Gloag v Perth & Kinross Council and the Rambler’s Association

Cases under the Land Reform (Scotland) Act 2003 · https://scotways.com/ken/gloag-v-perth-kinross-council-and-the-ramblers-association/

Case Report: 2007 S.C.L.R. 530
Perth Sheriff Court, Court ref: B111/06
Scottish Courts Service decision.

Decision by Sheriff Michael Fletcher in the Perth Sheriff Court on 12th June 2007.

Facts: Mrs Gloag bought Kinfauns Castle, a former hotel and country house to the east of Perth, lying on a slope above the A90 trunk road and the inner estuary of the River Tay, and she renovated it for her own residential use and for use in her charitable activities. Kinfauns castle is a substantial mansion surrounded by mown grass, specimen trees and policy woodland.

Mrs Gloag erected a new fence around the grounds to enhance the security of her property, for which she obtained planning permission retrospectively from Perth & Kinross Council. She then applied to the Court under the Land Reform (Scotland) Act 2003, section 28(1)(a), to have the area of her land that was within the fence declared to be exempt from the exercise of access rights. The Sheriff said, as a finding of fact, that this amounted to about 11 acres of grounds (the Council maps indicated an overall area of 14.6 acres within the fence). Mrs Gloag claimed this land was land adjacent to Kinfauns Castle sufficient to enable those living there to have reasonable measures of privacy in the house, and to ensure their enjoyment of it was not unreasonably disturbed. Mrs Gloag claimed that she and her family had a greater than normal security risk because of her high profile and the high value of the contents of the house.

Evidence: For Mrs Gloag, it was argued that her status as a public figure, her collection of valuable art, the use of the area by family, and visits by other public figures supportive of her charitable work, all called for a high degree of security and protection. The whole area sought as exempt from access rights was said to be in use, albeit that renovation of the woodland area was still in progress (though the Sheriff did debate the validity of the claim to use the whole area intensively). There were proposals for extension of the building to provide new leisure facilities.

Perth & Kinross Council proposed a smaller area to be excluded from access rights, making about 4 acres of woodlands and rough grass available for access, and the Ramblers Association also took the same approach. Both parties placed emphasis on the role of the Scottish Outdoor Access Code in advising how access takers should act when close to domestic property, and in identifying whether policy woodland areas and rough grass should be included within access rights. As well as arguing the case for a smaller exempt area, both parties led procedural evidence: for the Council on its role in overseeing implementation of the Act; and for the Ramblers, on the principles behind the legislation.

Decision: The Sheriff said that the court had no discretion to take the rights of the access taker into consideration in determining where there should be a right of access close to property. Parliament had decreed there were no access rights on such excluded land. The court had to decide the amount of ground to be excluded in accordance with its interpretation of section 6. He said the Code was intended to give help and guidance, on the one hand to the people taking access and, on the other hand, to those over whose land access is to be taken, as to how to act responsibly in relation to the rights given by the Act. However, there was no mention in the Act of the Code being a tool for interpretation of any other part of the Act, in particular, of section 6.

The exemption claimed by Mrs Gloag is contained in section 6(1)(b)(iv) of the Act, and one of the determining factors is the location and other characteristics of the house (section 7(5) of the Act). The Sheriff said that the Act gave little assistance on the issue of how much adjoining land was required for privacy and enjoyment, and he therefore had to rely to some extent on judicial knowledge, but the evidence in the case also led to the view he had reached. The test of how much adjoining land was required for privacy and enjoyment was an objective one, and not related to a particular owner at any one time. He therefore set aside claims of special needs made on behalf of Mrs Gloag, and said that an appropriate area should be determined against the reasonable needs and expectations of any person who purchased such a house. Any person who purchased such a property would only do so if they had a substantial area round the house to provide reasonable measures of privacy and the enjoyment of the house. Whoever owned Kinfauns Castle would be likely to have considerable resources and would be likely to possess valuable objects. The Sheriff also took the view that enjoyment of the house extended to the grounds around it.

Applying this objective test, the Sheriff held that all the land within the fence should be excluded from the exercise of access rights. The evidence had shown that the fence had been placed in the most suitable location. The fact that it followed the line of a previous fence showed that it had not

been placed along a purely arbitrary line, but one which a previous occupant had considered was required to secure their privacy and enjoyment of the property.

The Sheriff therefore granted a Declarator to Mrs Gloag that all the land that had been the subject of her application (i.e. all the land within the security fence) was excluded from the exercise of access rights. The Sheriff said “In my opinion it encompasses sufficient adjacent ground to enable persons living there to have reasonable measures of privacy in that house and to ensure that their enjoyment of that house is not unreasonably disturbed. The enjoyment of the house in my view depends on an extremely large number of factors, but it could not be ensured by a smaller area of adjacent ground such as the one suggested by the respondents, taking into account the location and characteristics of the house.”

All parties had agreed that the 2003 Act was not incompatible with the European Convention of Human Rights. The Sheriff said that the Act required the Court to find what was sufficient land for privacy and enjoyment of the house, and if this judgment was wrong that could be put right (presumably on appeal). There was no need to refer to the Convention.

Note on the parties in this case:
Under section 28 of the 2003 Act, a person applying to the court must give notice of their application to the local authority, and it is then up to the local authority whether they oppose it, as Perth & Kinross Council did in this case. Other parties may apply to the court to be joined as defenders in the action, and the Ramblers Association did so in this case, and in the case of Snowie.