1) of the 2003 Act.

The Sheriff Appeal Court therefore allowed the appeal on these grounds and recognised that access rights existed throughout the Estate, with the exception of the farm buildings and their curtilage and the area of the wild boar enclosure.