# Aviemore Highland Resort v Cairngorms National Park Authority

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Inverness Principal Sheriff Court, Court Ref B94/08
26th June 2009
Scottish Courts Service appeal decision.

This was an appeal to the Sheriff Principal in Inverness by Aviemore Highland Resort (AHR) against the decision of Sheriff Alasdair Macfadyen in the Inverness Sheriff Court, (Inverness Sheriff Court, January 2009, Scottish Courts Service decision.

**The facts:** AHR had erected a boundary fence, a section of which crossed Laurel Bank Lane, Aviemore, cutting off an access route from the north end of the village into the Resort, which had been well used by pedestrians in the past. The Cairngorms National Park Authority (CNPA) issued a Notice requiring the removal of the fence, under section 14(2) of the Land Reform (Scotland) Act 2003 because its erection blocked a recognised and well used access route.

The debate in this case considered the wording of section 14 of the 2003 Act, and the wording of the notice, and whether or not the notice could be said to apply to circumstances which had existed before the 2003 Act came into force. AHR contended that the CNPA were not entitled to force them to remove the fence because it had been erected in 2004 – after the passing of the 2003 Act but before the Act had come into force in 2005. It further argued that there were no access rights in the resort to be interfered with and that even if access rights did exist, there was no interference because there were other entries to the resort. The fence had been erected for security and land management purposes. The CNPA argued that although the fence was erected before the 2003 Act came into force, their case was not that the Act was being applied retrospectively, but that the erecting of the fence was an act whose effects commenced before the Act came into effect and continued thereafter. It also denied that the fence had been erected on land free from access rights under section 6 of the Act, and argued that the land management purposes claimed were not specified and were irrelevant. There was also consideration of a hedge which had grown up in conjunction with the fence. It was not clear when the hedge had been

planted.

## Decision in the Sheriff Court

In his determination of this case, Sheriff Macfadyen took the view that the case did not involve retrospective application of Part 1 of the 2003 Act, in that the continued use by the public of the route into the Resort via Laurel Bank Lane could be characterised as the exercise of an ‘access right’ in the terms of the Act: it did not matter that the fence had been erected earlier, it being conceded that its purpose was to impede access: that is, he agreed with the stance of the CNPA that this was an act commencing before the legislation came into force and continuing thereafter. AHR had also argued that, in any case, access rights could not exist over the land of the Resort, by virtue of section 6(1)(b) of the 2003 Act, it being curtilage to a group of buildings. But the Sheriff set this argument aside on the basis that the case had not been properly specified. The Sheriff accepted, however, that there was a case to be considered, at a further court hearing, on the question of the land management need claimed by AHR.

## Decision in the Appeal to the Sheriff Principal

On appeal, the Sheriff Principal (Sir Stephen Young) set aside the Sheriff’s decision. He said that access rights over the land in question could not exist prior to the date of commencement of the 2003 Act (9th of February 2005) and therefore access rights were not exercisable at the date when the fence was erected, thus there could be no contravention of section 14. He also rejected the argument that the erection of the fence was an act commencing before the 2003 Act came into effect and continuing thereafter. He said it might have been different if the wording of the Act had indicated that ‘maintaining’ a fence to deter access was a contravention of section 14, but this was not the case. In relation to the hedge, the Sheriff Principal said that the onus was on the CNPA to show that it had been planted after the commencement of the 2003 Act, and they had failed to do so.

The Sheriff Principal therefore concluded that the CNPA were not entitled to serve a notice requiring the removal of the fence and hedge, as there had been no contravention of the 2003 Act.

The Sheriff Principal also pointed out that he had interpreted the Section 14 Notice on the basis that the breach of the Act was in erecting the fence and hedge (i.e. in relation to section 14(1)(b)), not on the basis that there had been a breach because AHR had permitted a hedge to grow (also under section 14(1)(b)), or had failed to take any other action (section 14(1)(e)). As the Notice did

not include specific wording relating to these sub-clauses, the Sheriff Principal did not have to consider whether CNPA might have succeeded on these other grounds.

**Note:** this case was preceded by a planning case under which CNPA had issued an enforcement notice against the construction of the above fencing, as being contrary to local planning policy by creating a physical and visual barrier between the resort and the village of Aviemore. It required consent because of adjacency to a road used by the public. AHR appealed the notice on the basis (inter alia) that the fence was permitted development. The initial decision to dismiss the appeal was, in turn, quashed in the Court of Session, and in a redetermination (dated 15 October 2007), the Reporter (P G Hutchinson) dismissed the appeal against the notice, but consented to most of the fence, apart from the short section at the head of Laurel Bank Lane which should either be removed or reduced to 1m in height (and it was so reduced).